

Right of member to copies of audited financial statement (Sec 136)

1. Legislative background

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

“This clause corresponds to section 219 of the Companies Act, 1956 and seeks to provide that a copy of financial statement including consolidated financial statement, if any, auditor’s report along with annexure/ attachments shall be sent to every member, every trustee for the debenture holder, and all other persons who are so entitled, twenty one days before the date of general meeting. A specific manner of circulation may be prescribed by the Central Government. Listed company shall place its financial statement including consolidated financial statement on its website. Every company having subsidiary company shall place separate audited accounts of each of its subsidiary on the website. Every member, trustee, etc. is allowed to inspect the financial statements and auditor’s report, etc., at the registered office of the company during any business hours. This clause also provided for penal provisions in case of any default.”

2. Financial statement and other documents to be sent to every member and other persons

Sub-section (1) of section 136 provides that a copy of the financial statements, including consolidated financial statements, if any, auditor’s report and every other document required by law to be annexed or attached to the financial statements (such as directors’ report and its annexures, auditor’s report etc. as per the provisions of sub-section (7) of section 134), which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons who are so entitled to receive it.

For determining the persons to whom the financial statements are to be sent, recourse may be had to para 1.2.1 of the Secretarial Standard-2 read with sub-section (3) of section 101 (which deals with sending of notices to members). The following list emerges:

1. Member of the company
 - Member himself; or
 - In case of joint holders, to the first holder; or
 - In case of death of a member, nominee of the single holder/ the surviving first joint holder/ the Nominee appointed by all the joint holders/ legal representative as the case may be; or
 - In case of insolvency/ winding up, assignee/ liquidator as the case may be.

2. Every trustee for the debenture-holder
3. Other persons so entitled to receive the financial statements may include the following
 - Director
 - Auditor
 - Secretarial Auditor
 - Other statutory bodies/ contractual obligations as the case may be.

3. Period of circulation of financial statements

Financial statements and other documents shall be sent to such persons not less than 21 days before the date of the meeting. However, this section is “without prejudice to the provisions of section 101”. Further, the general circular number 11/2015 dated 21-07-2015 clarifies that in case of a company holding a general meeting after giving a shorter notice as provided under section 101 of the Act, financial statements may be circulated (to be laid/considered in the same general meeting) at such shorter notice. Hence, the requirement of sending of financial statements, etc. can also be complied with at such shorter notice.

The Companies (Amendment) Bill, 2016 proposes make the following changes to this section:

The words and figures “Without prejudice to the provisions of section 101” are proposed to be omitted. A new proviso is proposed to be added before the first proviso which seeks to provide that:

“Provided that if the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by ninety-five per cent of the members entitled to vote at the meeting”.

4. Exemption to Nidhi companies

In terms of notification no. G.S.R. 465(E) dated 05.06.2015, sub-section (1) of section 136 applies to Nidhi companies with an exemption. Such companies are not mandated to send the financial statement to members who do not hold shares having face value of Rs. 1,000/- or having 1% of total paid up capital, whichever is less. For counting such holding, shares held both individually and jointly are to be considered.

In such case, it shall be sufficient compliance if an intimation is sent by public notice in newspaper circulated in the district in which the registered office of the Nidhi is situated stating the date, time and venue of AGM and that the financial statement with its enclosures are available for inspection at the registered office of the company, and the financial statement with enclosures are affixed in the notice

board of the company and a member is entitled to vote either in person or through proxy.

5. Exemptions to section 8 companies

In terms of notification no. G.S.R. 466(E) dated 05.06.2015, for the purpose of section 8 company, the timeline for sending of financial statements, etc. shall not be less than 14 days. Therefore, a copy of the financial statements, including consolidated financial statements, if any, auditor's report and every other document required by law to be annexed or attached to the financial statements, which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled, not less than 14 days before the date of the meeting.

6. Compliance by listed companies

The provision of section 136(1) shall be deemed to be complied with by a listed company if the following conditions are satisfied in case where:

1. the copies of the financial statements and other documents are made available for inspection at the registered office of the company during working hours for a period of 21 days before the date of the meeting; and
2. a statement containing the salient features of such financial statements and other documents in Form AOC-3 or copies of the documents, as the company may deem fit, is sent to every member of the company and to every trustee for the holders of any debentures issued by the company not less than twenty-one days before the date of the meeting.

However, in case the shareholders ask for full financial statements, the company is bound to provide the same.

It should be noted that the proviso and Rule 10 do not refer to the other persons who are entitled to receive the financial statements. However, as a good practice, such Form AOC-3 shall be sent to such other persons. A divergent view is that in relation to such other persons who are entitled to receive copies of financial statements complete financial statements are to be sent. Further, as per third proviso of sub-section (1) of section 136, a listed company is also required to place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.

7. Manner of circulation of financial statements

As per the second proviso to sub-section (1) of section 136, Central Government is empowered to prescribe the manner of circulation of financial statement of company which has prescribed net worth or turnover. Rule 11 prescribes the manner of circulation for the following companies:

- (a) all listed companies;
- (b) public companies having
 - a. net worth of more than Rs. 1 Crore; or
 - b. turnover of more than Rs. 10 Crores;

The following manner for sending of financial statement has been prescribed under rule 11:

- (a) by electronic mode to such members whose shareholding is in dematerialised format and whose email Ids are registered with Depository for communication purposes;
- (b) where shareholding is held otherwise than by dematerialised format, to such members who have positively consented in writing for receiving by electronic mode; and
- (c) by dispatch of physical copies through any recognised mode of delivery as specified under section 20 of the Act, in all other cases.

Since the rule 11 contains the word 'may', it is not mandatory but merely indicative of the manner in which the documents may be sent by the companies specified therein. The recourse to the provisions of sub-section (2) of section 20 read with rule 35 of the Companies (Incorporation) Rules, 2014 is not entirely precluded by this provision. For all other companies, the said provisions for service of documents on members are applicable. (For detailed discussion, refer to the commentary on section 20).

8. Additional compliance in case of subsidiaries

As per the provision of fourth proviso of sub-section (1) of section 136, where a company is having one or more subsidiaries, such company is required to place separate audited accounts in respect of each of its subsidiary on its website, if any. However, in case any shareholder makes a demand for the copy of the separate audited financial statements in respect of each of its subsidiary, the company is bound to provide the same. It may be noted that in case of a listed company, which is mandatorily required to have a website, is required to place the financial statements of itself and its subsidiary/(ies) on its website. In the case of an unlisted company, it is not mandatory to have a website. However, if it has a website, it is mandatory to place the financial statement of its subsidiary/(ies).

The term 'separate audited accounts' is further explained by general circular no. 11/2015 dated 21.07.2015. It provides that in case of a foreign subsidiary, which is not required to get its accounts audited as per legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding/ parent Indian company may place/ file such unaudited accounts to comply with requirements of subsection (1) of section 136. Such accounts would need to be translated in English, if the original accounts are not in English.

Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under Act. In case this is not possible, a statement indicating the reasons for deviation may be placed/filed alongwith such accounts.

The Companies (Amendment) Bill, 2016 proposes to substitute the fourth proviso of sub-section (1) of section 136 with the following proviso to capture the current position better:

'Provided also that every listed company having a subsidiary or subsidiaries shall place separate audited accounts in respect of each of subsidiary on its website, if any:

Provided also that a listed company which has a subsidiary incorporated outside India (herein referred to as "foreign subsidiary")

- (a) where such foreign subsidiary is statutorily required to prepare consolidated financial statement under any law of the country of its incorporation, the requirement of this proviso shall be met if consolidated financial statement of such foreign subsidiary is placed on the website of the listed company;
- (b) where such foreign subsidiary is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the holding Indian listed company may place such unaudited financial statement on its website and where such financial statement is in a language other than English, a translated copy of the financial statement in English shall also be placed on the website."

9. Inspection of documents at registered office

A company shall allow every member or trustee of the holder of any debentures issued by the company to inspect the documents stated under sub-section (1) of section 136 i.e. financial statements, including consolidated financial statements, if any, auditor's report and every other document required by law to be annexed or attached to the financial statements. Such inspection is to be provided by the company at its registered office during business hours.

It should be noted that this inspection is different from the inspection of books of account. There are specific provisions (proviso to sub-section (1) of section 128) for maintaining books of account at a different place. However, as the section 136

deals with financial statements and other documents, this inspection will be provided at registered office of the company.

The Companies (Amendment) Bill, 2016 proposes to insert the following proviso after sub-section (2) of section 136:

“Provided that every company having a subsidiary or subsidiaries shall provide a copy of separate audited or unaudited financial statements, as the case may be, as prepared in respect of each of its subsidiary to any member of the company who asks for it.” This corresponds to clause (b) of fourth proviso of sub-section (1) of section 136 which is proposed to be replaced with a different proviso under the Companies (Amendment) Bill, 2016.

10. Punishment and Compoundability

If any default is made in complying with the provisions of this section, the company shall be liable to a penalty of Rs. 25,000/- and every officer of the company who is in default shall be liable to a penalty of Rs. 5,000/-. The offence is not compoundable as penalty is being levied. The same will be adjudicated under the provisions of section 454 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.