

Analysis of Companies Act, 2013

Background

Companies Act, 2013 got President's Assent on 29th August 2013.

The Act consists of 29 chapters, 470 sections, 7 Schedules.

The Act was implemented in phases, in first phase, 98 sections were made effective from 12th September 2013. However now most of the sections (283 sections) became effective from 1st April 2014.

Most Rules (covering 19 Chapters) are also notified to be effective from 1st April 2014.

New E-forms were made available on MCA Portal on 28th April 2014.

Provisions relating to formation of NCLT became operational w.e.f. 1st June 2016.

The Act was amended by Companies Amendment Act, 2015 and further amended by Companies Amendment Act, 2017

Defining Spirit & Intent to the New Law

More Accountability for the key Management, Directors, Secretary and Auditors.

Better Governance and better Disclosures for shareholders.

Focus on Self Compliance and improved procedures.

Considering the interest of all stakeholders in the functioning of the company and not just shareholders, including recognizing the corporate responsibility towards society at large.

More Stringent provisions for the defaulters and increased penalties which can act as deterrence.

De-linking of procedural aspects from the substantial law to provide more flexibility for change.

Introduction of new Concepts in line of international practices.

Creation of Authorities for the better Administration and Control of the Act.

Directors & KMP:

KMP (MD/CEO/WTD & CS & CFO) is mandatory for Listed Company and other Public Companies PUC > 10 Cr. CS is mandatory for all companies PUC ≥ 5 Cr.

MD/CEO can not be Chairman also for companies carrying multiple business.

Whole Time KMP can not hold office in more than one company except the Subsidiary.

Vacancy to be filled in six months.

Mandatory to have at least one resident Director (residing 182 days in current FY)

Executive Director means as Whole Time Director as defined under Section 2(94).

Role and responsibility of Company Secretary increased.

The dissenting vote of directors also to be recorded.

All KMPs authorised to sign and file forms with ROC, hence CFO, CEO etc. can also sign forms to be filed with ROC.

Limit of Sitting fee raised to Rs. One Lakh.

Listed Companies to make certain disclosures in Directors Report in respect of Managerial Remuneration.

There should be separate person in each category of KMP. For example, the same person can not be CFO and Company Secretary both.

Independent Directors:

Minimum two Independent Director is also required by unlisted public companies with share capital of Rs.10 Cr. or more; or turnover of Rs. 100 Cr. or more; or aggregate amount of loans, borrowings, debentures or deposits exceed Rs. 50 Cr.

1/3rd of the Board should be independent, in case of listed Companies.

A company not required to appoint Independent Directors as above can constitute its CSR Committee without Independent Directors.

The Tenure of Independent Director is fixed for five years, which can be extended for another five years. Thereafter 3 years cooling off period before appointment. The tenure before the Commencement of Act will be ignored for the purpose.

It is possible to fix the tenure for less than five years, but such tenure even if less than five years will be treated as one term and he would not be re-appointed after two terms, even if the tenure is less than 10 years.

Appointment of Independent Directors under the new Act would need to be finalised through a letter of appointment.

Mandatory to have one woman Director by companies where PUC >100 Cr. Turnover >300 Cr. within three years.

Independent Directors:

Independent Director to have no Pecuniary relationship with Company, Holding, Subsidiary, Associate. None of the relatives to have pecuniary relationship or transactions exceeding specified limits. Self/Relative not having KMP/Employee of Company/ Holding/ Subsidiary/ Associate. Relative being an employee but not a KMP will not affect independence. (Companies Amendment Act, 2017)

Remuneration as Director or transaction not exceeding 10% of a person's total income or such amount as may be prescribed will not impair independence. (Amendment Act, 2017)

In view of the provisions of section 188 which takes away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an ID will not be said to have pecuniary relationship in such cases. (Clarified in Circular 14/2014)

If it is intended to appoint existing Independent Directors, such appointment shall be made expressly under section 149(10)/(11) read with Schedule IV of the Act within one year w.e.f. 1st April 2014. (Circular 14/2014)

Independent Directors can be selected from a Database to be created.

Onerous Code provided for Independent Directors (Schedule IV).

Independent Directors to meet separately once in a year to discuss the performance of non-independent directors, Board, Chairman & quality, quantity and timeliness of information.

Board Powers:

Board to exercise certain powers only with the consent of the Company by way of special resolution. (Section 180). Earlier section 293 was applicable only on public Companies and the requirement was only Ordinary Resolution.

Ordinary Resolutions passed before 12th September under Section 293 in respect of borrowings and / or creation of Security on the assets of the company will be regarded as sufficient compliance of Section 180 for a period of one year from the date of Notification of section 180 of the Act.

Now certain Board Resolutions are also required to be filed with ROC (Section 117)

Certain powers to be exercised by the Board by means of a Board Resolution only (Section 179(3)).

Audit Committee & Nomination & Remuneration Committee:

Mandatory for specified companies (Listed Public Companies, Other Public Companies PUC \geq 10 Cr., Turnover \geq 100 Cr., Outstanding borrowing \geq 50 Cr.)

Composition is 3 or more Non-Executive Directors, majority to be independent.

All existing Audit Committees to be reconstituted within one year as per the new requirements.

All companies not required to have Audit Committee under earlier Act can constitute the same within one year or appointment of Independent Directors by them whichever is earlier. (Notification dt. 12th June 2014)

Audit Committee to approve all related party transaction.

Remuneration Committee to formulate criteria for determining qualification, positive attributes and independence of Directors.

Remuneration Committee to recommend Board a policy relating to remuneration of Directors, KMPs and other employees.

Board Report to indicate manner of formal evaluation of performance of Directors/ Board and Committees.

Companies accepting Deposits from Public or accepting bank loans $>$ 50 Cr. To establish vigil mechanism.

Vigil mechanism to provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.

More Accountability for Directors & KMP:

- CEO (if Director) and CFO to mandatorily attest financial statement.
- Directors responsibility Statement to additionally include:-
 - Internal financial controls – Applicable for listed Companies;
 - Internal Financial controls pertaining to financial statements – Applicable to all companies (Rule 8(5) Accounts Rules)
 - Compliance with all laws and regulations – Applicable to all Companies

Directors are liable for the acts of Board through a Board process in which he is involved/connived/not acted diligently. This applies to Independent Directors also.

Related Party Transactions to be approved in Board Meeting only. For specific Companies / Specific Transactions previous special resolution is required. Members who are related parties can not vote at such General Meeting.

Absolute Ban on Forward Contracts in Shares of the Company by Directors.

Prohibition of Insider Trading applicable for unlisted Companies as well.

Director must attend at least one meeting in a calendar year.

Company Secretary to report to the Board about Compliances with the provisions of all laws applicable on the Company.

Related Party Transactions:

Section 2(76) “related party”, with reference to a company, means—

- (i) a director or his relative; (ii) a key managerial personnel or his relative;
- (iii) a firm, in which a director, manager or his relative is a partner;
- (iv) a private company in which a director or manager is a member or director;
- (v) a public company in which a director or manager is a director ~~or~~ and holds along with his relatives, more than two per cent. of its paid-up share capital; (Modified vide First Removal of Difficulty Order)
- (vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- (vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any **body Corporate** which is—

- (A) a holding, subsidiary or an associate company of such company; or
- (B) a subsidiary of a holding company to which it is also a subsidiary;
- (C) an investing Company or the venturer of the Company.

(ix) such other person as may be prescribed; (Director or KMP of Holding Company **other than ID**)

Related Party Transactions:

No Approval required from Central Government for related party transaction.

All related party transactions to be approved by Audit Committee. Only Audit Committee Approval is sufficient if the transaction is at arms length price and in the normal course of Business.

Prior Approval of Board required for Other Related Party Transactions. The Approval should be in Board Meeting only.

Prior approval of Shareholders by special resolution required for certain specified transactions or ~~for the companies with PUC >= INR 10 Cr.~~

Specified Transactions – (a) Sale, Purchase or Supply of any goods or material >10~~25~~5% of Annual Turnover/Rs. 100 Cr., (b) Availing or rendering of any services > 10% of Turnover ~~Net Worth~~/Rs. 50 Cr., (c) Selling or otherwise disposing of or buying property of any kind > 10% of Net Worth/Rs. 100 Cr., (d) Leasing of Property >10% of Annual Turnover / Net Worth/Rs. 100 Cr., (e) underwriting the subscription of securities or derivatives >1% of Net Worth (f) appointment of any office or place of profit in the Company, subsidiary or Associates – monthly remuneration >2.5 Lacs.

Agenda of Board Meeting should disclose certain prescribed particulars in respect of related party transactions.

Interested Director should not be present during the discussion on the subject matter.

Board Report to provide the details of related party transactions alongwith justification thereof.

Duty of Independent Directors to pay sufficient attention and deliberate on related party transactions.

*Directors required to **indemnify for the losses** and disqualified if convicted of an offence.*

Prior shareholders approval is required for non-cash transactions of directors with Company.

The term relative is restricted only to parents, spouse, siblings and childs in the final Rules.

Loan to Directors (Section 185)*:

185. (1) Save as otherwise provided in this Act, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by any director of the Company or its holding company, or any partner or relative of such Director and any firm in which such partner or relative is a Partner.

For other parties where director of the Company is interested, loan can be given subject to passing of special resolution and disclosure of full particulars in explanatory statement and loan is utilized by borrowing company for its principle business.

Provided that nothing contained in this sub-section shall apply to—

(a) the giving of any loan to a managing or whole-time director—(i) as a part of the conditions of service extended by the company to all its employees; or (ii) pursuant to any scheme approved by the members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

Explanation.—For the purposes of this section, the expression “to any other person in whom director is interested” means—

(a) any private company of which any such director is a director or member;

(b) any body corporate at a general meeting of which not less than twenty five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

*Replaced by Companies Amendment Act, 2017

Loan to Directors (Section 185):

Applicable to all Companies (Public Private both)

Exemption to Loan by Holding Company to its wholly owned subsidiary.

Exemption to Holding Company for giving guarantee to its subsidiary company for loans financed by Bank or financial institution if such loan is utilised by subsidiary for its principle business. (Rule 10 of Companies (Meeting of Board and its Powers) Rules, 2014.)

Not Applicable in case of loan to Public Company, if the Director is holding less than 25% share in that Company.

It appears that the existing loans are not affected by this provision, if they were given in compliance with the provisions applicable at that time.

In case a Holding Company appoints an Independent Director/Professional Director on the Board of Subsidiary Company, which is a private Limited Company, the section will get attracted. However this may not be the intent of the legislators.

There can not be blanked assumption that the Board of Directors of Subsidiary Company are accustomed to act as per the directions of the Board of Holding Company.

Finance & Accounts:

All companies to follow uniform financial year, i.e., 1 April to 31 March

Existing companies required to align its financial year within 2 years of commencement of new law.

Holding/ subsidiary/[Associate](#) of a company incorporated outside India and required to follow different financial year for consolidation of financial statements outside India can get exemption by obtaining NCLT Approval

Cash Flow statement would be applicable for Companies having Turnover more than 2 Crores as per last P&L A/c.

Instead of Depreciation rates, the useful life of assets are prescribed. Companies may follow any suitable method for depreciation.

Companies can adopt different useful life by providing justifications.

Depreciation rates to be increased by 50% in Double Shift and by 100% in Triple Shift.

Component based Accounting & depreciation required for certain Assets.

For Revalued assets, the full depreciation to be charged to P&L A/c.

New provisions applicable for the financial Statements starting on or after 1st April 2014.

CEO and CFO to sign the Financial Statements. CEO to sign even if he/she is not a Director.

Accounts (New Provisions for Revision & Re-opening):

Voluntary revision of financial statements/ board report permitted for any of the 3 preceding financial years:

- Detailed reasons required to be disclosed in the board report

- Company needs to obtain specific approval from Tribunal for restatement

- Representations of the Central Government and Income-Tax Authorities need to be considered by Tribunal before passing such order

- Onerous responsibility on the management to obtain revised audit report.

Re-opening of accounts may be ordered by Court/Tribunal only on application by the Central Government, Income-Tax Authorities, SEBI, Other Regulatory Body or Authority and where :

- Accounts were prepared in a fraudulent manner

- Company's affairs were mismanaged casting a doubt on reliability of financial statements

Audit:

Audit Limit of 20 companies now include Private Companies also.

The Company has to file notice of Appointment of Auditor within 30 days with ROC. Auditor is required to file his resignation within 15 days with ROC.

Auditor Appointment for five year term and Rotation of Auditor mandatory for certain Companies, period **prior** to Companies Act will also be considered for calculation of period of rotation. Individual Auditor tenure can be for five years and for firm it can be upto 2 terms of 5 years each. Cooling period is **five years**. Firms operating under the same trade name, network etc. are not eligible. Three years transition period allowed.

No Rotation for OPC, Small Company, Unlisted Public Company PUC<10 Cr. Private Company PUC<20 Cr. & Bank Borrowing/Public Deposits <50 Cr.

The scope of work of Auditors is enhanced. Audit Report shall also include:

- The observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company.
 - Any qualification, reservation or adverse remarks relating to the maintenance of accounts and other matters connected therewith.
 - **Whether the company has adequate internal financial controls system in place [with reference to financial statements](#) and operating effectiveness of such controls.**
-

Audit:

For the purpose of section 134(5)(e) Directors Responsibility Statement: Internal Financial Controls means the policies and procedures adopted by the Company for ensuring the orderly and efficient conduct of its business, including the adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the Accounting Records, and timely preparation of reliable financial information.

A Firm in which majority of Partners are qualified to be appointed as Auditor can also be appointed as an Auditor however in such case only the partners who are chartered Accountants shall be authorised to act and sign on behalf of the firm.

Auditor disqualified if indebted >5 Lacs, holding securities/Relative >1 Lacs, having business relationship.

Auditors to have access to records of subsidiaries for consolidation requirements.

No requirement for qualifications to be in bold/italics.

Specific requirement that the Auditors will comply with Auditing Standards.

Offence involving fraud by officers or employees to be reported to Central Government.

Various non-audit services are prohibited for Statutory Auditors. These non-audit services include – design and implementation of any financial information system, rendering of outsourced financial services, management services.

Internal Audit mandatory for listed Company and other public Companies capital > Rs. 50 Cr./ Turnover > 200 Cr. / Bank Borrowing > Rs. 100 Cr. / Public Deposits > 25 Cr. at any time during financial year & Private Companies satisfying Turnover or Bank borrowing criteria.

Deposits:

Only public Companies with Net worth ≥ 100 Cr. and turnover ≥ 500 Cr. can accept deposits.

Share Application money, if not allotted within sixty days should be refunded in next 15 days otherwise, it will be treated as Deposits. Any adjustment of amount for any other purpose will not be treated as refund.

Security Deposits from employees are exempt only upto the limit of their Annual Salary.

Any Business Advance should be appropriated within 365 days, else it will be treated as Deposits.

Acceptance of Deposits from members also covered in the definition and subject to the Compliance requirements. Promoters unsecured Loan as per the Bank requirement is however exempt.

Stringent norms for acceptance of Deposits, Credit Rating mandatory, ~~Deposit Insurance to be provided for principal as well as for interest.~~ Mandatory disclosure in advertisements/circular, appointment of Depositors' Trustee.

Company to deposit 20% of deposits maturing in the current year in separate Bank A/c. (Private Companies accepting form its members are exempt).

Holding Subsidiary:

“Subsidiary” is defined to mean a company in which the holding company:

Controls the composition of the Board of Directors, or :

Exercises or **controls** more than one-half of the **total voting power*** either at its own or together with one or more of its subsidiary companies

“Control” is defined to include:

Right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or **shareholders agreements** or **voting agreements** or in **any other manner**.

- Preparation of Consolidated Financial Statements (CFS) mandatory for all companies having subsidiaries, Associates or JV. No Exemption to **Unlisted Companies**.
- A separate statement containing the salient features of financials statements of subsidiaries, associates and Joint Ventures shall be furnished in Form 9.1 (yet to be published)
- Rules provide total share capital means Paid up Equity Shares and Convertible Preference Shares.

- *Substituted for total share capital vide Companies Amendment Act, 2017.

Company Incorporation:

No Other Object Clause in MOA.

Articles may contain Entrenchment Clause.

Nationality and identity of subscribers to MOA to be provided at the time of Incorporation.

PAN Number mandatory for Subscribers who are Indian Nationals or those foreign subscribers who are required to have PAN Number in India. Foreign Nationals not having PAN number to file Declaration.

A new company to have registered address within 15 days of incorporation.

A newly company can not commence business unless it files a declaration with ROC to the effect that –

- every subscriber has paid-in the value of shares subscribed to MOA;*
- paid-up share capital of the company is not less than the minimum prescribed; and*
- verification of its registered office*

A company may also be struck off by the ROC on the ground that subscribers to the memorandum have not paid subscription money within 180 days from the date of incorporation

Existing Companies need not amend their MOA & AOA, however the provisions inconsistent with the new Act would not be applicable. However it is advisable to amend the Articles in line with the requirements of new Law.

Small Company, One Person Company & Dormant Company:

Small Company:

The Concept of Small Companies introduced with lesser Compliance requirements – PUC<50 Lacs, Turnover<2 Cr. Or as prescribed.

Holding / Subsidiary companies excluded.

Cash Flow Statement not required for Small Company.

Annual Return can be signed by CS or One Director.

Board Meetings required once in half year.

Fast Track merger for Small Companies.

One Person Company:

Paid up Capital of upto fifty lacs and Turnover upto two Crores.

Only One Director & Member required. Member should be natural person who is indian citizen and resident in India.

The member may appoint a nominee who shall also be a natural person who is Indian citizen and resident in India.

A person can incorporate only one OPC.

No requirements to hold Board Meetings and AGM.

Financial Statements to be filed within 180 days of end of Financial Year.

Dormant Company:

Where a company is formed and registered under 2013 Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to ROC to obtain status as a “dormant company”

“inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 FYs, or has not filed financial statements and annual returns during the last 2 Fys;

New Concepts : First Time Inductions:

Concept of One Man Company introduced with lesser compliance requirements.

The Concept of Small Companies introduced with lesser Compliance requirements – PUC<50 Lacs, Turnover<2 Cr. Or as prescribed.

Independent Directors, CEO and CFO introduced for the first time in the Act.

The concept of Class Action Suits introduced.

Establishment of National Company Law Tribunal (NCLT), National Financial Reporting Authority (NFRA), giving powers to Serious Fraud Investigation Office (SFIO)

Auditors Rotation introduced for the first time.

Provisions for Cross Border Mergers introduced.

Appointment of Registered Valuers introduced. However the provisions will be made applicable at a later date.
