

ANALYSIS OF COMPANIES ACT AMENDMENT 2017

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2 AT A GLANCE – COMPANIES (AMENDMENT) BILL 2017 – THE JOURNEY

The Bill was introduced in the Lok Sabha on March 16, 2016.

The bill was referred to the Standing Committee of Finance on April 12, 2016

The Standing Committee adopted its report on November 30, 2016.

The Companies (Amendment) Bill, 2017 was passed by Lok Sabha on July 27, 2017.

The Companies Amendment) Bill, 2017 was passed by Rajya Sabha on December 19, 2017.

The Companies Amendment) Bill, 2017 received President's assent on January 3, 2018.

Total 93 amendments were made. Central Government/MCA will notify effective date for each section separately.

Currently, 3 section notified by CG which are Section 53(issuance of shares at discount), 197 (Managerial Remuneration) and 247 (Registered valuer).

3 DEFINITIONS

Companies Act 2013	Companies Act (Amendment) 2017
Key Managerial Personnel – KMPs are MD, WTD, CEO, CFO, CS and such other officers as may be prescribed.	The BOD of a company will have power to designate the officers, not more than one level below the directors who are in whole-time employment, as KMP of the Company.
Subsidiary Company : One of the criterion for a company to be a subsidiary is “exercise or control of more than one half of ‘total share capital’”	Reference to ‘total share capital’ replaced with ‘total voting power’
Holding company : In relation to one or more other companies, means a company of which such companies are subsidiary companies	The expression “company” for the purpose of definition of holding company to include body corporate.
‘An associate’, significant influence means control of at least 20 per cent of total share capital or of business decisions under an agreement.	An ‘associate’, significant influence means control of at least 20 per cent of the total voting power, or control of or participation in business decisions under an agreement.
Net worth - includes reserves created out of the profits	Net worth includes debit/credit balance of profit and loss account. Hence this is a clarificatory change, one that was important to make.

4 BOARD MATTERS

Companies Act 2013	Companies Act (Amendment) 2017
The details of company's policy on directors' appointment & remuneration and CSR Policy, shall be part of Board's report	Salient features and changes therein of the policies in the Board's report and web-address is indicated at which the complete policy is available on the website of the Company.
Section 92 has mandated the filing of an extract of Annual Return in the Board's Report.	Instead of filing of an extract of the Annual Return, the web-link of the Annual Return shall be disclosed in the Board's report.
Disclosures with regard to loan and investments under section 186 and particulars of contract with related parties.	If these are provided in the financial statements, may be only referred and salient points in the boards' report.
Section 167 provides that if a person incurs any disqualification under section 164(2), the person's office of director becomes immediately vacant in all companies where he or she is a director. <i>Section 164(2) – company has not filed financials or AR for 5 years and failed to repay the deposits, redeem debentures on due date or interest thereon or pay any dividend declared, for one year or more.</i>	Clarifies that the office of the director will become vacant in all companies except the company which is in default under section 164(2). New proviso – a director will not incur disqualification for a period of six months from the date of appointment, if director is appointed in a company, which has already defaulted section 164.
CEO is required to sign on FS, only if he is also acting as a director.	CEO whether appointed as a Director or not, will sign the FS.

5 BOARD MATTERS

Companies Act 2013	Companies Act (Amendment) 2017
If money proposed to be borrowed together with money already borrowed by the company exceeds the aggregate of its paid-up capital and free reserves, Special Resolution should be passed.	2017 amendment include security premium along with paid-up capital and free reserves for the calculation of maximum limits on the borrowing powers of the board.
Section 93 - Return in Form MGT-10 to be filed with ROC in case promoters' and top ten shareholders' stake changes.	Section 93 itself omitted.
Number of directorships, no person shall hold office as a director including any alternate directorship, in more than twenty companies at same time.	For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included.
A director shall also forward a copy of his resignation to ROC along with detailed reasons for the resignation in Form DIR-11.	Filing of Form DIR-11 by director is optional, not mandatory.
No provision - DIN	New proviso - Central Government may prescribe any identification number which shall be treated as DIN.
Every company shall have at least one director who stayed in India for a total period of not less the 182 days in the previous calendar year.	Requirement of 182 days stay in India will be computed based on the financial year instead of the calendar year. For Newly incorporate, it shall apply proportionately.

6 CORPORATE GOVERNANCE

Companies Act 2013	Companies Act (Amendment) 2017
Requirement of deposit of Rs. 1 Lakh by a person who is intending to appoint as director or by some member who propose him as a director.	The requirement of deposit of rupees Rs. 1 lakh shall not be applicable in case of appointment of directors nominated by NRC. Where NRC is not applicable, board can recommend the same.
The NRC shall carry out an evaluation of every director's performance.	NRC shall specify the manner for the effective evaluation of the performance of Board, its committees and individual directors to be carried out either by board, by NRC or by an independent external agency. NRC shall review its implementation and compliance.
Audit Committee is applicable to every listed company and largely applied to public companies meeting the prescribed criteria. A private company that had listed its debt instruments also needed to comply with there requirements.	Reference to “every listed company” replaced to “every listed public company”. Now private company with debt listing should not be required to constitute an Audit Committee.

7 CORPORATE GOVERNANCE

Companies Act 2013	Companies Act (Amendment) 2017
An ID, who has or had no pecuniary relationship during two immediately preceding FY.	Pecuniary relationship does not include remuneration as such director or having transaction not exceeding 10% of his/her total income or such amount as may be prescribed.
An ID, none of whose relatives has or had pecuniary relationship or transaction during current year or two immediately preceding years, amounting to 2% or more of its gross turnover or total income or 50 lakh or such higher amount as may be prescribed	An ID, none of whose relatives has any other pecuniary transaction or relationship during current year or two immediately preceding FY , 2% or more of its gross turnover or total income singly or in combination with – a. Relatives holding any security b. Indebtedness of relative c. Relative has given guarantee or provided any security d. Any other pecuniary transaction or relationship by relative
An individual is not qualified to be appointed as ID in case he/she or his/her relative is/has been a KMP or an employee of the company or its holding, subsidiary or associate in any of the 3 financial years immediately preceding the financial year.	The criteria of disqualification due to employment during the preceding 3 financial years will not apply in case of a relative.

8 CORPORATE SOCIAL RESPONSIBILITY (CSR)

Companies Act 2013

Applicability of CSR : The threshold of the specified net worth/turnover/net profit for applicability of provisions relating to CSR, is determined with reference to 'during any financial year'.

In the absence of such clarification, whether a company should consider Net worth/turnover/Net profit for the immediately preceding FY or current FY.

Every company having specified net worth/turnover/net profit, shall constitute CSR Committee, consisting of 3 or more directors, out of which at least one director shall be an Independent Director.

Based on the prescribed criteria, a company that is not covered under the ID appointment, also need to appoint an ID for the purpose of CSR committee.

Companies Act (Amendment) 2017

Reference to "any financial year" replaced with "immediately preceding financial year".

A non-listed public or private company, which is not required to appoint an ID, can have in its CSR committee 2 or more directors without an ID.

9 RELATED PARTY TRANSACTIONS (RPT)

Companies Act 2013	Companies Act (Amendment) 2017
The word “company” includes holding, subsidiary, associate. Foreign company is not a company under CA 2013.	A Body corporate (Foreign company) which is a holding/subsidiary/ associate/fellow subsidiary of an Indian company will be treated as related party. Here company includes “body corporate”.
CA 2013 states that no member of the Company will vote on ordinary resolution if such member is a related party. MCA circular ref	A company wherein 90% or more members in number are relatives or the promoter or related parties, will be entitled to vote on the resolution.
Where any contract or arrangement is entered into by a director or any employee without obtaining the consent of the board and/or approval in general meeting within 3 months, then such contract will be voidable at the option of the board.	States that apart from being voidable at the option of the board, the contract would also be voidable at the option of the shareholders.
All related party transactions with related parties requires of Audit Committee’s approval, subject to the approval of the board/ shareholders as required u/s 188 of the Act.	2017 amendment clarifies that RPTs between a holding company and its Wholly owned subsidiaries will not required the approval of the Audit Committee. However, if these transactions requires board approval u/s 188, then will also require approval of Audit Committee.

10 RELATED PARTY TRANSACTIONS (RPT)

Companies Act 2013	Companies Act (Amendment) 2017
No provision	New provision u/s 177 • In case of transaction, not covered under section 188 and where the Audit Committee does not approve the transaction, it should make its recommendations to the board. • If a transaction (not exceeding INR 1 crore) is entered into by a director or officer of the company, without approval of Audit Committee and has not been ratified by it within 3 months from the date of the transaction, such transaction is voidable at the option of the Audit Committee.

|| LOAN AND INVESTMENTS

Companies Act 2013

Loan to directors –
u/s 185 of CA 2013, a company cannot provide loan, guarantee or security to any of its directors or to any other person in whom the director is interested. It means a company could not give a loan even to its subsidiary, associate or joint venture companies. This has created significant challenges to many groups.

Section 186(2) specifically prohibits loan/guarantee/security etc. to a person. The word “person” covers employees.

Companies Act (Amendment) 2017

2017 amendment replaces the current requirement of section with a completely new section 185.

Loan/guarantee or security in relation to ‘any person in whom any director of the company is interested’ is permitted only if -

- Prior approval by a special resolution in a general meeting is obtained;
- Loans to be utilised by the borrowing company for its principal business activities.

The above prohibitions will not apply in the following cases:

- Loan given by a company to MD/WTD, either as a part of service or scheme approved by the shareholders.
- Any loan made by or guarantee/security provided by a holding company to WOS company but should be utilised for principal business activities.
- Any guarantee/security provided by Holding Company in respect of loan made by any bank or Financial Institution to its subsidiary company, but should be utilised for principal business activities.

2017 amendment, the word ‘person’ does not include any individual who is in the employment of the company.

12 AUDITORS

Companies Act 2013	Companies Act (Amendment) 2017
Every company is required to appoint an auditor for consecutive period of five years, subject to ratification by shareholders at every AGM	Annual ratification from the shareholders has been omitted.
Auditor of the holding company, shall also have right of access to the records of all its subsidiaries .	Right of access to the records of its subsidiaries and associate companies.
An auditor is required to report whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls.	Clarified that the reporting obligations of the auditor on “internal financial controls is with reference to the financial statements”.
Currently, CARO 2015 requires auditors to comment whether managerial remuneration has been paid or provided in accordance with the requisite approvals mandated by the provisions of section 197 read with schedule V to the 2013 Companies Act	Auditor to state in his report under section 143 whether: • Remuneration paid is as per section 197; • Remuneration paid to any director is in excess of limits under section 197; • Other details as may be prescribed.
Section 136 – Every company having a subsidiary or subsidiaries shall place separate audited accounts on its website.	Only listed companies having subsidiary or subsidiaries will be required to place separate audited accounts on its website.

13 MANAGERIAL REMUNERATION

Companies Act 2013

- Total managerial remuneration payable by a public company to its directors and its manager should not exceed 11 per cent of the net profits of that company for that financial year.
- Payment in excess of the above limits can be made only with the approval of the Central Government (CG) and approval of the company in general meeting by ordinary resolution.

Companies Act (Amendment) 2017

- CG approval for payment of excess of 11% omitted but approval in for excess payments requires by special resolution in GM.
- Prior approval of the bank or public financial institution or non-convertible debenture holders or other secured creditor, as the case may be, should be obtained before obtaining approval in general meeting, if the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor.
- Director receiving excess remuneration shall refund such amount within 2 years.
- Auditor to report in his audit report whether remuneration to directors is in accordance with law. Where such remuneration is in excess, certain prescribed details to be provided.

14 ACCEPTANCE OF DEPOSITS

Companies Act 2013

An amount not less than 15% of the amount of deposits maturing during a financial year and the financial year next following, should be deposited in:

- Deposit repayment reserve account
- on or before the 30th day of April each year.

The company is required to provide deposit insurance in such manner and to such extent as may be prescribed.

Companies Act (Amendment) 2017

The amount of deposit has been revised to an amount not less than 20% of the amount of deposits maturing during the following financial year.

The requirement of providing deposit insurance is omitted.

Interim Dividend

Dividend - The Board may declare interim dividend during any financial year in which such interim dividend is sought to be declared:

- out of the surplus in the P&L and
- out of profits of the FY

The Board may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting:

- out of the surplus in the profit and loss account or;
- out of profits of the financial year for which such interim dividend is sought to be declared or;
- out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.

15 OTHERS

Companies Act 2013	Companies Act (Amendment) 2017
Section 110 – a company shall, in respect of such items of business, declare to be transacted only by means of postal ballot.	Provided that any item of business required to be transacted by means of postal ballot, may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means. (Every listed company or company having not less than 1000 shareholders).
A document or proceeding requiring authentication by a company or contract may be signed by any KMP or an officer of the Company authorised by the Board.	A document or proceeding requiring authentication by a company or contract may be signed by any KMP or an officer or <u>an employee</u> of the Company authorised by the Board.
No Provision – AGM of unlisted company	Provided that Annual General meeting of unlisted company can be held anywhere in India, if consent is given in writing or electronic mode by all the members in advance.
No Provision– calling of EGM	Provided that an EGM of the company, other than Wholly owned Subsidiary of a company incorporated outside India, shall be held in India.

“If you think Compliance is expensive,
Try Non-Compliance”

Thank you
CS Anil Kumar Panchariya
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