

## SERIOUS FRAUD INVESTIGATION OFFICE AND ITS POWERS UNDER COMPANIES ACT, 2013

In this piece of writing, author throws light on new concept introduced under Companies Act, 2013 ('the Act') regarding of "Establishment of Serious Fraud Investigation Office" (SFIO) by Central Government and investigation of affairs of company by established SFIO & their powers to arrest the accused. Its laid down procedure and mechanism for conducting such investigations are briefly discussed in this article.

Establishment of SFIO by Central Government and Investigation into the affairs of company by SFIO are guided by **section 211 & section 212** of the Companies Act, 2013 respectively. *Enforcement of the provisions of this sections and applicable rules thereof are notified on following dates accordingly:*

Sr.no	Particulars	Notification
1	Section 211 of the Act	The Ministry of Corporate Affairs notified via notification no SO 902(E) dated 26.03.2014, effective from 01.04.2014
2	Section 212 of the Act	The ministry of Corporate Affairs notified certain sections via notification no SO 902(E) dated 26.03.2014, effective from 01.04.2014
3	Sub section (8) to (10) of section 212 of the Act	The ministry of Corporate Affairs notified certain sections via notification no SO 2751(E) dated 24.08.2017, effective from 24.08.2014 <a href="http://www.mca.gov.in/Ministry/pdf/Commencementnotification_25082017.pdf">http://www.mca.gov.in/Ministry/pdf/Commencementnotification_25082017.pdf</a>
4	Companies (Inspection, Investigation and Inquiry) Rules, 2014	Effective from 01.04.2014
5	Companies (Arrest in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017	The ministry of Corporate Affairs notified certain sections via notification no GSR 1062(E) dated 24.08.2017 effective from date of publication into official gazette

### **SERIOUS FRAUD INVESTIGATION OFFICE:**

Section 211 of the Act deals with the establishment of Serious Fraud Investigation Office by the Central Government as a multi-disciplinary organisation, guided by separate new section under the Companies Act, 2013.

#### **What is SFIO.....?**

**SFIO is agency** in India carrying investigation of serious case of **FRAUDS**. It is under the jurisdiction of **Ministry of Corporate Affairs, Government of India**. It is a multi-disciplinary organization having experts from financial sector, capital market, accountancy, forensic audit, taxation, law, information technology, company law, customs and investigation for the prosecution of white-collar crimes and frauds under the company's law. Agency headquarters is in the Indian capital, New Delhi; the agency has 4 regional offices in Hyderabad, Mumbai, Kolkata and Chennai

This was a major recommendation made by the Naresh Chandra Committee which was set up by the government on 21 August 2002 on corporate governance and Government approved the setting up of organisation on 9<sup>th</sup> January, 2003.

The ***whole and sole purpose behind the establishment of SFIO*** was protection of interest of investors. Investors are the real owners of a company but the power of management of the company is vested in the Board of Directors. There are chances to abuse of power like committing fraud, by few directors of the company. Therefore Central Government has established SFIO to deal specifically with investigation of corporate frauds, to prevent and catch such crimes.

#### **SFIO will undertake only those cases, which involves:**

- a) Complexity and having inter- departmental and multi-disciplinary ramifications.
- b) Substantial involvement of public interest in terms of monetary misappropriation or in terms of number of persons affected and
- c) The possibility of investigations leading to or contributing towards a clear improvement in systems, law of procedure.

#### **Constitution of SFIO.....?**

- The SFIO is headed by a **director** not below the rank of a Joint Secretary to the Government of India having knowledge and experience in dealing with the matters relating to corporate affairs.
- The other experts are to be appointed by the Central Government from amongst persons of ability, integrity and experience in the field of banking, Corporate Affairs, Taxation, Forensic audit, Capital Market, Information Technology, Law, or Other fields as required.

*(Accordingly the Central Government has framed Ministry of Corporate Affairs, Serious Fraud Investigation Office, Additional Director (Capital Market)/ Joint Director (Capital Market) and Additional Director (Financial Transaction) Group 'A' post recruitment Rules, 2015.)*

#### **INVESTIGATION INTO THE AFFAIRS OF THE COMPANY BY SFIO**

The Companies Act empowers the Central Government with the right to investigate the affairs of the company, especially in cases of an alleged fraud or even in the oppression of the minority shareholders.

#### **There are three types of investigation mentioned in the Companies Act 2013**

1. An investigation into the affairs of the Companies<sup>1</sup>
2. An investigation into company's affairs in other cases<sup>2</sup>
3. An investigation into the ownership of the Companies<sup>3</sup>

As per section 212 of the Act, the Central Government ***may refer any matter for investigation to SFIO***, if it is of the opinion that it is necessary to investigate ***on the basis of:***

- a) on receipt of a report of the Registrar or inspector under section 208<sup>4</sup> where further investigation into the affairs of the company is necessary;

<sup>1</sup> Under section 210 of the 2013 Act,

<sup>2</sup> Under section 213 of the 2013 Act,

<sup>3</sup> Under section 216 of the 2013 Act,

<sup>4</sup> Section 208 of the Act provides submission of inspection report to the Central Government after the inspection of the books of accounts by the Registrar or inspector

- b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
- c) in the public interest; or
- d) on request from any Department of the Central Government or a State Government

### **The case shall not be investigated by other departments when assigned to SFIO**

As per section 212 (2) of the Act, when any case has been assigned by the Central Government to the SFIO for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and all existing cases will be transferred to SFIO.

The investigation officer of SFIO **shall have powers of inspector under section 217.** The company and its officers and employees, who are or have been in employment of the company, shall be responsible to provide all information, explanation, documents and assistance to the investigating officer as he may require for conduct of the investigation

### **Criminal Liabilities of Company in cases of Fraud**

The certain corporate activities have been regarded as fraud and kept under the category of **cognizable as well as non-bailable** offences and punishable under section 447 of the Companies Act, 2013.

***Provided the special court shall not take cognizance of any offence except upon complaint in writing made by –***

- The Director, Serious Fraud Investigation office,
- Any officer of the Central Government authorised by general or special order in writing in this behalf

SFIO will now have **power to arrest** in respect of certain offences which are punishable for fraud provided in section 447 and such person.

## **POWERS TO ARREST**

### **Companies (Arrest in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 read with Section 212 of the Act**

Most provisions of the Act came into force on April 1, 2014. While powers of arrest to the SFIO, which comes under the corporate affairs ministry, the provision has been notified only now. The ministry has notified the rules pertaining to arrests in connection with Investigation by the SFIO and they came into effect from August 24, 2017. [http://www.mca.gov.in/Ministry/pdf/companiesArrestsconnectionSFIORule\\_25082017.pdf](http://www.mca.gov.in/Ministry/pdf/companiesArrestsconnectionSFIORule_25082017.pdf)

### **As per the notification:**

- The director as well as additional or assistant director level officials at the SFIO after carrying investigation into the affairs of company (**not being Government or Foreign Company**)
- Has reason to believe the person is guilty of any offence with regards to the case

being investigated, **on the basis of material** information in his possession.

- Then Director, Additional Director or Assistant Director may arrest such person. *(Provided "In case of an arrest being made by additional director or assistant director, the prior written approval of the director SFIO shall be obtained," as per the Notification)*
- **The SFIO director would be the competent authority for all decisions pertaining to arrest.**
- **(Arrest in case of Government or Foreign Company);** the person found guilty with regards to case being investigated can be arrested only with **"the prior approval of Central Government"**

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#### **Prior Intimation required in case of Government Company:**

- To managing Director or person in charge of affairs of such company
  - To the secretary of the administrative ministry concerned should be intimated by the arresting officer ***(if managing director or person in charge of affairs of such company themselves are being arrested)***
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#### **Actions to be taken after Arrest:**

- Arrest order with personal memo in the prescribed form **to be signed** by Director, Additional Director or Assistant Director.
- Same shall be **served on Arrestee** and obtain written acknowledgement.
- Same to be **served to the office of director** in as sealed envelope in a prescribed manner *(i.e with forwarding letter and sign to affixed on each page of document within 24 hours)*
- Every person so arrested shall within 24 hours, **be taken to a Judicial Magistrate or Metropolitan Magistrate**, as the case may be, having jurisdiction. *(24 hours excludes time of journey)*

#### **Maintenance of Register**

According to the ministry,

- The SFIO would **maintain an arrest register.**
- Register will be maintained **at office of Director**
- **Particulars of the arrestee**, date and time of arrest as well as other relevant information pertaining to every arrest made by the agency's officer ***should be entered accordingly immediately on receipt of information***
- Documents to be **preserved for period of 5 years** which includes copy of arrest order together with supporting materials;
  - i. From the date of judgement or final order of the Trial court, in cases where the said judgement has not been impugned in the appellate court
  - ii. from the date of disposal of the matter before the final appellate court, in cases where the said judgment or final order has been impugned, whichever is later.

The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to arrest

shall be applied mutatis mutandis to every arrest made under this (Companies) Act," the ministry said

**<sup>5</sup>Order by Central Government:**

On completion of the investigation, **SFIO will submit report to the Central Government**, who on its receipt may, order SFIO to initiate prosecution against the company and its past or present officers or employees connected thereto and any other person directly or indirectly connected to the affairs of the company.

Thus Companies act, 2013 has given statutory recognition to serious fraud Investigation office and investigation into affairs of company by SFIO under section 211 and 212 of the Act respectively.

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<sup>5</sup> Sub section (12) to (14) of section 212 of the Act.