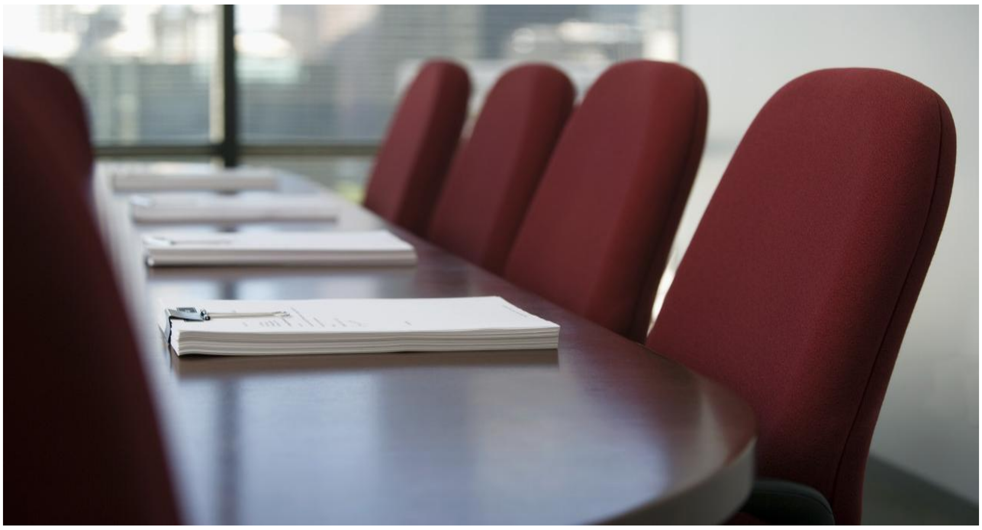
Dissecting the New Law



Provisions under Companies Act, 2013 which EVERY DIRECTOR must know

Transitional Provisions important for each Boardroom

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Provisions under the Companies Act, 2013 which every Director needs to know

Sl.	Title	New Provisions under Companies Act, 2013
1	**Minimum & Maximum No. of Directors** *(Sec. 149 (1))*	Minimum of **3** Directors have to be appointed in a Public Company, **2** Directors in a Private Company and **1** Director in One Person Company. A Company can have a **Maximum of 15 Directors**. *(The erstwhile act provided a maximum of 12 Directors)* If the Company wants to increase the number of Directors on its Board then approval of Members by way of Special Resolution is required. *(Previously approval of Central Government was required)*
2	**Maximum number of Directorships** *(Section 165)*	A person cannot hold directorships in more than **20 Companies** (including alternate directorship) of which there should not be more than **10 Public Companies** (including private companies which are subsidiaries of public companies). *(Earlier a director was permitted to hold directors in maximum 15 public companies and there was no restriction on the number of Directorships held in Private Companies)* A transitional period of 1 year is provided from the date of the commencement of this Act, to directors to comply with this requirement and they have to intimate their choice to each company where they wish to continue as Director and also to ROC.
3	**Woman Director** *(Second Proviso to Sec. 149 (1) read with Draft Rule 11.1)*	Following Class of companies will have to appoint atleast one Woman Director on its Board: • **Listed Companies** *(within 1 year from enforcement of the provision)* • Companies having a paid up share capital of more than **Rs. 100 crore**. *(within 3 years from enforcement of the provision)*
4	**Resident Director** *(Sec. 149 (3))*	Every company must have at least one Director who has stayed in India for a total period of not less than **182 days** in the previous calendar year.

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5	**Independent Director** *(Section 149 (4) to 149 (12) read with Schedule IV and Draft Rule 11.2 & 11.3)*	1. Following Class of companies will have to appoint atleast **one third** of its total number of Directors as Independent Directors within **1 year** from the enforcement of this section: • **Listed Companies** • Public Companies having a paid up share capital of more than **Rs. 100 crore**. • Public Companies which have, in aggregate, outstanding loans or borrowings or debentures or deposits, exceeding **Rs. 200 crore.** • *Such criteria shall be applicable for the first year and shall continue to apply to that company in subsequent years during the tenure of the Independent Director even if the paid up share capital or net worth or borrowings/deposits, as the case may be, fall below the limits specified therein.* 2. "**Independent Director**" is defined as a Director other than the Managing Director, Whole Time Director or Nominee Director. *(The Listing Agreement includes Nominee Director as an Independent Director)* 3. The process of appointment of an Independent Director has been formalized as a **Letter of appointment** has to be issued to Independent Directors setting out details w.r.t. term, duties, liabilities, D&O Insurance, remuneration etc. 4. The office of an Independent Director **shall not be liable to retire by rotation.** 5. An Independent Director shall hold office for a term **upto 5 consecutive years** and can be eligible for re-appointment for a further term upto 5 years if the members of the company approve so by way of a Special Resolution. However, such director can resume the position as Independent Director after a cooling period of 3 years. *The tenure of an independent director as on the date of commencement of this Act shall not be counted for above purpose.*

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		6. An Independent Director should be a person of integrity and should possess relevant expertise & experience in the opinion of the Board. 7. An Independent Director shall possess appropriate balance of skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business. 8. On appointment of an Independent Director, **a statement** will have to be made in the **Director's Report** that the appointed Independent Director **possesses appropriate balance of skills, experience and knowledge as required,** in the opinion of the Board. 9. All the Independent Director will have to abide by Schedule IV to the Act which discusses the guidelines of professional conduct, manner of appointment, functions, duties, re-appointment and removal of independent directors. 10. A **Separate Meeting** of Independent Directors will have to be held atleast **once a year** in absence of the Non Independent Directors and the Management to review the performance of Non Independent Directors and the Chairperson after taking into account views of ED & NED's. 11. Performance Evaluation of the Independent Directors will be done by the entire BOD excluding the director to be evaluated. 12. An Independent Director is **not eligible for Stock Options** and can be remunerated by way of Sitting Fee, Re-imbursement of Expenses for attending Meetings & Commission approved by shareholders. 13. Every Independent Director will have to give a declaration at the first Board Meeting he attends after his appointment/ at the first Board Meeting in every Financial Year / wherever

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		there is change in circumstances which may affect his status as an Independent Director that he satisfies the **Criteria for 'Independence'** provided as under: a. An Independent Director cannot be a **promoter or relative of the promoters** of the company or its holding/subsidiary/associate company. b. An Independent Director or his/her **relatives** cannot have **any pecuniary relationship** with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding Financial Years or during the current Financial Year. *(The Listing Agreement states that an Independent Director cannot have any **material pecuniary relationship** with the Company)* c. The Relatives of Independent Director should not have or have had pecuniary relationship / transaction with the Company, its Holding / Subsidiary / Associate Company or their promoters, directors during the 2 Immediately preceding financial years or during the current financial year amounting to : • 2% or more of its Gross Turnover or Total Income or, • Rs. 50 Lac whichever is lower d. An Independent Director or his/her **relatives should not :** • Have or had been **KMP / employee** of the Company or its Holding/ Subsidiary/ Associate Company in any of the **3 Financial Years** immediately preceding the financial year in which he is proposed to be appointed. • Be an **Employee/ Partner/ Proprietor** in any of the 3 Financial years immediately preceding the financial year in which he is proposed to be appointed of:

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		✓ A firm of Auditors, Practicing CS/ CWA of the Company or its holding/ subsidiary / associate company or, ✓ Legal Consulting Firm of the company or its holding/subsidiary/associate company if the remuneration received by it amounts to **10 % or more of the gross turnover of such firm.** • Hold more than 1.99% of the total voting power of the Company or • Be a CEO/Director of any non-profit organization that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding / subsidiary/ associate company or that holds 2% or more of the total voting power of the company
6	**Liability of an Independent Director, Non-Promoter Non Executive Director or KMP** *(Sec. 149(13))*	A non executive director including an independent director and nominee directors will be held liable only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through board processes and with his consent or connivance or where he had not acted diligently.
7	**Small Shareholders' Director** *(Sec. 151 read with Draft Rule 11.5)*	A **listed company** may ***suo motu*** or upon the **notice** of not less than 500 or 1/10th of the total number of small shareholders, **whichever is lower**, elect a small shareholders' director from amongst the small shareholders *(Shareholders holding shares of Face Value of not more than Rs.20,000/-)*.
8	**Appointment of Directors** *(Sec. 152 read with Draft Rule 11.6)*	1. An individual before being appointed as Director will have to furnish a Declaration that they are not disqualified for being appointed as a Director. 2. In case of appointment of an Independent Director, the explanatory statement should contain a declaration from the

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		Board of Directors that in their opinion, the Independent Director satisfies the conditions provided in the act for such appointment. 3. For the purpose of calculation of retiring directors *(i.e. 2/3rd of the total number of Directors)* Independent Directors will not be taken into account
9	**Right of persons other than Retiring Directors to stand for Directorship.** *(Sec. 160)*	A person apart from a Retiring Director can stand for directorship at a General Meeting if : a. Notice has been served by a member/ himself proposing him as a director in writing at the registered office of the company atleast 14 days before the meeting b. Along with the deposit of **Rs. 1 lac** *(Previously Rs. 500/-)* and such deposit will be refunded, if the person proposed gets elected as a director **or gets more than 25**% of total valid votes cast.
10	**Additional Directors** *(Sec. 161(1))*	A person who **fails to get appointed in a General Meeting** cannot be appointed as an Additional Director.
11	**Alternate Director** *(Sec. 161(2))*	1. An Alternate Director can only be appointed in case a Director **leaves India** for a period of not less than 3 months *(Contrary to the earlier Act, wherein it was provided that an Alternate Director can be appointed in place of the Director who is absent from the state for more than 3 months in which Board Meetings are generally held.)* 2. An alternate Director to an Independent Director should also satisfy the criteria of Independence as laid down in the Act. 3. A person to be appointed as an Alternate Director cannot hold any other Alternate Directorship.

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12	**Disqualifications for appointment of Director** *(Section 164)*	In addition to disqualification provided under the Companies Act, 1956 following new additional disqualifications to be appointed as a Director: 1. The person has been convicted of the offence dealing with Related Party Transactions at any time during preceding 5 years. 2. Applicability of disqualification under section 274 (1)(g) of the erstwhile act has been extended to Private Companies also i.e. any person who is or has been a Director of **any company which has not filed** financial statements or annual returns for any continuous period of 3 financial years; or has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, **shall also not be eligible for appointment as a Director** of any Public Company and also for re-appointment in the same company for a period of 5 years. 3. The power of Central Government to exempt the application of a particular disqualification on any person has been dispensed with.
13	**Duties of Directors** *(Section 166)*	For the first time Duties of Directors have been laid down in the Act with penal provisions of a minimum of Rs. 1 Lac extending upto Rs. 5 Lac: • To act in accordance with the articles of the company • To exercise his duties with due and reasonable care, skill and diligence and to exercise independent judgment • To act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the stakeholders (company, employees, shareholders, etc.) • To Avoid conflict of interest (with that of the Company)

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		• Not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates • Not assign his office and any assignment so made shall be void
14	**Vacation of Office of Directors** *(Section 167)*	1. A director shall vacate office, if **he fails to attend all Board Meetings for a consecutive period of 12 months** even if leave of absence has been granted. 2. A director will have to vacate office, if he is disqualified by an order of the Court / Tribunal **under any act** and not just Companies Act. 3. A director shall vacate office if the company fails to file financial statements or annual returns for any continuous period of 3 financial years; or has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures or pay dividend etc.
15	**Resignation of Directors** *(Section 168)*	1. A director may resign from his office by giving a **notice in writing** to the company 2. The Board shall on receipt of such notice **take note of the same** and **place the fact of such resignation** in the **report of directors** laid in the immediately following general meeting by the company. 3. The director shall also forward a copy of his resignation along with **detailed reasons** for the resignation to the Registrar within **30 days** of resignation in such manner as may be prescribed. 4. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, **whichever is later.**

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16	**Board Meeting** *(Section 173)*	1. **Prior 7 days notice** is required to call a Board Meetings and electronic mode has been provided for communication of Notice. 2. Meeting may be called at a **shorter notice** for urgent business if **atleast 1 Independent Director** is present. If an Independent Director is not present then the decision of the meetings will have to be circulated to all the directors and it shall be valid only after final ratification of decision by atleast one Independent Director. 3. Board Meetings may be attended by means of **Video Conference** or by audio visual means which are capable of recording the proceedings. However matters relating to approval of annual financial statements have to be dealt only in a physically convened Board Meeting.
17	**Resolution by Circulation** *(Section 175)*	1. All resolutions passed by circulation will have to be **mandatorily noted** in the next Board Meeting and should form a part of minutes. 2. Resolution by Circulation will not be possible if **1/3rd of the total number of Directors object**. Such resolution has to be passed at a Board Meeting.
18	**Powers of Board** *(Section 179)*	Following new powers have been introduced to be exercised by the Board only at their meetings: 1. To **issue securities** whether in India or outside 2. To **grant Loans** or give guarantee or provide security in respect of Loans 3. To approve Financial Statements and Directors' Report 4. To **diversify the Business** of the Company 5. To approve amalgamation/ merger/ reconstruction 6. **To take over a company** or acquire a substantial stake in it 7. To enter into **a joint venture** or technical or financial collaboration or any collaboration agreement 8. To **shift the location** of a plant or factory or the registered office;

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		9. To **appoint or remove KMP and senior management personnel** one level below the KMP; 10. To appoint **internal auditors** 11. To **take note of the disclosure of director's interest and shareholding**; 12. To **sell investments held by the company** (other than trade investments), constituting five percent or more of the paid – up share capital and free reserves of the investee company
19	**Restrictions on the powers of Board** *(Section 180)*	1. The certain powers u/s 293 of the erstwhile act was only applicable to public companies. Now it is **applicable to all companies.** 2. Under section 293 of the erstwhile act, certain powers required approval of members by way of Ordinary Resolution in a General Meeting. Now **Special Resolution** is required for such matters.
20	**Disclosure of Interest of Directors** *(Section 184)*	1. Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into— (a) with a body corporate in which such director or such director in association with any other director, holds more than 2% shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or (b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be **shall disclose the nature of his concern or interest** at the meeting of the Board in which the contract or arrangement is discussed and **shall not participate in such meeting.** 2. A contract or arrangement entered into by the company without disclosure or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option

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		of the company. 3. This section has been made applicable to private companies also.
21	**Loans to Directors** *(Section 185)*	1. No company shall directly/ indirectly advance any loan to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person. **2. A private company** of which any such director is a director or member **is included in the expression "to any other person in whom director is interested".** **3. Exemption to WOS / private company have been dispensed** 4. Company can give loans to MD/ WTD without the approval of Members where the loan is given as a part of condition or service extended by the company to all its employees or where the loan is approved by way of Special Resolution.
22	**Related Party Transactions** *(Section 188)*	1. Related party transactions are required to be approved by the board by a resolution unless the transaction is in the ordinary course of business and done at arm's length. 2. In case the transaction exceeds certain sum or in case the companies' paid up share capital exceeds Rs. 1 crore and transaction value exceeds limits as prescribed prior special resolution of the members are required. 3. Related parties shareholders are not permitted to vote on such resolutions. 4. Imprisonment upto One year has been prescribed for non compliance of related party provisions for listed companies

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		"Related party", with reference to a company, means: i. a director or his relative; ii. a KMP 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 holds along with his relatives, more than 2% of its paid-up share capital; 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 Point (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;* viii. any company 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. The Rules prescribe the following persons with reference to a company as a Deemed Related Party:** a. **a director or KMP of the holding, subsidiary or associate company of such company or his relative** b. Members of Core Management Team (excluding the Board of Directors) comprising all members of management one

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		level below the executive directors, including the **functional heads of the company or its holding, subsidiary or associate company.**
22	**Relative** *(Section 2(77)*	"relative", with reference to any person, means anyone who is related to another, if: i. they are members of a Hindu Undivided Family; ii. they are husband and wife; or iii. **The following relatives were prescribed under the rules** 1. *Father **(including step-father)*** 2. *Father's father* 3. *Father's mother* 4. *Mother (including step-mother)* 5. *Mother's mother* 6. *Mother's father* 7. *Son (including step-son)* 8. *Son's wife* 9. *Son's son* 10. *Son's daughter* 11. *Daughter (including step-daughter)* 12. *Daughter's husband* 13. *Brother (including step-brother)* 14. *Sister (including step-sister)* ***Step Father has been included in the list of relatives** and the following relatives have been excluded from the list of relatives under the erstwhile Companies Act, 1956:* ~~*1. Son's Son's wife*~~ ~~*2. Son's Daughter's Husband*~~ ~~*3. Daughter's Son*~~ ~~*4. Daughter's Son's Wife*~~ ~~*5. Daughter's Daughter*~~ ~~*6. Daughter's Daughter's Husband*~~ ~~*7. Brother's Wife*~~ ~~*8. Sister's Husband*~~

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23	**Directors Report** *(Section 134)*	Following new Disclosures required in the Directors Report: 1. Extract of Annual Return 2. Number of meetings of the Board 3. Statement on **declaration by Independent Directors** **4. Company's policies on director's appointment, remuneration, criteria for determining qualifications, etc.** 5. Explanations or comments by the Board on every qualification/ reservation/ adverse remark made by a Practising Company Secretary in his **Secretarial Audit Report**. **6. Particulars of Loans, Guarantees and Investments made.** 7. Particulars of Contracts and arrangements with **Related Parties** **8.** A statement indicating development and implementation of **Risk Management Policy.** 9. Policies adopted and implemented by the Company on the **CSR Initiatives.** 10. In case of Listed Company a statement in which **formal evaluation** has been made by the Board of its own performance and that of its committees and individual Directors 11. The **Directors Responsibility statement** shall include the following new statements ✓ The Directors had **laid down controls to be followed by the company and that such internal financial controls are adequate and were operating effectively** ✓ **The directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively**

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24	**Prohibition on Insider Trading of Securities** *(Section 195)*	Earlier the section was applicable only to Listed Companies under SEBI (PIT) Regulations. **Now these provisions are applicable to all companies.** If trading is done on basis of **mere access (and not possession)** it would imply that the directors/ officers have violated insider trading norms and thus are liable to Insider Trading even when the trading window is open.

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