

Prepared by:

CS Ankur Garg

<https://www.facebook.com/#!/ankur.gargcs>

Useful Interpretations about Companies Act, 2013-Part-2

Dear Professional Colleagues,

We all must appreciate the fact that new Companies act, 2013 have created various new challenges for professionals and decoding new provisions is a huge task in front of all of us. Indeed learning is a continuous process and MCA through Companies act, 2013 have prove that.

During the process of decoding new provisions and stipulations of Companies Act, 2013, I am observing and going through various interpretations about important topics which will surely affect our day to day corporate working in days to come. I have already shared first version of this series which is available at the link mentioned below:

Useful Interpretations about Companies Act, 2013 - Part-1

Now please find below second version of this series. I am sure in future I'll be able to share more such interpretations and practices under this series.

1. Is the process of section 160 (Section 257 in CA 1956) applicable to appointment of Independent Directors?

Section 160 is about right of a person to stand for directorship in a Company, provided he/she is not a retiring Director. This provision was also there in Companies Act, 1956. It was section 257 of Companies Act, 1956, which corresponds to section 160 of the New Companies Act, 2013.

Section 160 corresponds to section 257 of the 1956, Act. Section 257 of the Companies Act, 1956, requires the deposit of Rs. 500/- only, where **a member** or **the Director himself**, proposes a non-retiring director. On the other hand Section 160 of the Companies Act, 2013, requires deposit of Rs. 1,00,000/-, for the same purpose which is a big amount for few companies.

Intention of law is quite evident behind increasing this amount from Rs. 500/- to Rs. 1,00,000. This has been done to discourage frivolous proposals for candidature of Directorship.

What if Company or Board of Directors proposes the candidature

Section 160 comes into picture only when, A person who is not a retiring director in terms of section 152, stand for Directorship at any general meeting, and if **he himself**, or some **other member** propose him as a Director.

Hence, keeping in view the language of section 160, if the company itself or Board of Director proposes the candidature, there seems no reason to apply section 160 and there is no scope for application of the section.

Prepared by:

CS Ankur Garg

<https://www.facebook.com/#!/ankur.gargcs>

The procedure prescribed by section 160 like intimation to be given by the proponent to the company through special notice along with deposit of fees to the tune of Rs. 1,00,000 and information to be circulated by the company to members seems irrelevant where the company itself is proposing the Director.

Appointment of Independent Director Vs. Section 160

Para IV of Schedule IV deals with manner of appointment of Independent Director. If we check the language of Para IV of Schedule IV, this clearly states that it is duty of Board of Director to propose the appointment of Independent Director. So if Board of Directors is to propose the Independent Directors then what is the need to comply with Section 160 as this section is applicable where a member or the Director himself is proposing the candidature.

So, we can conclude that the procedure given in section 160 is not required to be followed for the appointment of Independent Directors, as their appointments would be proposed directly by the Board to members.

2. Appointment of Director in Private Companies as per new law

In the erstwhile Companies Act, 1956, section 255(2), gives liberty to Public companies as well as private company, which is not a subsidiary of a public company, to self-regulate the appointment of its Director. Accordingly a private company, which is not a subsidiary of a public company, may appoint its Directors through the regulations contained in its Articles.

Section 255(2) of Companies Act, 1956, may be read below:

(2) The remaining directors in the case of any such (Public) company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

Position under Companies Act, 2013

It is very surprising to note that liberty given to private Companies w.r.t. control the appointment of its Directors through Articles, as mentioned above, has been completely taken away in Companies Act, 2013. However, the same liberty shall continue in case of public companies by virtue the language used in **section 152(6)(b)** read with **section 152(2)**, as far as the appointment of Directors to the extent of 1/3rd of the board strength, is concerned.

Interpretation of Section 152(6)(b)

Section 152(6)(b) of Companies Act, 2013 is the replica of section 255(2) of Companies Act, 1956 except the fact that power given to private Companies by the language used in section 255(2) of Erstwhile Companies Act, 1956, has been removed in Section 152(6)(b).

As per Section 152(2) except where the Act provides a carve-out, all director of all companies will be appointed by the general meeting. **This provision is applicable to private companies too.**

Prepared by:

CS Ankur Garg

<https://www.facebook.com/#!/ankur.gargcs>

Section 152 (6) (b) **provides liberty, but only to public companies**, to appoint 1/3rd of the total board by a self-regulated process. While there was an exception to private companies in section 255 (2) of the 1956 Act, which has been dropped while transporting the provisions into the new Act.

Even casual vacancies cannot be filled by the board:

Going further as per section 161 (4) a Private Company cannot fill a casual vacancy through the resolution of Board of Directors. This means, the board of a private company cannot even fill up a casual vacancy caused in the office of Director. Keeping in view the language of section 161(4) now it is mandatory for a Private Company to call a General Meeting and fill the vacancy.

3. **Borrowing of Money under Section-180 Vs. MCA Clarification for borrowing u/s 180**

On March 25, 2014, MCA has issued a clarification on section 180 of Companies Act, 2013. Section 180 of Companies Act, 2013 corresponds to section 293 of erstwhile Companies Act, 1956. This clarification pertains to the requirement of passing resolutions under section 180 of the Companies Act, 2013 for **borrowing and/or creation of security**. Main extract of the MCA clarification is given below for your ready reference:

“the resolution passed under section 293 of the Companies Act, 1956 prior to 12.09.2013 with reference to borrowings (subject to the limits prescribed) and / or creation of security on assets of the company will be regarded as sufficient compliance of the requirements of section 180 of the Companies Act, 2013 for a period of one year from the date of notification of section 180 of the Act.”

Reason/Logic behind this MCA Clarification

Position under Companies Act, 1956

As per section 293 of Companies Act, 1956, an **Ordinary Resolution** was required to be passed for the purpose of borrowing in excess of the total of paid up share capital and free reserves of the Company.

Position under Companies Act, 2013

However as per Section 180 of Companies Act, 2013 a **Special Resolution** will be passed for the purpose of borrowing in excess of the total of paid up share capital and free reserves of the Company.

Section 180 came into force w.e.f. September 12, 2013 and after that banks start asking for a fresh special resolution under section 180 for existing borrowings. To handle this arm twisting technique adopted by the banks, MCA came out with this clarification.

Prepared by:

CS Ankur Garg

<https://www.facebook.com/#!/ankur.gargcs>

Burden created by the MCA Clarification in place of Providing relaxation

As per my understanding of amendment brought in by Section 180, no fresh resolution was required as no section can have retrospective effect. It is a different matter that banks using their superior position.

However after the MCA clarification, it has now become mandatory for borrower Companies to pass fresh Special Resolution for borrowing money or creation of security before the lapse of 1 year from 12.09.2013. It is advisable for companies to pass this resolution in the ensuing Annual General Meetings or else they have to hold an Extra Ordinary General Meetings.

It is a fact that section 180 is applicable on both private and the public companies. However section 293 of Companies Act, 1956 was applicable only on Public companies. Hence this clarification will not create any impact on the private companies since there will be no resolution u/s 293 in private companies.

Clauses other than the clause of borrowing money or creation of security, of section 180, would not be affected by this MCA clarification and will be governed by resolution passed under Companies Act, 1956.

4. Non-Filing Of Form 23B For Financial Year 2013-14

I have observed that many companies have not filed **form 23B** last year for FY 2013-14 when they appoint Auditor in the AGM and now they are concerned what to be filled in form 23AC and 23ACA in place of SRN No. of form 23B.

I have analyzed this issue and my opinion is mentioned below.

"Kindly appreciate that Form 23B has been discontinued by MCA now. So for Annual filing forms like 23AC and 23ACA for the FY 2013-14, it would not be possible to fill SRN of 23B, if you have not filed form 23B last year in respect of FY 2013-14.

As per section 224(1) of Companies Act, 1956, ideally Form 23B should have been filed last year by the Auditor after appointment of Auditor for FY 2013-14 in the AGM.

However, now as per new rule prescribed in section 139(1), Auditor appointed at the AGM is to be intimated by the Company to the ROC within 15 days of appointment through filing of form **ADT.1**.

Form **ADT.1** is to be filed through E-form **GLN.2**. Kindly refer MCA General Circular No. 9/2014 dated April 25, 2014.

So the solution for non-filing of Form 23B for FY 2013-14 would be to file form **ADT.1** through E-form **GLN.2** with late fee in respect of FY 2013-14. In this case you can very much use the SRN of form **GLN.2** filed in respect of FY 2013-14 when you prepare form 23AC and 23ACA for FY 2013-14." I hope that the above suggestion would be of some help.

Prepared by:

CS Ankur Garg

<https://www.facebook.com/#!/ankur.gargcs>

Other Corporate Secretarial work under Companies Act, 2013

For my other Corporate Law Articles on Companies Act, 2013, kindly refer the links mentioned below:

1. [Useful Interpretations about Companies Act, 2013 - Part-1](#)
2. [List of Resolutions to be filed with ROC in Form MGT.14](#)
3. [Procedure for Appointment of Additional Director in CA 2013](#)
4. [Different Monetary Limits under Companies Act 2013](#)
5. [Companies to have Uniform Financial year under CA 2013](#)
6. [Procedure for Increase in Authorise Share Capital under Companies Act, 2013.](#)
7. [Intimation to ROC for Auditor appointment in form ADT.1](#)
8. [Procedure for Resignation of Director under Companies Act, 2013](#)
9. [Useful Corporate Board Resolutions under Companies Act, 2013](#)
10. [Checklist for Action Points under Companies Act 2013](#)

Disclaimer:

This write up is intended to start academic discussion on few significant interpretations under Companies Act, 2013. It is not intended to be a professional advice and should not be relied upon for real time professional facts. Readers are advised to refer relevant provision of law before applying or accepting any of the point mentioned above. Author accepts no responsibility whatsoever and will not be liable for any losses, claims or damages which may arise because of the contents of this write up.

I am very hopeful that this write up would be of some help to understand the concepts in new Companies Act, 2013. Further I would like to thank Shri Vinod Kothari Ji (PCS from Kolkata) and Shri PC Agarwal Ji for their continued Company Law guidance through different platforms.

Thanks

CS Ankur Garg

[Connect through Facebook](#)