COMPANIES BILL 2013

An Insight on the changes

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Part - 1

Preface

ORIGIN OF COMPANIES ACT IN INDIA

The earliest piece of legislation in India relating to companies was the Act of 1857.

The next came companies Act ,1866.

After this the companies Act 1882 was enacted and it was replaced by Indian Companies Act,1913.

Following the recommendations of Company law committee set up in 1950 , the Indian Companies act,1956 was enacted.

Amendments to the Companies Act, 1956

The Companies Act, 1956, has been amended as many as 24 times since 1956.

The major amendment to the Companies Act, 1956, was made by enacting the Companies Amendment Act, 1988.

The next major amendment was made by the Companies Amendment Act, 2002.

Objectives of the Act

- To help the attainment of the ultimate ends of the social and economic policy of the Government.
- To help the development of Companies in India on healthy lines, because corporate sector constitutes a very important segment of the economy.
- To equip the Government with adequate powers to intervene in the affairs of a company in the public interest and as per the procedure prescribed by law so that the interest of all the stake-holders may be protected from unscrupulous management.
- To protect the interests of large number of share holders, as there exists separation of ownership from management in a company.
- To safeguard the interests of creditors.

Pathway to Companies Bill, 2013

2008

- **Companies Bill, 2008 was introduced on 23rd October 2008 in the Lok Sabha to Replace Existing Companies Act, 1956**

2009

- **Companies Bill 2009 was reintroduced on 3rd August 2009 in the Lok Sabha to replace Existing Companies Act, 1956 with modifications and the same was referred to SCF for further process**

2010

- **Report of Standing Committee on finance on companies bill,2009 was introduced in the Lok Sabha on 31st August 2010**

2011

- **Companies Bill 2011 introduced in Lok Sabha on 14th December 2011**

2012

- **Companies Bill 2012 passed by Lok Sabha on 18th December 2012 at 10.46 P.M**

2013

- **Companies Bill 2013 passed by Rajya Sabha on 8th August 2013 at 05.16 P.M**

Part - 2

KEY CHANGES PROPOSED IN THE BILL

SCHEME OF THE BILL

470 Clauses

658 Sections

7 Schedules

15 Schedules

29 Chapters

13 Parts

A Very substantial part of the Act will be in the form of rules which will be prescribed separately.

DEFINITIONS

NEW DEFINITIONS INTRODUCED IN SECTION 2 –

- Accounting Standards
- Associate Company
- Auditing Standards
- Authorised Capital
- Books of Accounts
- Called up capital
- Charge
- Chartered Accountant
- Chief Executive Officer
- Chief Financial Officer
- Company Limited By Guarantee
- Company Limited by Shares
- Company Liquidator
- Contributory
- Control
- Cost Accountant
- Deposit
- Expert
- Financial Institution
- Financial Statement
- Foreign Company
- Free Reserves
- Global Depository Receipts
- **Independent Director**
- Indian Depository Receipt
- Interested Director
- Issued Capital
- **Key Managerial Personnel**
- Notification
- Official Liquidator
- **One Person Company**
- Ordinary or Special Resolution
- Postal Ballot
- Promoter
- Public Financial Institution
- Register of Companies
- **Related Party**
- Remuneration
- **Serious Fraud Investigation Office**
- **Small Company**
- Subscribed capital
- Sweat Equity Shares
- Turnover
- Unlimited Company
- Voting Right
- Whole Time Director

DEFINITIONS

DEFINITIONS WHICH HAVE BEEN DISCONTINUED –

- District Court
- Industrial Company
- Industrial Undertaking
- Information memorandum
- Issued generally
- State Level Institution
- Option in Securities
- Operating Agency
- Public Holiday
- Share with Differential Rights
- Sick Industrial Company

SOME

CONCEPTS

ONE PERSON COMPANY

Definition

- "One Person Company" means a company which has only one person as a member

Incorporation

- Will be formed as a private company
- Name of nominee who will continue in event of death to be specified.
- Words "One Person Company" to be mentioned below name

Meetings

- No AGM required.
- No Board Meetings required in case of only one Director.
- Entering resolutions in minutes book is Sufficient.
- Minutes to be signed and dated.

ONE PERSON COMPANY

Director

- Minimum one director required
- Subscriber to MOA deemed to be first director till director is duly appointed.

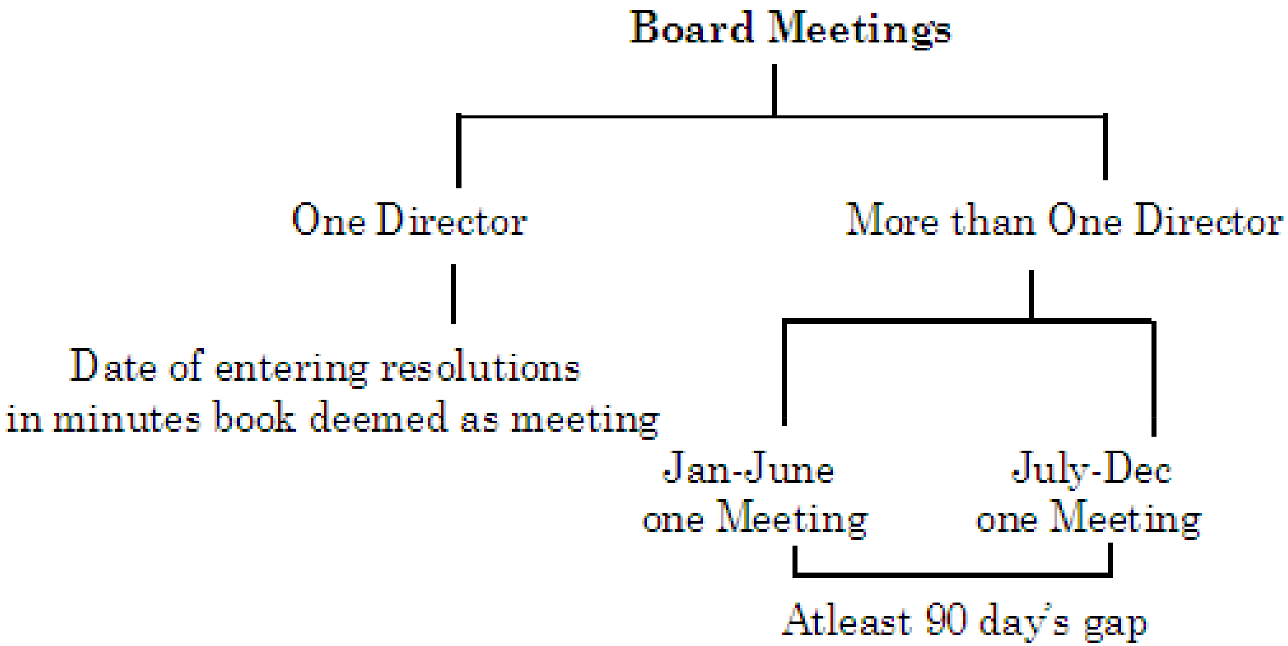
Accounts

- Financial Statements may not include cash flow statement
- Accounts to be filed within 180 days of FY
- Board's report to contain only response to auditor's qualification

Signing

- Financial Statements can be signed by one director alone
- Annual Return to be signed by CS, if appointed, else by one director

Board Meeting Provisions for OPC



Contracts by a OPC

In case a One Person Company enters into any contract, not in the ordinary course of business, with its sole member who is also a director, then such contract must –

- either be in writing, or
- entered in the Memorandum, or
- recorded in the minutes of the meeting held for the first time after entering of the contract

and the particulars of the said contract must be filed by the company with the Registrar within 15 days of the approval of the contract by the Board.

SMALL COMPANY

Definition

‘‘small company’’ means a company, **other than a public company**,—

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees;

or

(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to—

(*A*) a holding company or a subsidiary company;
(*B*) a company registered under section 8; or
(*C*) a company or body corporate governed by any special Act;

SALIENT FEATURES OF A SMALL COMPANY

- Only a private company can be classified as a small company.

- Holding company, subsidiary company, charitable company and company governed by any Special Act cannot be classified as a small company.

- For a small company, either the paid up capital should not exceed Rupees fifty lakhs or the turnover as per last statement of profit & loss should not exceed rupees two crores.

- The status of a company as "Small Company" may change from year to year. Thus the benefits which are available during a particular year may stand withdrawn in the next year and become available again in the subsequent year.

SMALL COMPANY

Accounts

The financial statement, with respect to small company may not include the cash flow statement

Annual Return

The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

Board Meeting

At least one board meeting to be conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.

DORMANT COMPANY

Salient Features of a Dormant Company

- Company formed and registered under this act
- For a future project or to hold an asset or intellectual property, AND
- has no significant accounting transaction

Inactive Company

- a company which has not been carrying on any business or operation, OR
- has not made any significant accounting transaction during the last two financial years, OR
- has not filed financial statements and annual returns during the last two financial years

Significant Accounting Transaction

- significant accounting transaction" means any transaction other than—
- (*a*) payment of fees by a company to the Registrar;
- (*b*) payments made by it to fulfill the requirements of this Act or any other law;
- (*c*) allotment of shares to fulfill the requirements of this Act; and
- (*d*) payments for maintenance of its office and records.

Dormant Company

A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register

Financial statement, with respect to dormant company, may not include the cash flow statement.

At least one meeting of the Board of Directors to be conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.

A Dormant Company may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed

Dormant Company – Functions of Registrar

The Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect.

The Registrar shall maintain a register of dormant companies in such form as may be prescribed.

Registrar shall issue a notice in case of a company which has not filed financial statements or annual returns for two financial years consecutively and enter the name of such company in the register maintained for dormant companies

Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.

Associate Company

<u>Definition</u> - "associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation.—For the purposes of this clause, "significant influence" means control of at least twenty per cent of total share capital, or of business decisions under an agreement.

<u>Impact at other places –</u>

➢Included in definition of related party

➢Annual Return of a company to carry particulars of associate companies also.

➢Consolidated financial statements to include accounts of associate companies.

➢Ascertainment of independence of independent director and auditor at the time of appointment

INCORPORATION

Basis for Comparison	Provision contained in existing Companies Act, 1956	Provision contained in Companies Bill 2013
Maximum number of members for private companies	50 (Fifty)	200 (Two Hundred)
Object Clause of MOA	Object clause bifurcated into – Main Objects, Incidental or Ancillary Objects and Other Objects.	MOA to contain the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.
Registered Office	Companies are required to furnish the details of the Registered office of the company by filing Form 18 at the time of incorporation. Notice of every change of the situation of the registered office, shall be given to the Registrar within thirty days of the change, who shall record the same.	A company shall, on and from the fifteenth day of its incorporation have a registered office. The company is also required to furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in a prescribed manner. Notice of every change of the situation of the registered office, shall be given to the Registrar within fifteen days of the change, who shall record the same.
Commencement of Business	Provision is applicable only to public limited companies	Applicable to all companies having share capital. Certificate

INCORPORATION

New Requirements at time of incorporation–

- Affidavit to be filed by first directors and subscribers that they have not been convicted of any offence, breach of duty to any company etc. and that all information furnished regarding incorporation is true and complete to their knowledge.

- Proof of identity to be furnished for all directors and subscribers

- Directors' interest in other companies/body corporate to be furnished.

INCORPORATION

Other related new provisions –

- Subscription money to be brought in within 180 days of incorporation

- AOA may contain entrenchment provision.

- Notice of change in situation of registered office and alteration of articles to be filed with ROC within 15 days instead of 30 days as provided in the existing Act.

SHARES AND SHARE CAPITAL

Issue of Shares at a discount

Companies Act, 1956	Companies Bill, 2013
Section 79 permits issue of shares at discount subject to Central Government Approval	Issue of shares at discount is prohibited except in case of sweat equity shares.

Issue of preference shares for more than 20 years

Companies Act, 1956	Companies Bill, 2013
Section 80 prohibits issue of irredeemable preference shares and preference shares redeemable after 20 years.	Issue of preference shares for period exceeding 20 years is permitted for infrastructure projects.

Issue of shares on private placement, bonus shares and GDRs

Companies Act, 1956	Companies Bill, 2013
No specific provision for issue of shares on private placement, bonus shares and GDRs exist in the present Act.	Specific provision introduced for issue of shares on private placement, bonus shares and GDRs in the Bill.

SHARES AND SHARE CAPITAL

Companies Act, 1956	Companies Bill, 2013

Consolidation and division of shares

Company permitted to consolidated or sub divide its shares by passing resolution in general meeting	Consolidation and division which results in changes in the voting percentage of shareholders shall require approval of the Tribunal to be effective.

Increase in penalty amount – Fraudulent issue of Duplicate Certificate

Company – Fine up to Rs. 10,000/- Officer in Default – Imprisonment up to 6 months or Fine up to Rs. 1,00,000/- or both.	Company – not less than 5 time of face value of shares which may extend up to 10 times or Rs. 10,00,00,000/- whichever is higher. Officer in default – Same penalty as specified u/s 447 for fraud.

SHARE CERTIFICATES

Companies Act, 1956	Companies Bill, 2013
To Subscribers	
No specific time limit prescribed.	Share Certificates to be issued within two months of incorporation
On Allotment of Shares	
Within 3 months from date of allotment	Within 2 months from date of allotment
On Transfer/Transmission of Shares	
2 months from date of lodgment of instrument of transfer/transmission	1 month from date of lodgment of instrument of transfer/transmission

Further Issue of Shares

Basis of Comparison	Existing Companies Act, 1956	Companies Bill 2013
Applicability	Applicable only to public companies. Applicable only for allotment made after 2 years of formation or one year from date of first allotment made after incorporation.	Applicable to all companies. Applicable to allotment made anytime after incorporation of company.
To whom shares can be offered	To existing equity share holders in proportion to their existing holding To others by passing a special resolution	**To existing equity share holders** in proportion to their existing holding **To employees** under a scheme of ESO, subject to special resolution passed by company and subject to such conditions as may be prescribed **To any persons**, if it is authorised by a special resolution and if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed

DIVIDEND

Basis of comparison	Companies Act 1956	Companies Bill 2013
Transfer to Reserves	Dividend to be declared after transferring to reserves such percentage of profits for that year, not exceeding 10%, as may be prescribed. (Companies Transfer of Profits to Reserves Rules, 1975). Voluntary transfer by company of a percentage is permitted.	Company, may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company.

DIVIDEND

Basis of comparison	Companies Act 1956	Companies Bill 2013
Interim Dividend	The Board of directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a separate bank account. The amount of dividend including interim dividend so deposited shall be used for payment of interim dividend.	The Board of Directors may declare interim dividend during any financial year out of the surplus in the P&L A/c and out of profits of the FY in which such interim dividend is sought to be declared. In case co has incurred loss in the current FY up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding 3 Fys

DIVIDEND

Companies Act, 1956	Companies Bill, 2013
Unpaid Dividend Account	
Unclaimed dividend to be transferred to separate bank account after 30 days of declaration.	Same requirement. Additionally, co. shall, within 90 days of making any transfer to the Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company, if any, and also on any other website approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.

DIVIDEND

- ALL SHARES IN RESPECT OF WHICH UNPAID OR UNCLAIMED DIVIDEND HAS BEEN TRANSFERRED UNDER SUB-SECTION *(5) SHALL ALSO BE TRANSFERRED BY THE COMPANY IN THE NAME OF INVESTOR* EDUCATION AND PROTECTION FUND ALONG WITH A STATEMENT CONTAINING SUCH DETAILS AS MAY BE PRESCRIBED:

- AMOUNTS TO BE CREDITED TO IEPF – ADDITIONAL REQUIREMENTS:

  - SALE PROCEEDS OF FRACTIONAL SHARES ARISING OUT OF ISSUANCE OF BONUS SHARES, MERGER AND AMALGAMATION FOR SEVEN OR MORE YEARS;

  - REDEMPTION AMOUNT OF PREFERENCE SHARES REMAINING UNPAID OR UNCLAIMED FOR SEVEN OR MORE YEARS; AND

DIVIDEND

BASIS OF COMPARISON

- **Utilization of IEPF**

COMPANIES ACT, 1956

- The fund shall be utilized for promotion of investor awareness and protection of the interest of the investors in accordance with such rules as may be prescribed.

COMPANIES BILL 2013

- the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon shall be utilzed for;
- promotion of investors' education, awareness and protection;
- distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement;
- reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the Tribunal, and
- any other purpose incidental thereto, in accordance with such rules as may be prescribed:

DIVIDEND

BASIS OF COMPARISON	COMPANIES ACT, 1956	COMPANIES BILL 2013
• **Penalty Provision – Failure to distribute dividend within 30 days**	• Every Director who is knowingly party to the default – Simple imprisonment up to **3 years** + **fine of Rs. 1000/-** for every day during which the default continues. • Company – to pay simple interest @ 18% p.a. during the period for which default continues	• Every Director who is knowingly party to the default – Simple imprisonment up to **2 years** + **fine of not less than Rs. 1000/-** for every day during which the default continues. • Company – to pay simple interest @ 18% p.a. during the period for which default continues

New Concepts in Directors

WOMEN DIRECTOR

- Specific class or classes of company to have at least one WOMAN DIRECTOR.
- No specific qualifications / disqualifications prescribed for selection and appointment.
- Rules to Clarify

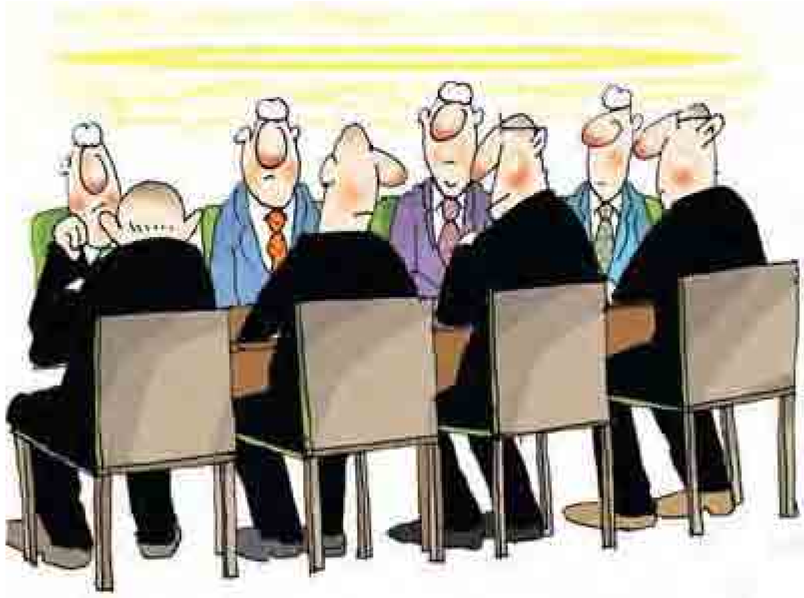
Resident Director

- **Every company** shall have at least one director who has stayed in India for a total period of **not less than one hundred and eighty-two days** in the previous **calendar year**.

INDEPENDENT DIRECTOR

- Every listed public company shall have at least one-third of the total number of directors as independent directors.
- Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.
- Any fraction contained in such one-third number shall be rounded off as one.

INDEPENDENT DIRECTOR



- Qualifications/Disqualifications for independent directors prescribed in depth which are even more stringent than that of listing agreement.
- Independent Director to give declaration of independence every year.
- Alternate director to independent director should also satisfy criteria of independence.

INDEPENDENT DIRECTOR

- To be appointed for a period of 5 years
- Can be reappointed for another period of 5 years by passing special resolution and disclosure in board's report.
- After 2 consecutive terms of five years, 3 years cooling off period to be observed.

Who cannot be appointed as an independent director?

1. Managing Director/Whole Time Director/Nominee Director
2. Any promoter of company, holding and subsidiary company
3. Any relative of promoters or directors of company, holding and subsidiary company
4. Any person having any monetary relationship with the co., hol co., sub co, promoters, directors during last 2 FYs and Current FY
5. Any person whose relative has any monetary relationship with the co., hol co., sub co, promoters, directors during last 2 FYs and Current FY in excess of 2% of Gross Turnover/Total Income or Rs. 50 lakhs whichever is lower.
6. Any KMP or employee of the co, hol and sub co during last 3 years.
7. Any relative of KMP or employee of the co, hol and sub co during last 3 years

Who cannot be appointed as an independent director?

8. Any person who himself or his relative is a proprietor, partner or employee of statutory auditor firm, firm of PCS and firm of Cost Accountants during last 3 Fys pertaining to co, hol co or sub co.
9. Any person who himself or his relative is a proprietor, partner or employee of legal or consulting firm having transaction during last 3 Fys with co, hol co or sub co. in excess of 10% of its turnover.
10. Any person who along with his relatives holds more than 2% of voting power of company
11. Any CEO or director of a NPO which receives 25% or more of its receipts from the company, hol co, sub co, company's promoters, directors.
12. Any CEO or director of a NPO which holds more than 2% of the voting power of the company.

Definition of relative

(*77) ''relative'', with reference to any person, means any one who is related to* another, if—

(i) they are members of a Hindu Undivided Family;

(*ii) they are husband and wife; or*

(*iii*) ***one person is related to the other in such manner as may be prescribed***

Other Changes pertaining to Directors

Basis for comparison	Provision contained in existing Companies Act, 1956	Provision contained in Companies Bill, 2013
Maximum Number of Directors	12	15 More than 15 can be appointed by passing special resolution
Maximum number of Directorship	15 Excludes private companies, unlimited companies, alternate directorship and directorship in non-profit associations	20 Out of which not more than 10 can be public companies. Includes Alternate Directorship also. No specific exclusions provided.
Composition of Board	Minimum 2 directors in case of private and 3 in case of public companies. Maximum 12 Directors.	Certain class of companies to have atleast 1 women director. Every company to have atleast one director who has stayed for atleast 182 days in India in previous Calendar year. Listed Companies to have atleast 1/3rd independent directors.
Vacancy of office for not attending board meetings	The office of a director shall become vacant if he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board, for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board	The office of a director shall become vacant in case— he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board

Other Changes pertaining to Directors

Basis for comparison	Provision contained in existing Companies Act, 1956	Provision contained in Companies Bill, 2013
Resignation of Director	No specific provisions contained except that any change in directors to be filed with ROC within 30 days.	Director to send copy of resignation letter and detailed reasons for resignation to Registrar within 30 days of resignation.
Disclosures in Board's report	Section 217 contains disclosure requirements of Board's report.	Additional Disclosures proposed by the bill, namely, Extract of Annual Return, Number of board meetings, CSR initiatives and policy, particulars of loans, guarantees, investments etc.
Directors responsibility statement	Section 217(2AA) prescribes the content of Director's responsibility statements which contains 4 clauses	Additional clauses proposed by the bill in respect of "Internal Financial Controls" and "Systems to ensure compliance with laws".

Other Changes pertaining to Directors

- A person who has failed to be appointed as a director in a general meeting cannot be appointed as an additional director at a board meeting.

- Alternate Director – Person can act as alternate director only for one director during absence of original director for a period of three months from India.

- Members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

KEY MANAGERIAL PERSONNEL

Definition - Clause 2(51)

"key managerial personnel", in relation to a company, means—

(*i) the Chief Executive Officer or the managing director or the manager;*

(*ii) the company secretary;*

(*iii) the whole-time director;*

(*iv) the Chief Financial Officer; and*

(*v) such other officer as may be prescribed;*

KEY MANAGERIAL PERSONNEL

- **“Chief Executive Officer”** means an officer of a company, who has been designated as such by it;

- **“managing director”** means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

- **“manager”** means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not;

- **“Chief Financial Officer”** means a person appointed as the Chief Financial Officer of a company;

KEY MANAGERIAL PERSONNEL

- **“company secretary” or “secretary”** means a company secretary as defined in clause (*c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who* is appointed by a company to perform the functions of a company secretary under this Act.

- **“whole-time director”** includes a director in the whole-time employment of the company;

Appointment of KMP

- Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,—

(i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;
(ii) company secretary; and
(iii) Chief Financial Officer

- Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

Maintenance of Accounts

Maintenance of Accounts in electronic form permitted.

Financials statements to include Balance Sheet, Profit & Loss and Cash Flow Statement.

No provision regarding extension of financial year. Financial year to end on 31st March every year for all companies.

Consolidation made mandatory for companies having subsidiaries, associates and Joint Ventures.

Financial statements can be signed by Chairman alone if so authorised by the Board.

RE-OPENING OF ACCOUNTS ON COURT'S OR TRIBUNAL'S ORDERS

- A Company shall reopen its books of accounts and shall recast its financial statements, on an application made by the Central Government, the Income-tax authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or any person concerned to the Court of competent jurisdiction or the Tribunal and an order is made by a court of competent jurisdiction or the Tribunal for the below stated reason

➢ The relevant earlier accounts were prepared in a fraudulent manner; or

➢ The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements

VOLUNTARY REVISION OF FINANCIAL STATEMENTS OR BOARD'S REPORT

- **If it appears to the directors of the Company that the financial statement of the Company or the reports of the Board do not comply with the provisions of section 129 or section 134, the company can make an application to the Tribunal.**

- **The tribunal shall make such orders as it thinks fit**

- **The order copy passed by the Tribunal shall be filed with the Registrar**

- **Such revised financial statement or report shall not be prepared or filed more than once in a financial year.**

Auditors

Appointment of First Auditor

- Auditor to be appointed within 30 days of incorporation in a Board Meeting.
- Auditor to be appointed within 30 days of incorporation in a Board Meeting else within 90 days in an EGM.

Term of Appointment of Auditor

- Auditor to be appointed in each AGM.
- Listed companies to appoint new auditor every five years (in case of individuals) and ten years (in case of firm of auditors). For other companies, auditor to be appointed for a term of five years in each appointment. Appointment to be ratified in each AGM.

Intimation of appointment

- Company to intimate auditor within 7 days and auditor to intimate ROC within 30 days.
- Company to intimate Auditor and ROC within 15 days of appointment.

Auditors

Internal Audit

- Not Mandatory
- Compulsory Internal Audit proposed for certain specified class of companies to be notified.

Intimation of Resignation

- No intimation required to ROC.
- On resignation, auditor to file statement with company and Registrar within 30 days.

Attendance at General Meeting

- Auditor is entitled but not obligated to attend General Meetings.
- Auditors to attend all general meetings unless specifically exempted by the company.

BOARD MEETINGS

Basis for comparison	**Provision contained in existing Companies Act, 1956**	**Provision contained in Companies Bill 2013**
First Board Meeting	No specific time stipulated for holding first board meeting.	Every company shall hold the first meeting of the Board of Directors within **thirty days** of the date of its incorporation.
Time Gap between two meetings	At least one meeting to be held in every quarter	Not more than **one hundred and twenty days** shall intervene between two consecutive meetings of the Board
Length of Notice	No specific length of notice specified	Meeting of the Board shall be called by giving not less than **seven days'** notice
Penalty	Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to **one thousand rupees**.	Every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of **twenty-five thousand rupees.**

BOARD MEETINGS THROUGH VIDEO-CONFERENCING ALLOWED NOW

- Under clause 173(2), participation of directors at Board Meetings has been permitted through video-conferencing or other audio visual means.

- Provided such participation is capable of recording and recognizing and the proceedings can be recorded and stored with date and time.

- Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means.

ANNUAL GENERAL MEETINGS

Basis for comparison	Provision contained in existing Companies Act, 1956	Provision contained in Companies Bill 2013
Maximum time for holding first AGM	18 months from incorporation or 9 months from closure of accounts, whichever is earlier	9 Months from closure of accounts
Time and Day	Every annual general meeting shall be called for a time during business hours, on a day that is not a public holiday.	Every annual general meeting shall be called during business hours, that is, between 9 A.M. and 6 P.M. on any day that is not a National Holiday
Length and Mode of Notice	Private companies can specify the length of notice in their Articles of Association. Written Notice mandatory.	21 days clear notice to be given by all companies. Notice may be given in writing or in electronic form in the manner prescribed.
Consent for Shorter Notice	Consent to be given by all members entitled to vote at the meeting	Consent to be given by not less than 95% of the members entitled to vote at the meeting

ANNUAL GENERAL MEETINGS

Basis for comparison	Provision contained in existing Companies Act, 1956	Provision contained in Companies Bill 2013
Quorum	Private Companies – 2 Members Public Companies – 5 Members	Private Companies – 2 Members Public Companies – 5 members where total number of members do not exceed 1000 - 15 members where total number of members exceed 1000 but do not exceed 5000 - 30 members where total number of members exceed 5000
Penalty	Company, and every officer of the company who is in default, shall be punishable with fine which may extend to Fifty thousand rupees and in the case of a continuing default, with a further fine which may extend to two thousand five Hundred rupees for every day after the first during which such default continues.	Company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues.
Statutory Meeting	Every Public limited company to hold statutory meeting after one month but before 6 months from the date of entitlement to commence business and file statutory report with ROC	No similar provision is there in the new bill.

RELATED PARTY TRANSACTIONS

Scope of related party transactions has been widened.

Clause 188 of the bill which carries provisions regarding related party transactions, combines existing sections 297 and 314.

Central Government Approval has been done away with.

Every related party transaction to be disclosed in Board's report.

TYPES OF RELATED PARTY TRANSACTIONS

- sale, purchase or supply of any goods or materials
- selling or otherwise disposing of, or buying, property of any kind
- leasing of property of any kind
- availing or rendering of any services
- appointment of any agent for purchase or sale of goods, materials, services or property
- such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company;
- underwriting the subscription of any securities or derivatives thereof, of the company:

Changes in Annual Return

Scope of return enlarged to great extent. Board's report to include extract of annual return.

Annual return to be made up to end of financial year not up to date of AGM.

All annual returns as stated above to be certified either by company secretary of the Company or by a Company Secretary in practice.

Every Listed company to file return to ROC regarding changes in shares held by promoters and top 10 shareholders within 15 days of the change.

Secretarial Audit

Secretarial Audit mandated for all listed companies and certain other class of companies.

To be given by a company secretary in practice.

Audit Report to be annexed to Board's report.

This is in addition to Corporate Governance Report as per listing agreement.

It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company.

Secretarial Audit

Board to respond to qualifications contained in Secretarial Audit by means of explanation in Board's report.

Powers and duties of statutory auditors as specified under clause 143 shall also apply to a practising company secretary doing secretarial audit.

Contents, manner of preparation, frequency of report etc. to be prescribed.

CORPORATE SOCIAL RESPONSIBILITY

➢Followings Companies Shall constitute a CSR Committee:

- Net worth of rupees five hundred crore or more, or
- Turnover of rupees one thousand crore or more, or
- Net profit of rupees five crore or more

➢Committee to consist of at least three directors out of which at least one should be independent director.

➢Committee to formulate a CSR policy and monitor its implementation.

CORPORATE SOCIAL RESPONSIBILITY

- Board to ensure that at least 2% of the average net profits of last 3 years is spent by the company on CSR activities every financial year.

- Else reasons for non compliance to be specified in the Board's report.

- Amount of expenditure incurred on corporate social responsibility activities to be disclosed by way of footnote to Statement of Profit & Loss.

- Schedule VII to the bill contains list of Activities which may be included by companies in their Corporate Social Responsibility Policies.

- Board's report to contain the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year

ENFORCEMENT MECHANISM UNDER THE COMPANIES BILL 2013

OVERVIEW

Provision regarding inspection, enquiry and investigation is available in the existing Companies Act of 1956 and the Act also provides for penalty under Sections 627 and 628 for false statement and false evidence.

BUT

Companies Bill 2013 brings out the real essence of enforcement by giving statutory recognition to the Serious Fraud Investigation Office and giving them power to arrest under the Companies Bill itself without having to invoke provisions of other legislations.

Clause 447 of the Companies Bill 2013

This is a new provision introduced in the Companies Bill 2013 which for the first time defines the term **"Fraud"** and provides for stringent penalty if fraud is proved.

Numerous sections in the Act have been linked to this one section by providing in those sections – **"Penalty as prescribed under Section 447"**

Definition of Fraud as per Clause 447

"Fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

***"wrongful gain" means the gain by unlawful means of property to which the* person gaining is not legally entitled;**

***"wrongful loss" means the loss by unlawful means of property to which the* person losing is legally entitled.**

Clause 447 – Punishment for Fraud

Any person who is found to be guilty of fraud, shall be punishable with **imprisonment for a term which shall not be less than six months but which may extend to ten years** and shall also be liable to **fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud**

Effect of Clause 447 via Section 468 of CRPC

468 - Bar to taking cognizance after lapse of the period of limitation

(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

CASCADING EFFECT OF CLAUSE 447

Incorporation of a company –

- Furnishing any false or incorrect particulars or suppressing any material information in relation to the registration of a company. **[CLAUSE 7(5)]**

- If after incorporation it is found that company was formed by furnishing false or incorrect information or by suppressing any material fact, then promoters and first directors will be liable. **[CLAUSE 7(6)]**

CASCADING EFFECT OF CLAUSE 447

Social/Charitable companies –

- When it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447. (**Clause 8)**

Criminal liability for misstatement in prospectus–

- Where a prospectus includes any statement which is untrue or misleading every person who authorises the issue of such prospectus shall be liable under section 447. **(Clause 34)**

CASCADING EFFECT OF CLAUSE 447

Punishment for fraudulently inducing persons to invest money

(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or

(b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or

(c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution;

[CLAUSE 36]

CASCADING EFFECT OF CLAUSE 447

Punishment for personation for acquisition etc. of shares –

- Any person who—

  (*a*) *makes or abets making of an application in a fictitious name to a company for* acquiring, or subscribing for, its securities; or

  (b) makes or abets making of multiple applications to a company in different names or in different combinations of his name or surname for acquiring or subscribing for its securities; or

  (c) otherwise induces directly or indirectly a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name,

shall be liable for action under section 447. **[CLAUSE 38(1)]**

CASCADING EFFECT OF CLAUSE 447

Certificate of Shares –

- If a company with intent to defraud issues a **duplicate certificate of shares**, the company shall be punishable with fine and every officer of the company who is in default shall be liable for action under section 447. **[CLAUSE 46(5)]**

Transfer and transmission of securities –

- Without prejudice to any liability under the Depositories Act, 1996, where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable under section 447. **[CLAUSE 56(7)]**

CASCADING EFFECT OF CLAUSE 447

Damages for Fraud (Deposit) –

- Where a company fails to repay the deposit or part thereof or any interest thereon and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in subsection (*3) of that section and liability under section 447, be personally responsible, without* any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors. **[CLAUSE 75(1)]**

CASCADING EFFECT OF CLAUSE 447

- **Removal, resignation of auditor and giving of special notice (Clause 140)**
- **Where business of a company has been or is being carried on for a fraudulent or unlawful purpose (Clause 206(4) proviso)**
- **Investigation into company's affairs in other cases (Clause 213)**

CASACADING EFFECT OF CLAUSE 447

- Penalty for furnishing false statement, mutilation, destruction of documents during the course of inspection, inquiry or investigation (Clause 229)

- Fraudulent application for removal of name [Clause 251 (1)]

CASACADING EFFECT OF CLAUSE 447

- **Penalty for frauds by officers** (Clause 337)
- **Liability for fraudulent conduct of business** [Clause 339 (3)]

Clause 448 – Punishment for False Statement

If in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement,—

(*a*) *which is false in any material particulars, knowing it to be false; or*

(*b*) *which omits any material fact, knowing it to be material,*

he shall be liable under section 447

Section 628 which contains same provision provides for imprisonment up to 2 years and fine (amt not specified).

Clause 449 – Punishment for False Evidence

If any person intentionally gives false evidence—

- (*a) upon any examination on oath or solemn affirmation, authorised under this* Act; or
- (*b) in any affidavit, deposition or solemn affirmation, in or about the winding up* of any company under this Act, or otherwise in or about any matter arising under this Act,

he shall be punishable with **imprisonment** for a term which shall **not be less than three years** but which **may extend to seven years** and with **fine** which **may extend to ten lakh rupees.**

Section 629 which contains same provision provides for imprisonment up to 7 years and fine (amt not specified).

Monitoring/Regulatory Authorities

- National Financial Reporting Authority

NFRA

- National Company Law Tribunal

NCLT

- Serious Fraud Investigation Office

SFIO

SERIOUS FRAUD INVESTIGATION OFFICE

- **The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company.**

- **Investigation into affairs of Company by Serious Fraud Investigation Office –**

  (*a) on receipt of a report of the Registrar or inspector under section 208;*

  (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,

SERIOUS FRAUD INVESTIGATION OFFICE

- **Statutory status to SFIO proposed and SFIO is given wide powers .**
- **SFIO's report to be treated as report filed by Police Officer.**
- **SFIO will have power to arrest in certain cases which attract punishment for Fraud and person accused of such offence shall be released on bail subject to conditions as mentioned in the relevant provisions of this bill.**
- **Stringent penalty provided for fraud related offences**

National Financial Reporting Authority

To be constituted by a notification of the Central Government.

It shall consist of a Chairman (to be appointed by CG) and other members not exceeding 15 in number.

Chairperson and members shall make a declaration to the Central Government regarding no conflict of interest or lack of independence in respect of his or their appointment.

Chairperson and members, who are in full-time employment with NFRA shall not be associated with any audit firm (including related consultancy firms) during the course of their appointment and two years after ceasing to hold such appointment.

Duties/Functions of NFRA

Make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors.

Monitor and enforce the compliance with accounting standards and auditing standards

Oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service

Perform such other functions relating to clauses (a), (b) and (c) as may be prescribed.

Powers of NFRA

To investigate into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949

Exercise the powers of a Civil Court, while trying a suit, in matters of productions of books of accounts, summoning and examining of persons under oath, inspections of books, registers etc. and issuing commissions for examination of witnesses or documents

Where professional or other misconduct is proved - Imposing penalty up to five times of fees received in case of individuals (not less than 1 lakh rupees) and ten times in case of firms (not less than 10 lakh rupees) and debarring member from practice up to ten years

Appeal against orders of NFRA

Appellate authority to be constituted by CG consisting of a chairperson and not more then two other members for hearing appeals arising out of the orders of the NFRA.

Any person aggrieved by any order of the National Financial Reporting Authority may prefer an appeal before the Appellate Authority

The qualifications for appointment of the chairperson and members of the Appellate Authority, the manner of selection, the terms and conditions of their service and the requirement of the supporting staff etc. and the fee for filing the appeal will be prescribed later.

National Company Law Tribunal

- National Company Law Tribunal shall be established by central government through notification consisting of
  - President and
  - Judicial and Technical members

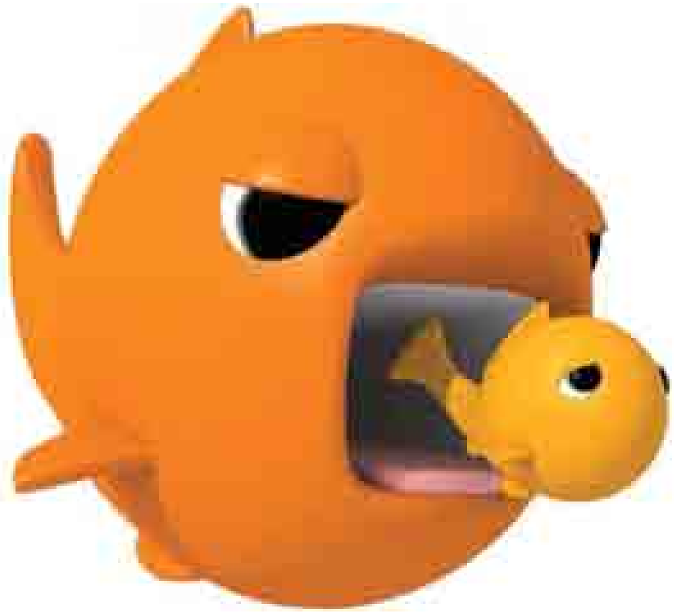
  to discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties

SCHEMES OF ARRANGEMENT

Section Wise Comparative Analysis



S Dhanapal & Associates
Practising Company Secretaries

General overview of the comparison between Act and Bill with respect to Schemes of Arrangements

- **Presently Company (Court) Rules 1959 provides for procedure. Under the Bill, Tribunal will have to frame suitable rules**
- **The Bill opens up two new dimension to mergers and amalgamations**
  - **Cross border mergers**
  - **Mergers outside judiciary process**
- **The Bill prescribes elaborate disclosure norms and sending information to all concerned authorities**
- **The Bill brings in certain changes in the corporate restructuring related provisions:**
  - **By adding new propositions**
  - **By deviating from certain established judicial propositions**
  - **By codifying certain judicial propositions and common practices**

Chapter Heading and Section Numbers

Companies Bill 2012

COMPANY ACT 1956

Provisions relating to "***Compromises, arrangements and amalgamations***" **have been** specified in **Chapter XV** consisting of **Clauses 230 to 240** of the Companies Bill, 2013.

In the Existing Act, **Chapter V** consisting of **Sections 390 to 396A** contain provisions regarding ***"Arbitration, Compromises, Arrangements and Reconstructions".***

Section 390 of the Companies Act, 1956

Section 390 provides interpretation for the purposes of **Section 391 and 393.** The said Section states that –

- "Company" means any company liable to be wound up under the Act.
- "Arrangement" includes re-organisation of the share capital of the company
- Unsecured creditors who have filed suit or obtained decree are deemed to be of the same class as other unsecured creditors.

There is no corresponding clause to this effect in the Companies Bill 2013. However, under Clause 230, an explanation is provided which states that "Arrangement" includes re-organisation of a company's share capital.

Section 391 vis a vis clause 230

Section 391/Clause 230 is the enabling section which empowers a company to contemplate a scheme of compromise or arrangement. This section talks about –

- Scheme of compromise between a co. and its creditors or any class of them, or
- Scheme of arrangement between a co. and its members or any class of them.

The section contains that application for the Scheme can be made either by the Company, or by any creditor, or by a member or by the liquidator in case of company which is being would up.

The authority before whom an application has to be made is the "High Court" having jurisdiction in the State in which the registered office of the company is situated.

Companies Bill 2013 proposes to authorise the National Company Law Tribunal (Hereinafter referred to as Tribunal) to sanction all schemes of compromises or arrangements except in certain specific situations discussed later

Section 391 vis a vis clause 230

A scheme of compromise or arrangement has to be approved by MAJORITY IN NUMBER REPRESENTING 3/4TH IN VALUE, of the creditors or members, present at the meeting and voting EITHER IN PERSON OR BY PROXY.

Companies Bill 2013 proposes voting through POSTAL BALLOT ALSO.

Section 391 vis a vis clause 230

Section 391/Clause 230 requires the applicant to disclose, all material facts relating to the company, to the Court/Tribunal before an order is passed sanctioning a scheme. These disclosures include – latest financial position of the company, latest auditors' report, pendency of any investigation proceedings etc.

Clause 230 requires an additional disclosure regarding "reduction of share capital, if any, included in the scheme.

Section 391 vis a vis clause 230

Section 391 further states that no order made by the Court shall be effective unless a certified copy of it is filed with the Registrar and it also requires that a copy of the order has to be annexed to every copy of the MOA issued after filing order copy with Registrar.

Companies Bill 2013 does not contain any express provision to this effect, except that Clause 230 contains that copy of order has to be filed with Registrar within 30 days of receipt of order.

Section 393 vis a vis clause 230

Section 393 of the Companies Act, 1956 contains provisions regarding information to be furnished and the manner of furnishing the information in relation to a scheme of compromise or arrangement.

Companies Bill 2013 does not have a separate clause corresponding to Section 393, but most of the provisions of Section 393 have been included under clause 230 itself, with certain amendments.

Section 393 vis a vis clause 230

Section 393 requires that where a notice calling for a meeting of the creditors or members or any class is sent to **a creditor or a member**, it shall be accompanied with a statement containing the terms of the compromise or arrangement and In case the scheme affects the rights of debenture-holders, the Statement, as aforesaid, shall also include similar details of debenture trustees as is required to be given for directors.

Clause 230 deviates from Section 393 to the effect that from the language used in Clause 230 it appears that notice has to be served on all creditors, members and debenture holders individually, irrespective of the kind of meeting. There is not much change in the requirement of the accompanying documents.

Section 393 vis a vis clause 230

Section 393 further contains that in case a meeting is called by advertisement, it should include the information as stipulated above, and else it should indicate the **place and manner** in which copy of the statement can be obtained by the members or creditors, free of charge.

Clause 230 contains that such a notice should specify the **time** within which free copy can be obtained from the **Registered Office** of the Company.

Section 393 vis a vis clause 230

Section 393 requires every director, managing director, manager and debenture trustee to provide to the company all details as may be necessary for the purpose of the this section. It also stipulates a penalty provision if the requirements of the section are not complied with.

There is no explicit corresponding provision in Clause 230.

New provisions proposed under clause 230 of Companies Bill 2013

With respect to notice requirements –

Where a meeting is proposed to be called in pursuance of an order of the Tribunal –

- **Notice, along with documents as sent to all members and creditors, to be served on Central Government, Income Tax authorities, RBI, SEBI, ROC, Official Liquidator, respective Stock Exchanges, Competition Commission of India and such other authorities as may be effected by the scheme. Notice to state that representations to be received within 30 days else it will be presumed that there are no representations to make.**

- **Notice and other documents as mentioned above to be placed on the website of the company, if any and published in newspapers in the manner as may be prescribed.**

- **Listed companies to send notice and other documents to SEBI and Stock Exchanges for placing on their website.**

- **Notice to state that voting can also be done through proxy or Postal Ballot (within one month of receipt of notice)**

New provisions proposed under clause 230 of Companies Bill 2013

With respect to order of Tribunal

Clause 230 contains that an order of Tribunal to be passed under this clause shall provide for all or any of the following matters –

- **Where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable**
- **the protection of any class of creditors**
- **if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48, which contains provision regarding variation of share holders rights.**
- **Stay of any proceedings pending before the BIFR**
- **such other matters including exit offer to dissenting shareholders**

New provisions proposed under clause 230 of Companies Bill 2013

Other miscellaneous new provisions

- **Auditors' certificate regarding compliance with accounting standards to be submitted to Tribunal before passing of order.**
- **Meeting of creditors may be dispensed with by the Tribunal, if at least 90% of creditors (in value) agree to the scheme by way of an affidavit.**
- **Any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.**

Section 393 vis a vis clause 231

Section 392 of the Companies Act gives power to the Court to implement a compromise or arrangement. It contains that the Court has the power to supervise the implementation of a scheme and can make modifications in the scheme which are necessary for the purpose of its proper implementation. It further empowers the Court to order winding up of the company where the scheme cannot be satisfactorily implemented with or without modifications.

Clause 231 is similar to Section 392 in all respects except that the authority, as previously stated, is Tribunal and the use of language is slightly different at one or two places.

Section 394 vis a vis clause 232

Section 394 of the Companies Act contains provisions facilitating a scheme of reconstruction or amalgamation.

Clause 232 of the Bill contains provision regarding Merger (including demerger) and Amalgamation of companies.

The difference between Section 394 and Clause 232 is that, in Clause 232, an attempt has been made to codify separately, the complete procedure for amalgamation and demerger of companies.

Section 394 vis a vis clause 232

Clause 232 additionally mandates circulation of following details/documents before a meeting is held –

Copy of draft scheme approved by the Board of the merging companies

Confirmation that a copy of the scheme has been filed with ROC

Report by directors of the merging companies, explaining the effect of the scheme on Shareholders, Key Management Personnel etc., laying out in particular the share exchange ratio and specifying any special valuation difficulties

Copy of valuation report, if any

Copy of Accounts drawn up to a date not preceding the board meeting date (held for consideration of scheme) by more than 6 months.

Section 394 vis a vis clause 232

As regards matters to be included in the Tribunal's order sanctioning a scheme of amalgamation or demerger, Clause 232 incorporates all of the points mentioned under section 394 with the following additions –

Allotment of shares to Non-resident shareholders in the manner to be specified in the order.

Transfer of the employees of the transferor company to the transferee company

Where the transferor company is a listed company and the transferee company is an unlisted company, the transferee company shall remain an unlisted company until it becomes a listed company

Where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation

Section 394 vis a vis clause 232

Section 394 mandates that a report of the ROC and OL, confirming that the affairs of the company have not been conducted in a manner prejudicial to its members or public interest, has to be submitted to the Court before an order, sanctioning the scheme or confirming dissolution, is made.

Clause 232 does not expressly mandate this requirement.

Section 394 vis a vis clause 232

Section 394/Clause 232 also requires that a certified copy of the order has to be filed with ROC within 30 days, with the difference that Section 394 states that order has to be filed within 30 days of **making of the order** whereas Clause 232 stipulates that order has to be filed within 30 days of **receipt of the certified copy of the order**.

Section 394 clarifies that “transferee company” does not include any company other than a company within the meaning of this Act, but “transferor company” includes any body corporate, whether a company within the meaning of this Act or not. Clause 232 is silent on this aspect.

NEW PROVISIONS PROPOSED UNDER CLAUSE 232 OF COMPANIES BILL 2013

Auditors' certificate regarding compliance with accounting standards to be submitted to Tribunal before passing of order.

The scheme under this section to clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

Every company in relation to which the order is made shall, until the completion of the scheme, file a statement with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not

Clause 234 explains about merger by absorption and merger by formation of a new company.

Clause 233 – Simplified procedure for Small companies and Holding – WOS companies

- Clause 233 is a new inclusion in the bill which provides for a simplified procedure in relation to a scheme of merger or amalgamation between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed.

- The authority to sanction the scheme in this case is given to the Regional Director (Central Government) instead of the Tribunal.

Clause 233 – Simplified procedure for Small companies and Holding – WOS companies

Procedure explained –

- **Notice to be served on ROC and OL inviting suggestion within 30 days.**
- **Scheme to be approved by**

  - the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares, and

  - majority representing nine-tenths in value of the creditors or class of creditors of respective companies
- **Each company to file declaration of solvency with ROC.**
- **Copy of Scheme to be filed by transferee co. with CG, Registrar and OL**
- **ROC and OL to communicate objections/suggestion on the Scheme to the CG within 30 days else it will be presumed that they don't have any objections/suggestions. CG will register the scheme thereafter.**

Clause 233 – Simplified procedure for Small companies and Holding – WOS companies

Procedure explained – IF SCHEME U/S 233 IS NOT IN PUBLIC INTEREST

- **CG may make any application to the Tribunal within 60 days to consider the application under CLAUSE 232 if it is of the opinion that such a scheme is not in public interest or in the interest of the creditors.**

- **On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit.**

- **A copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.**

Schemes with foreign companies

Clause 234

Clause 234 contains for the first time provisions regarding merger or amalgamation with companies registered in other countries.

Countries shall be notified from time to time by the Central Government

Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

A foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa.

The expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Mergers and Amalgamations

Other Clauses

- Clause 235 - Power to acquire shares of shareholders dissenting from scheme or contract approved by majority.
- Clause 236 - Purchase of minority shareholding.
- Clause 237 - Power of Central Government to provide for amalgamation of companies in public interest.
- Clause 238 – Registration of offer of schemes involving transfer of shares.
- Clause 239 – Preservation of books and papers of amalgamated companies.
- Clause 240 - Liability of officers in respect of offences committed prior to merger, amalgamation, etc.

COMPOUNDING
SPECIAL COURTS
MEDIATION – CONCILIATION

COMPOUNDING OF OFFENCES

Any offence punishable under this with fine only are compoundable by –

(*a) the Tribunal; or*

(*b) Regional Director up to a limit of Rs. 5 lakhs*

If investigation has been already initiated or is pending under this bill, then compounding will not be granted.

Any offences which is punishable:

- **With imprisonment or fine, or**
- **With imprisonment or fine or both**

Shall be compoundable only with the permission of the Special Court

Any offence which is punishable under this Act

- **with imprisonment only or**
- **with imprisonment and also with fine**

shall not be compoundable.

COMPOUNDING APPLICATION

- Every application for the compounding of an offence shall be made to the Registrar

- Registrar will forward the same along with its comments to Tribunal or the Regional Director or any officer authorised by the Central Government

- Notice to be given to the Registrar within seven days from the date on which the offence is so compounded before or after the institution of any prosecution.

SPECIAL COURTS

Special Courts (New Provision) – Clause 435

Established by central government for speedy trail of offences under this Act and can establish as many as special courts by notification as may be necessary.

Composition of Special Court

Single Judge - Appointed by central government

OFFENCES TRIABLE BY SPECIAL COURTS

ALL OFFENCES MADE UNDER THIS BILL (CLAUSE 436)

All offences are triable only by the special courts established by the central government in the particular locality where the registered office of the company against which the offence was committed is situated.

APPEAL AND REVISION (CLAUSE 437)

All appeals made against the order of the special courts shall lie to the high court.

TRANSITIONAL PROVISIONS

Until the Special Courts are established by the Central Government any offences committed under this bill which is triable by Special Courts shall be triable by **court of sessions** exercising jurisdiction until Special Courts are established.

MEDIATION AND CONCILIATION

Mediation and Conciliation Panel

The central government **shall** maintain a panel of experts called as “**Mediation and Conciliation Panel**”.

Purpose of setting the panel

For mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act

MEDIATION AND CONCILIATION

Who can make application to the Panel?

- Any of the parties to the proceedings
- The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending

Fees, Procedure and other terms and conditions

To be prescribed

Time Period

Within a period of three months from the date of reference

Post your reflections to:
S. Dhanapal, Managing Partner
Smita Chirimar, Partner
N. Ramanathan, Partner

S DHANAPAL & ASSOCIATES
Practising Company Secretaries

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