**Article on some of the important provisions of Companies Act, 2013**

**Important provisions of**

# Companies Act, 2013

**Which have become effective from 12th September, 2013**

The Ministry of Corporate Affairs has notified 12th **September, 2013** as effective date for **98 sections** of the Companies Act, 2013 (hereinafter referred as 'the Act') vide its notification dated 12th September, 2013.

And

The Ministry of Corporate Affairs has notified on **01st April, 2014** as effective date for **183 sections** of the Companies Act, 2013 (hereinafter referred as 'the Act') vide its notification dated 26th March, 2014.

***Certain important provisions (which have become effective) are briefly explained below to ensure timely compliance by the companies.***

## DEFINITIONS (Section2)

- **Associate Company**
  - Section 2 (6) defines Associate Company as the company in which another company holds at least 20% of total share capital ( and not only equity capital) or can have significance influence on business decisions due to agreement or joint venture.
  - As per section 2 (76) Related party includes 'Associate Company'. Hence, contract with Associate Company will require disclosure/ approval / entry in statutory register as is applicable to contract with a Related party.

- **Expert**
  - Section 2 (38) defines an expert as a person who has authority to issue certificate e.g. Chartered Accountant, Company Secretary.
  - A stakeholder may claim damage from the expert under the Act. Hence, an expert should take utmost care while issuing certificate/giving advice to a company. An expert should maintain records to defend his position if claim is made against him.

- **Financial Year**

  Section 2 (41) Now Financial year can only be **1st April to 31st March**.

  Important: All the Company/body corporate should align its financial year as per the provisions of this Act within a period of 2 years from 01.04.2014. **i.e. up to 31.03.2016.**

- **Free Reserve**
  - Section 2 (43) defines free reserve as amount available for distribution – as per the latest audited balance sheet – but excludes revaluation reserve and change due to change in carrying value of its assets/liability routed through profit & loss account or otherwise.

- **Net-worth**
  - Section 2 (57), inter alia, includes securities premium account but excludes write back of depreciation in Net-worth.

- **Officer who is in default**

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- Section 2 (60) includes Key Managerial Personnel ( i.e MD, CEO, CFO, Company Secretary and other prescribed persons).
- Hence, Key Managerial Personnel should take utmost care while discharging their respective responsibility to avoid damage claim, penalty and prosecution under the Act.

➢ **One Person Company**

Section 2 (62) it means a company which has only one person as member.

➢ **Private Company**

- Section 2 (68) permits a private company to have total members **up to 200 persons**.
- It also excludes restriction of not accepting deposits from public, as section 76 permits only prescribed public company to accept deposit from public.
- As per circular dated 13th September, 2013, submissions of Memorandum & Articles of Associate of a private company to be incorporated must have clauses as per section 2 (68).

➢ **Public Company**

- Section 2 (71) defines public company to include a private company – which is a subsidiary of a public company. The private company may have specific clauses as provided in section 2 (68).

➢ **Remuneration**

- Section 2 (78) provides computation of perquisites as per Income-Tax Act.

➢ **Small Company**

- Section 2 (85) defines a small company as a private company with **paid-up capital** not exceeding **Rs 50 lakhs** or **turnover** not exceeding **Rs 2 Crores during previous financial year**.
- Small Company is given relaxation from complying with certain provisions of the Act.

➢ **Subsidiary Company**

- Section 2 (87) provides, inter alia, that that if a company hold more than one half of total share capital of other company, then the other company will be subsidiary of the former company. Hence, target percentage is more than 50% (and not 51% or more) and holding in total capital including preference shares is to be considered.

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➢ **ONE PERSON COMPANY**

**Section 3: Formation of Company**

- No person shall be eligible to incorporate more than a 1 One Person Company or become nominee in more than one such company **(Section 3: Formation of Company read with Rule No 3(2))**
- Where the paid up share capital of a One Person Company exceeds Rs. 50 Lacs rupees or its average annual turnover during the relevant period exceeds Rs. 2 Crore rupees, it shall cease to be entitled to continue as a One Person Company. One Person Company can get itself converted into a Private or Public company after increasing the minimum number of members and directors.**(Section 3: Formation of Company read with Rule No 6(6))**

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- **Section 4: Memorandum**

Objects Section in the Memorandum of Association of a company not required to be divided into Main, Ancillary and Other Objects. The company **cannot provide for Other Objects**.

- **Commencement Of Business**

**Section 11: Commencement of Business read with Rule No 24**

To commence business a **public/private** company needs to file the following with the Registrar of Companies:

- A declaration by a director in prescribed form stating that the subscribers to the memorandum have paid the value of shares agreed to be taken by them, and
- A confirmation that the company has filed a verification of its registered office with the Registrar
- In the case of a company requiring registration from sectoral regulators such as RBI, SEBI etc, approval from such regulator shall be required.

- **Registered Office Of Company (Corresponding Section: 17A, 146, 147)**

- As per the **Section 12(1) (c)** of the Companies Act,2013, companies are required to get its name, address of its registered office and the **Corporate Identity Number** along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications from 01/04/2014.

- **PROVISIONS RELATED TO ALLOTMENT OF SHARES**

- **Section 42 (Corresponding Section: 67)**

Companies are time bound to allot the shares within a period of sixty (60) days from the date of receiving application. If they fail to allot the shares within prescribed duration then the entire amount should be repaid by companies within 15 days to the respective applicants.

Non repayment within prescribed duration would be considered as default & from the 76th day, the whole application money held by company will be treated as deposit.

Further, application money received by the company for allotment of shares cannot be utilized for any other purpose & a separate bank account shall be maintained for receiving the application money from the applicant & all the transaction related to allotment shall be done through that account only.

Cannot accept application money in cash and it should be through banking channel only.

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**In the light of above mentioned provisions, our views are that all the companies shall repay the application money held as on 31.03.2014 before 30th May 2014.**

- **Section 62- Further Issue of Share Capital (Corresponding Section: 81)**

  There are many changes in this sanction from previous Section 81, one of the major change is this is **now applicable for Private Companies Also**.

## Prohibition on Buy-back of shares

- **Section 70** prohibit buy back of shares through a subsidiary company or through an investment company.

  It also prohibits buy back of shares if default is made in repayment of Fixed Deposit, interest on Fixed Deposit, redemption of debenture/preference shares, payment of dividend and repayment of term loan or interest thereon to a financial institution/bank. However, it excludes default in payment of working capital facility/interest from a bank.

## PROVISIONS PERTAINING TO LOANS /DEPOSITS ACCEPTED BY THE COMPANY.

- **Section 73 (Prohibition on acceptance of Deposits from Public (Corresponding Section: 58A):**

It states that **No company whether public or private can accept deposit from anybody** without complying with the provisions mentioned in Section 73.

Section 73(2) (2) A **company may, subject to the passing of a resolution in general meeting** and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, **accept deposits from its members** on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfillment of the conditions mentioned in this section.

Important: Clause (viii) of Rule 2(c) specifically **excludes loans from directors** from the purview of deposit definition if the director gives a declaration that the amount he is lending is not out of borrowed funds.

Important: Clause (vi) of Rule 2(c) **excludes loans received from any other company** from the definition of Deposits.

There are many other exclusion given in Rule 2(c) of Rules of Chapter V.

**To sum up any company whether public or private can accept loan or deposit from directors (subject to obtaining a declaration) and any other company whether private or public (subject to the restrictions imposed by S.180(1)(c),of the Act) apart from banks and financial institutions. If any company is desirous of obtaining loan from any other person then they have to comply with the Deposit rules which include obtaining credit rating, issuing circular, creating deposit repayment reserve account, etc.**

- **Section 74- Repayment of Deposits, etc accepted before commencement of this act (New Provision):**

**Section 74(1)** Where in respect of **any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement** or becomes due at any time thereafter, the company shall—

(a) **file Form DPT-4, within** a period of **three months** from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) **repay within one year from such commencement** or from the date on which such payments are due, whichever is earlier.

- **Section 180- Borrowing in excess of paid-up capital and free reserve (Corresponding Section:293)**

**Section 180** of the Act, inter alia, requires that a company cannot borrow in excess of its paid-up capital & free reserve **unless it is approved by special resolution**.

Section 180 does not exempt a private company. Hence, a private company is also required to pass special resolution if its proposed borrowing with its existing borrowing exceeds its paid-up capital and free reserves.

**As per General Circular dated 25.03.2014- resolution passed earlier pursuant to section 293 will remain in effect till 12.09.2014 only.**

- **Duty to register charges, etc. (Corresponding Section: 58A)**
  - As per **Section 77** of the Companies Act, 2013 all type of charges would require to be registered.

    The section doesn't specify any list of event's under which the charges is required to be registered as per the provisions of Companies Act, 1956

- **ANNUAL GENERAL MEETING & ANNUAL RETURN**
  - **Section 92 (Corresponding Section: 159, 160, 161, 162)**

    Every Company whether having share capital or not should file Annual Return with registrar within 60 days of A.G.M, this provision is also the same in previous act.

    Now Annual Return should carry information upto the date of closure of financial year, not upto the date of A.G.M. and all the information pertaining to Annual Return is required to be maintained for the said financial year. (**NOW INFORMATION WILL BE GIVEN FROM APRIL TO MARCH**)

    Now extract of Annual Return shall form part of Board's Report.

  - **Section 96 (Corresponding Section: 166)**

    Now Company is required to held its **First Annual General Meeting within the period of 9 months from the closure of its first Financial Year instead** of 18months from the date of Incorporation as provided in Companies Act, 1956.

    **AGM can only be held between 9 a.m. to 6 p.m.**

**RELATED TO MEETINGS OF BOARD & MEMBER**

- **Explanatory Statement for special business (Corresponding Section: 173)**
  - **Section 102**, inter alia, provides that an explanatory statement for a special business must provide nature of interest of every director, Key Managerial Personnel and their relatives.

    If the proposed transaction is with a company, then shareholding in other company by its promoter, directors, Key Managerial Personnel is to be stated in the statement provided it exceeds 2% in other company.

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- **Quorum for shareholders' meeting (Corresponding Section: 174)**

- **Section 103** has prescribed new quorum requirement **for public companies** which is as follows:

| No. of members as on date of Meeting | Quorum Requirement |
|---|---|
| 1000 or less | 5 members personally present |
| 1000-5000 | 15 members personally present |
| More than 5000 | 30 members personally present |

**The quorum requirement for private companies remains same at 2 members.**

- **Chairman of a general meeting (Corresponding Section: 175)**

- **Section 104** provides that members present at the meeting will appoint one of them as Chairman for the meeting on show of hands unless the articles of the company provides otherwise.

  It is advisable to amend articles to provide that the Chairman of the Company's Board will be the Chairman of a general meeting.

- **Meeting Of Board (Corresponding Section 285, 286)**

- **Section 173:** Every company shall hold the **first meeting** of the Board of Directors **within 30 days** of the date of its incorporation and thereafter **hold a minimum number of 4 meetings** of its Board of Directors **every year** in such a manner that **not more than 120 days shall intervene between two consecutive meetings** of the Board

- **REQUIRED TO APPOINT AN INTERNAL AUDITOR**

- **Section 138 Read with Rule 13 of The Companies (Accounts) Rules, 2014**

  The following class of companies shall be **required to appoint an internal auditor or a firm of internal auditors** on or before 30.09.2014:-

  - every listed company
  - every unlisted public company having:
    - paid up share capital of fifty Crore rupees or more during the preceding financial year; or
    - turnover of two hundred Crore rupees or more during the preceding financial year; or

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- outstanding loans or borrowings from banks or public financial institutions exceeding Rs 100 Crore or more at any point of time during the preceding financial year; or
- outstanding deposits of Rs 25 Crore or more at any point of time during the preceding financial year; and

- every private company having
  - turnover of Rs 200 Crore or more during the preceding financial year; or
  - Outstanding loans or borrowings from banks or public financial institutions exceeding Rs 100 Crore or more at any point of time during the preceding financial year.

The internal auditor shall either be a chartered accountant or cost accountant or such other professional as may be decided by the board. That person may/may not be an employee of the company.

## APPOINTMENT OF AUDITOR

- **Pursuant to Section 139 of the Companies Act, 2013 (Corresponding Section: 224)**

Every company shall, at the **first annual general meeting**, appoint an individual or a firm as an auditor who shall hold office **from the conclusion of that meeting till the conclusion of its sixth annual general meeting** and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed:

Provided that the company shall place the matter relating to such appointment for ratification by members at every annual general meeting:

Provided also that the company shall inform the **auditor** concerned of his or its appointment, and also **file a notice of such appointment with the Registrar within fifteen days of the meeting** in which the auditor is appointed.

## DISCLOSURE OF INTEREST (Corresponding Section: 299 & 301)

- According to **Section 184** of The Companies Act 2013 (herein after referred to as an "Act") every director is required to disclose his concern or interest in any company or companies or bodies corporate (including shareholding interest), firms or other association of individuals, by giving a notice in writing in **Form MBP-1.**

Every director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding,

- According to Section 179 (3) (k), the Board of Directors of a company shall exercise the power to take note of the disclosure of director's interest and shareholding.

- According to Section 117(3) (g) of the Act resolutions passed in the sub section (3) of section 179 shall be **filed with Registrar within 30 days of passing the resolution.**

**Penalty** : If a director of the company contravenes the provisions of section 184 of the Act then such director shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than **fifty thousand rupees** but which **may extend to one lakh rupees, or with both**.

- **Thus it is necessary for all the companies to obtain declaration in Form MBP 1 from all its directors and has to file the same with MCA in form MGT 14 within 30 days of the first board meeting in the financial year.**

## LOAN AND INVESTMENT BY COMPANY

### Loan to Directors etc (Corresponding Section: 295)

- **Section 185** prohibit loan including any loan represented by book debt to its directors or to any other person in whom the director is interested or give guarantee or security for a loan taken by them unless it is given to MD or whole time director as per terms and conditions / scheme applicable to all its employees. The scheme should be approved by a special resolution.

### Section 186: Loan & Investment by Company(Corresponding Section: 372A)

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- **Sub- Section (1)**

  Without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:

  Provided that the provisions of this sub-section shall not affect,—

  (i) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

  (ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

- **Sub- Section (2)**

  No company shall directly or indirectly —

  (a) give any loan to any person or other body corporate;

  (b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

  (c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

  exceeding **60%** of **Paid up capital + Free Reserve + Security Premium** or **100%** of **Free Reserve + Security Premium** (whichever is **More**). .

- **Sub- Section (3)**

  Where the giving of any loan or guarantee or providing any security or the acquisition under sub-section (2) **exceeds the limits** specified in that sub-section, **prior approval by means of a special resolution passed at a general meeting shall be necessary**.

**Our Opinion- The Sub section (2) of Section 186 makes restriction, but Section 186(3), gives power to the company, that it may give loan, guarantee or provide any security or acquisition beyond the limit but before taking prior approval from Shareholder in the General Meeting.**

**It means once we need to take approval from Shareholder in the General Meeting, thereafter we may make investment beyond the limit.**

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- **Sub- Section (7)**

  **No loan shall be given** under this section **at a rate of interest lower than the prevailing yield** of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

## Restriction on non-cash transaction with directors (There was no section earlier)

- **Section 192** prohibits purchase or sale of asset from/to the company's director or director of its holding company, subsidiary company or associate company unless it is approved by shareholders at general meeting.

## PROVISION RELATED TO DIRECTOR'S (CHAPTER IX)

Following are the extract of the related sections.

- **Section 149: Company to have Board of Director (Corresponding Section 252, 253, 259)**

  From the date of commencement of this Act, Every Company is required to have minimum **one resident director**. Here resident means "director who stayed in India for 182 days or more in previous **calendar year"**

  For existing companies, company should fulfil the requirement of the resident director within one year from the date of notification.

- **Section 152: Appointment of Director (Corresponding Section 254, 255, 256, 264)**

  A person appointed as a director shall not act as a director unless he gives his **consent to hold the office as director and such consent has been filed with the Registrar within thirty days of his appointment** in such manner as may be prescribed:

  Provided that in the case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment.

**Consent to Act as Director is mandatory to file for Private and Public both companies.**

**Article on some of the important provisions of Companies Act, 2013**

- **Section 161: Appointment of Additional Director** **(Corresponding Section 260, 262, 313)**

  The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

- **Section 165: No. of Directorship** **(Corresponding Section 275, 276,277,278,279)**

  As **per** the provision of **Section 165** of Companies Act, 2013 **a person is allowed to hold directorship in 20 companies only**, out of which not more than **10 could be public companies** including private ltd companies.

  Further this section says: If the person is the director in more than the above mentioned limit then he has to **resign from the other companies in the excess of above limit within one year** from the commencement of the act. i.e. **upto 31.03.2015**

➢ **APPOINTMENT OF KEY MANAGERIAL PERSONNEL**

**Section203. (Corresponding Section: 316, 383A, 386)**

(*1*) 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 :

(*2*) 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.

(*3*) A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time:

Provided that nothing contained in this sub-section shall disentitle a key managerial personnel from being a director of any company with the permission of the Board:

Provided further that whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, **within a period of six months from such**

**commencement**, choose one company, in which he wishes to continue to hold the office of key managerial personnel:

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

(*4*) If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of **six months** from the date of such vacancy.

(*5*) If a company contravenes the provisions of this section, the company shall be punishable with **fine** which shall not be less than **one lakh rupees** but which **may extend to five lakh rupees** and every director and key managerial personnel of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.

**Rules of Chapter-XIII (Appointment & Remuneration of Managerial Person.**

**Appointment of Key Managerial Personnel.-**

Every listed company and every other public company having a **paid-up share capital of ten crore rupees or more** shall have whole-time key managerial personnel.

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**Here are some of the sections of Companies Act, 2013 who require urgent look.**

**Section, 12(1)(c), 73(2), 74(1), 92, 138, 139, 165, 173, 180, 184, 185, 186**

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