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Companies (Amendment) Act 2017: A step forward

March 2018

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Background

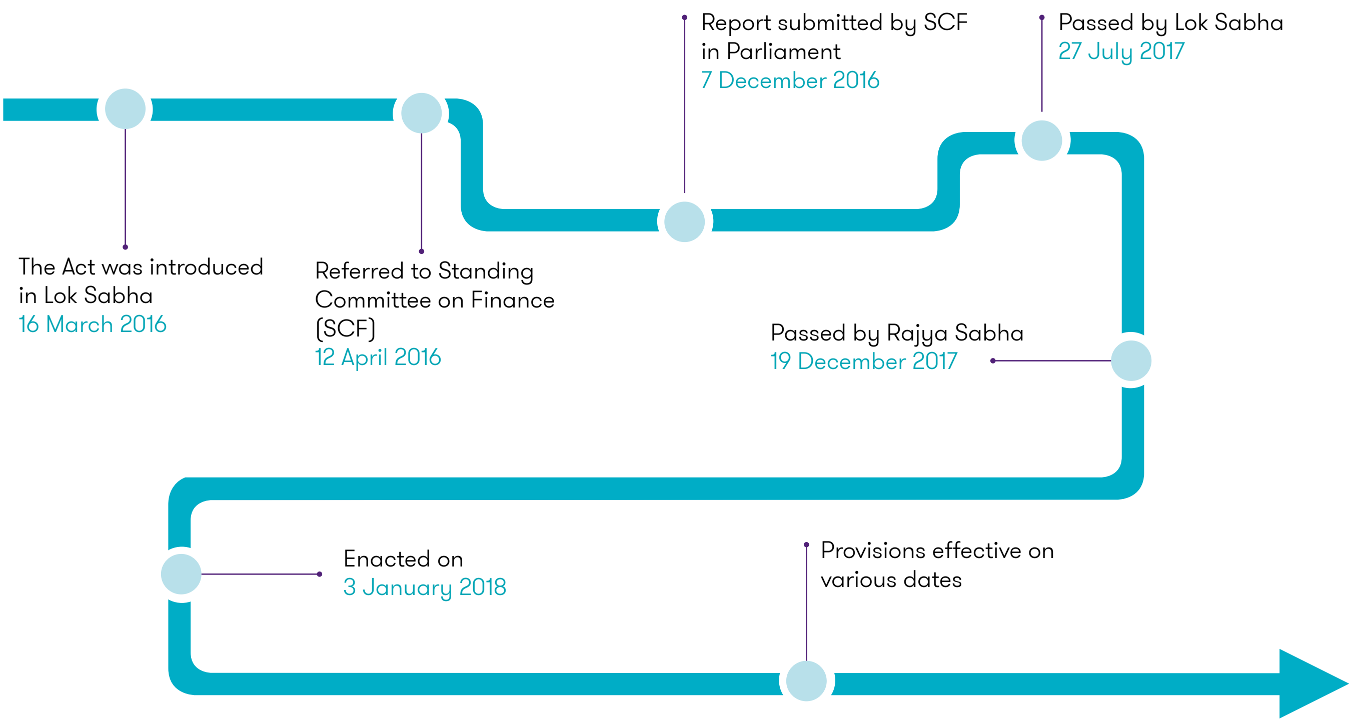
The Companies Act, 2013 ('2013 Act') has undergone quite a few changes since it was first enacted, through rules, orders, circulars and amendments. The Companies (Amendment) Act, 2017 ('the 2017 Amendment Act') is the second amendment to the 2013 Act, with the first one in 2015. The rules under the 2013 Act have a significant role to play in understanding the substantive provisions of the 2013 Act as compared to its predecessor, the Companies Act, 1956 ('1956 Act'). Any reference to the 2013 Act in this publication also includes reference to the related rules.

The Ministry of Corporate Affairs ('MCA') had constituted a Company Law Committee ('CLC') in 2015, with the objective of considering the difficulties and challenges faced by various stakeholders arising from the 2013 Act and to facilitate ease of doing business in India. Basis these suggested changes, the Companies (Amendment) Bill ('the Amendment Bill') was introduced in the Lok Sabha on 16 March 2016, which was referred to the Standing Committee on Finance ('the Standing Committee') of the parliament chaired by Dr. M Veerappa Moily. This standing committee submitted its observations/ recommendations on the significant clauses in the Amendment Bill in December 2016.

Following this, the Amendment Bill was tabled again in Lok Sabha and passed on 27 July 2017. The Rajya Sabha also passed the Amendment Bill on 19 December 2017 and the 2017 Amendment Act has now been notified, after receiving the assent of the Hon'ble President of India on 3 January 2018.

As of the date of this publication, MCA has notified the effective dates of certain sections of the 2017 Amendment Act. These have been summarised in the appendix to this publication. Such sections, when discussed in the publication, also indicate the effective dates. The amendments to sections, besides the ones for which the effective dates have been notified, will come into effect when MCA notifies their effective dates (which may be different for various sections).

Companies (Amendment) Act 2017: Tracking the progress



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As noted by the standing committee, the amendments were guided by certain broad objectives:

- Addressing difficulties in implementation owing to undue stringency of compliance requirements.
- Facilitating ease of doing business for companies, including start-ups, in order to promote growth with employment.
- Harmonisation of provisions with accounting standards and other legislations.
- Rectifying omissions and inconsistencies in the 2013 Act.
- Carrying out amendments in the provisions related to qualification and selection of members of National Company Law Tribunal ('NCLT') and National Company Law Appellate Tribunal ('NCLAT') in accordance with the Supreme Court's directions.

Grant Thornton is pleased to present the publication 'Companies (Amendment) Act 2017: A step forward' which gives an overview of the key amendments proposed by the 2017 Amendment Act. It also includes our views on the implication of these amendments.

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Changes in compliance requirements

Beneficial ownership

Beneficial interest in any share: Section 89 **now includes a definition of beneficial interest**, which is an inclusive definition. It defines the term as "beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to:

i. Exercise or cause to be exercised any or all of the rights attached to such share; or

ii. Receive or participate in any dividend or other distribution in respect of such share."

Implication: While the section required certain disclosures to be made by the person having 'beneficial interest', in the absence of the definition of beneficial interest, it was not possible to implement this section effectively. The amendment now provides clarity to the concept and enables implementation of the requirements under this section as well as section 90. MCA has issued draft Companies (Beneficial Interest and Significant Beneficial Interest) Rules, 2018 on 15 February 2018. These rules were subject to comments, with the last date of comments being 7 March 2018. These rules would come into effect on the date of their publication on the Official Gazette.

Need to maintain a register of significant beneficial owners in a company: Section 90 has now been **substituted with a new section.** The revised section requires all individuals holding beneficial interests of more than 25 per cent in the shares of a company or the right to exercise or the actual exercising of significant influence or control over a company, to make a declaration to the company about such beneficial interests. It further requires companies to maintain a register of such beneficial interests and keep such register open for inspection by any member. Companies will also be required to file a return of significant beneficial owners of the company. Companies and officers of the company not complying with these requirements would be subject to penalties and where false or incorrect information is furnished, the individual will be subject to action under section 447 (punishment for fraud). **- Effective from 9 February 2018**

Implication: The revised provisions are targeted at ensuring the appropriate identification of actual beneficial owners of the company to safeguard misuse of corporate entities for the purpose of evading tax or laundering money for corrupt or illegal purposes. The provisions clearly specify the compliance requirements of the beneficial owners as well as the company, which should help in effective implementation. MCA has issued draft Companies (Beneficial Interest and Significant Beneficial Interest) Rules, 2018 on 15 February 2018. These rules were subject to comments, with the last date of comments being 7 March 2018. These rules would come into effect on the date of their publication on the Official Gazette.

Investigation of ownership of company: In case of any investigation relating to the company and its membership, in order to determine the "true persons" having ownership, **the following has also been added** in section 216 - "who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company."

Implication: Prior to this amendment, section 90 included this provision and it also referred back to section 216 for the purpose of investigation. Consequently, this amendment has simply realigned the sections and consolidated all the provisions relating to investigation under one section.

Related parties and related party transactions

Associate company and joint venture: The term 'significant influence' in relation to the definition of the term associate company under section 2(6) is explained to be control of at least 20 per cent of **total voting power, or control of or participation** in business decisions under an agreement. Earlier, significant influence was assumed to be present on account of control of 20 per cent of the total share capital or of business decisions under an agreement.

Further, **the term joint venture has also been explained** to mean a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

Implication: This amendment ensures that the definition of 'associate' is assessed with reference only to equity share capital as against total share capital (which included convertible preference share capital as well). The above amendment brings the definition of significant influence closer to that in the Indian Accounting Standards ('Ind AS'). It further adds the definition of a joint venture which is also consistent with the definition used in Ind AS 28: Investments in Associates and Joint Ventures.

Holding Company: An explanation has now been included to section 2(46) to clarify that for the purpose of this definition, a company includes body corporates. **- Effective from 9 February 2018**

Implication: This amendment appears quite innocuous, but has significant implications with respect to ascertaining the status of the company in case of a foreign holding company as well as determining the applicability of the Act. Further, this amendment corrects the disconnect between the definition of a subsidiary company and holding company. While a similar explanation was included in the definition of a subsidiary company under section 2(87), it was not included in the definition of a holding company. The amendment bridges this gap.

Interested director: This definition under section 2(49) has now been omitted **- Effective from 9 February 2018**

Implication: This definition, although important, was redundant since it was not used anywhere in the 2013 Act. Section 184 (2) provides nature of interests to be disclosed by directors, but does not use the phrase 'interested director'. Further, the only reference to the term 'interested director' in the 2013 Act was in section 174 (3), and an explanation to that provision clarified that the meaning of the term 'interested director' would be the same as in section 184 (2). Consequently, this definition was redundant and hence omitted.

Key Managerial Personnel ('KMP'): The definition of a KMP as per section 2(51) **will now include an officer, not more than one level below the director who is in whole-time employment and designated as key managerial personnel by the Board - Effective from 9 February 2018**

Implication: It is a fact that the stakeholders and the Board of Directors look towards certain KMP for formulation and execution of policies as observed by the J.J. Irani report on Company Law. However, currently, very few persons, limited to top management, were entitled to be designated as KMPs. This amendment is expected to bring more ease in doing business by giving flexibility to the Board of Directors to designate other personnel in whole time employment as KMPs.

Related Party: Clause viii of section 2(76) **replaces the word company with body corporate** thereby extending the definition of related parties to body corporates as well. It further **adds, an investing company or venturer of a company in the definition of a related party** which is defined as follows:

'An investing company or the venturer of the company' will mean a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.' **- Effective from 9 February 2018**

Implication: The above amendment ensures that entities incorporated outside of India such as the holding/subsidiary/associate/fellow subsidiary of an Indian company are also included in the purview of related party of an Indian company. Further, while investee companies were being considered as related parties (Eg: a subsidiary or associate), the investing parties were not covered till now as a related party, which has now been addressed in this amendment. The amendment also brings the definition closer to that in the accounting standards.

Companies will now need to identify additional parties that are covered by the definition of related party and ensure compliance with the relevant requirements.

Related party transactions: With regard to voting at the general meeting to approve a related party transaction, the second proviso to section 188(1) restricted any member who is a related party from voting.

The 2017 Amendment Act **now includes another proviso** that the above restriction will not apply to a company in which 90 per cent or more members, in number, are relatives of promoters or are related parties.

Additionally, with respect to transactions which are voidable on account of not obtaining board or shareholder approval, currently section 188(3) specified that such transactions are voidable at the option of board. The 2017 Amendment Act **now extends that to the shareholders as well** since there could be transactions which are entered into without obtaining the shareholders' approval as required under the provisions.

Implications: Under the 2013 Act, it was noted that the compliance of requirement under the second proviso of section 188 posed some practical difficulties, particularly in cases where all parties in case of joint ventures and closely held public companies were related parties. Therefore, to address this issue, in situations where 90 per cent or more members are relatives of the promoter or are related parties, all shareholders will now be entitled to vote on the ordinary resolution.

Loan to directors

Rather than the absolute prohibition imposed earlier under section 185, companies are now allowed to advance loans, give guarantees or provide security for loans taken by "any person in whom the director is interested", subject to the prior approval of the company **by a special resolution** and **that the loan is utilised by the borrowing company for its principal business activity only.**

The prohibition continues to exist in case of loans, guarantees or security given for loans in case of:

- any director of the company or
- of a company which is its holding company or
- any partner or relative of such director or
- any firm in which any such director or relative is a partner.

Interest rate applicable to a company which provides loans or gives guarantees or securities in the ordinary course of it's business prescribed in the proviso is now required to be **aligned with the tenor based rate of a government security as provided under Section 186(7).**

In terms of punishment for contravention, apart from the existing provisions which impose penalty/ imprisonment for the company and the director or the other person, the amendment now imposes penalty on every officer of the company who is in default with imprisonment for a term which may extend to six months or fine which is not less than INR 5 lakh, but which may extend to INR 25 lakh.

Implication: The MCA has considered that limited relaxation has already been provided to private companies not having other body corporates invested in them and therefore any further relaxation should be subject to greater safeguards.

Consequently, the amendment now allows companies to advance a loan to any other person in whom director is interested subject to prior approval of the company by a **special resolution**. Further, loans extended to persons, falling within the purview of Section 185 should be used by the borrowing entity **for its principal business activity only**, and not for further investment or grant of loan. This amendment is a much needed relief since it removes the absolute prohibition, but at the same time includes safeguards which are effective and not onerous.

The imposition of penalties/imprisonment for the officers of the company is also a reasonable amendment considering the fact that officers of the company are required to ensure compliance with the requirements of the law while entering or proposing to enter into transactions.

Accounts

Financial year: Section 2(41) now extends the option of having a financial year different from year ending 31 March for the purpose of consolidation of accounts outside India to the **associate company of a company incorporated outside India. - Effective from 9 February 2018**

Implication: This amendment enables an associate company of a company incorporated outside India to follow a different financial year by making an application to the tribunal. This amendment is a great relief to such associate companies considering they otherwise had to maintain two separate books of accounts with two different financial years (i.e. one for the purpose of reporting to the company incorporated outside India and one for the local purposes).

Reopening of accounts on court's or Tribunal's order: A **new sub-section has now been inserted** in section 130, which allows regulators to reopen the accounts only relating to a period of 8 years immediately preceding the current financial year, unless the Central government has ordered the books of account to be kept open for a longer period.

The other amendments address internal inconsistencies within the section.

Implication: This is an important amendment since there was no time limit prescribed under this section. It is also essential to note that while section 128(5) required companies to retain their books of account for 8 years, this section earlier indicated that there was no time limit for reopening of accounts. Consequently, MCA has included a time limit to ensure consistency between the requirements and also to ensure that companies are not unduly burdened.

Financial Statement, Board's report etc: The following amendments have been made to Section 134:

- Financial statements (including consolidated financial statements) **can now be signed by the Chief Executive Officer** ('CEO'), even if he is not a director.
- The **need to include an extract of the annual return** in the board's report **has been removed** consistent with the changes in section 92.
- **Changes that reflect that the need for self-evaluation** by the Board has been removed: This is consistent with the changes in section 178.

- **Removes the need to repeat any information** disclosed in the financial statements in the board's report.
- Policies relating to director's appointment and the corporate social responsibility **can now be posted on the website** with only the salient features being included in the Board's report.

Implication: The amendments in this section are targeted at removing redundancies and making practical changes. It is appropriate that the Board's report does not carry the entire policies and only carries the salient points with respect to:

- Policy on directors' appointment and remuneration including eligibility criteria
- Corporate social responsibility

Also, the elimination of the need to repeat information in the Board's report where it is already disclosed in the financial statements is a much-needed relief.

Notice of meeting: The 2017 Amendment Act now **provides separate criteria for Annual General Meetings (AGMs) and other general meetings** under section 101, for obtaining consent in relation to issuing a short notice for general meetings. Based on the amendments, to call a general meeting on shorter notice:

- In case of an AGM, consent of 95 per cent of the members entitled to vote needs to be obtained.
- In case of any other general meeting, where the company has share capital, consent of such majority number of members entitled to vote and who represent 95 per cent of the paid-up share capital with voting rights needs to be obtained and in case of a company not having share capital, consent of members having 95 per cent of the total voting power exercisable in that meeting needs to be obtained.

Implication: The above amendment essentially restores similar provisions as prescribed under 1956 Act and eliminates the inconsistency between section 101 and section 136. Further, as compared to the earlier provision under the 1956 Act, this amendment now considers both number of members as well as the proportion of paid up share capital held by the members.

Right of member to copies of audited financial statement: Section 136 has been amended in line with the amendments in section 101 relating to shorter notice for general meeting.

It also makes **certain practical amendments** with respect to the requirement to place/provide separate audited financial statements of the subsidiary. These provisions are **now applicable only to listed companies.** With respect to foreign subsidiaries, the provisions are:

- If such foreign subsidiary is required to get its consolidated financial statements audited as per the local laws of its country, then such audited consolidated financial statements should be placed on the website of the company.
- If such foreign subsidiary is not required to and hence does not get its financial statements audited as per any law in the country of its incorporation, then the unaudited financial statements of such entity (in English) should be placed on the website.

Further **a new proviso has also been inserted** which requires all companies with subsidiaries to provide the audited or unaudited financial statements of its subsidiary (ies) to any member of the company who asks for it.

Similar **amendment has also been made in section 137** which requires companies to file financial statements of subsidiary. Companies can now file the unaudited financial statements of foreign subsidiaries if such foreign subsidiary is not mandated to get its audit done as per the laws of the country where it is incorporated.

Implication: Firstly, it is helpful that the requirements of section 101 and 136 are now aligned. Refer comments on page 9 relating to section 101.

With regard to listed companies, this amendment is a big relief since they no longer have to ensure that the financial statements of their foreign subsidiary are audited, if there is no requirement under any law in that jurisdiction that mandates an audit. It appears that MCA has considered the hurdles as well as cost and efforts involved in getting the audit of foreign subsidiaries done in making this amendment.

For unlisted companies, while they are not required to place the audited/unaudited financial statements of the subsidiaries on their website, they still have to make it available to their members.

Corporate Social Responsibility ('CSR')

Following are the amendments made to section 135:

- Companies which are otherwise not required to appoint Independent Directors ('IDs') **need not appoint IDs, for the purpose of constituting CSR committees. CSR committees to have two or more directors in such cases.**
- The **ambiguity** with respect to the words "any financial year" has been **removed** by replacing it with the words 'preceding financial year'.
- **Section 135 (3) (a) has been modified** to refer to subjects in Schedule VII within which CSR activities could be taken up by an eligible company.
- The term "average net profit" in section 135(5) has **been replaced** with the words "net profit", to remove any ambiguity.
- Section 384 has also **been amended** in order to make the provisions of section 135 applicable to foreign companies.

Implication: The amendments in this section are largely to remove ambiguities that exist currently. Also, some of these issues were resolved by the relevant rules. For example, the applicability of CSR provisions to foreign companies and elimination of the need to appoint ID where it was otherwise not required under section 149. Such issues have now been addressed in the section itself, thus removing the disconnect between the section and the relevant rules.

Appointment and remuneration of directors

As per the 2013 Act, a special resolution was required for appointment of a person, as a Managing Director ('MD'), Whole-Time Director ('WTD') or manager, who has attained the age of seventy years.

An exception has now been added to section 197 in the 2017 Amendment Act, where, if no such special resolution is passed but votes cast in favor of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, then such person over the age of 70 can be appointed.

Implication: The 2017 Amendment Act has relaxed the need for special resolution in case of appointment for persons above 70 years of age as an MD, WTD or manager. However, it does increase the administrative process by requiring a Central Government approval in such cases.

Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits – Section 197 has been amended as below:

- Public companies can now pay remuneration to their directors, including MD and WTD and manager in respect of any financial year exceeding eleven per cent of the net profit of the company **only with an approval in the general meeting. The approval of Central Government is no longer required.**
- In the absence of profits or inadequate profits, companies need to make payments to the directors in accordance with provisions of Schedule V and **need not obtain the Central Government approval.**
- Payments made to a MD, WTD or manager in excess of individual limits will now require an approval by **special resolution** in the general meeting.
- Central government approval is now not required for waiving the recovery of excess remuneration paid to directors. **Companies only need to obtain an approval by special resolution within 2 years from the date the excess remuneration becomes refundable.**

- Where a company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, **the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, will be required both in case of payment of remuneration in excess of individual limits to MD or WTD or manager and where the company plans to waive the recovery of excess remuneration paid**
- **Additional reporting responsibilities have also been brought about for the auditors.** The auditor of the company is now required to make a statement as to
  - whether the remuneration paid by the company to its directors is in accordance with the provisions of this section
  - whether remuneration paid to any director is in excess of the limits laid down under this section and
  - give such other details which are yet to be prescribed
- Also from the commencement of the 2017 Amendment Act, any application made to the Central Government under the provisions of this section as it stood before such commencement, which is pending with that Government will abate, and the company should, within one year of such commencement, obtain the approval in accordance with the provisions of this amended section

Implication: With the requirement for approval of Central Government being done away with, the amendments to this section will reduce the time required to obtain approvals while appointing individuals at these positions. The amendment has, however, ensured that adequate safeguards such as requirement of a special resolution, are included instead of Central Government approvals.

Requirement for creditors of the company (banks, public financial institutions, non-convertible debenture holders or any other secured creditor) to approve excess payments to managerial persons or waiver of recovery of excess remuneration paid, will only help in securing their interests. In line with the overall approach under the Act, the concept of self-regulation by companies has been further demonstrated in the above amendments.

With respect to the additional reporting by auditor, it should be noted that where the Companies (Auditor's Report) Order ('CARO') applies, the auditor is already required to comment on "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 Companies Act? If not, state the amount involved and steps taken by the company for securing refund of the same".

It appears that the auditor is now required to comment on compliance with managerial remuneration in all cases in the main auditors report and where applicable, under the CARO as well.

Limit with regard to remuneration

Section 200 has been amended to allow **only a company** to fix the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company as it may deem fit, while according its approval under section 196, to any appointment or to any remuneration under section 197 in respect of cases where the company has inadequate or no profits.

Implication: These amendments are in line with the changes in section 197 and the power of Central Government to fix limits with regard to remuneration has now been withdrawn.

Issuing shares at discount

Prohibition on issue of shares at discount: Companies can now issue shares at a discount to its creditors in case its debt is converted into shares in accordance with the guidelines issued by the Reserve Bank of India ('RBI') under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

Earlier, issue of shares at a discount was specifically prohibited.

It is also relevant to note that the term discounted price used in section 53(2) has been replaced with the term discount.
– **Effective from 09 February 2018**

Implication: This amendment enables the restructuring of distressed companies by allowing them to issue shares at a discount when the debt of such a company is converted into shares in accordance with any debt restructuring guidelines specified by RBI (Strategic Debt Restructuring Scheme issued by RBI vide Circular dated 8.06.2015).

Further the term discounted price is replaced with discount to remove ambiguity, as the term discounted price could be interpreted as a price lower than the market value of shares, and not lower than its nominal value, as intended in section 53(1). These are practical amendments which are aimed at providing practical alternatives to distressed companies.

Appointment of auditors

The requirement for ratification of appointment of the auditor, under section 139, at each annual general meeting has **now been removed**.

Implication: When this section was notified, there was no clarity regarding what could be the possible implication if the shareholders did not ratify the appointment each year. Explanation to Rule 3 of the Companies (Audit and Auditors) Rules, 2014 clarified that in such case the Board would appoint an auditor as per the procedure laid down in the Act. This seemed to tantamount to removal of the previous auditor before the end of this term of 5 years.

However, section 140 with respect to removal of auditor requires a special resolution as well as an approval by the Central Government.

To remove the ambiguity and inconsistency between the two requirements, MCA has now omitted the provision relating to ratification. Consequently, an auditor will necessarily be appointed for 5 years and any removal of the auditor before the end of his term will have to be in compliance with the requirements of section 140.

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Ease of doing business

Starting a company

Memorandum: Section 4(4) of the 2013 Act allows a person to make an application along with the prescribed fees to the Registrar of Companies ('RoC') to reserve a name for the proposed company.

The 2017 Amendment Act **substitutes the existing section 4(5)** which now provides that the Registrar may reserve the name of the proposed company for a period of **20 days from the date of approval** or any other prescribed period. For an existing company, the Registrar may continue to reserve the name of the company for a period of 60 days.

Earlier, the reservation of name for a proposed company would be for a period of 60 days from the date of application. **- Effective from 26 January 2018**

Implication: The reduction of the period of reservation to 60 days from the date of application to 20 days from the date of approval, in case of a proposed company, is intended to bring about efficiency in the system and reduce misuse of the provisions by companies.

Incorporation of a company: Section 7(1)(c) now requires all the subscribers to the memorandum and the persons named as the first directors to give a **declaration instead of an affidavit** confirming that he is not convicted of certain offences or is not guilty under any company law and that the all documents and information submitted to the Registrar are complete and true. **- Effective from 9 February 2018**

Implication: A self-declaration makes the process much easier for subscribers to the memorandum and the first directors, rather than having to obtain an affidavit. MCA has provided this ease considering the fact that a wrong declaration would result in stiff punishment under the 2013 Act.

Raising funds

The 2017 Amendment Act **includes a proviso to the definition of debentures** in section 2(30) to exclude the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934 and other instruments, prescribed by the Central Government in consultation with the RBI, issued by a company, from the definition of debentures. **- Effective from 9 February 2018**

Implication: Exclusion of instruments regulated by RBI from the definition of debentures is consistent with the amendment made to rule 18 of the Companies (Share Capital and Debenture) Rules, 2014 in March 2015, whereby commercial papers were excluded from the governance by rules pertaining to issue of debentures. It was noted that treatment of instruments, governed by the RBI, as debentures would give rise to practical difficulties. As a result of this amendment, companies raising short term funds through such instruments will get the much-needed relief.

Simplifying administrative processes

Authentication of documents, proceeding and contracts: Section 21 **now also permits an officer or employee of the company, duly authorised by the Board**, to authenticate documents or contracts or proceedings requiring authentication, on behalf of the Board.

Earlier, only key managerial personnel or officers were authorised to authenticate on behalf of the Board.

Implication: Considering the term 'officer' includes only top level management, this amendment is likely to bring an ease in doing business since an employee can now be authorised by the Board to authenticate documents on behalf of the Board. It is expected that the Board will exercise due care while authorising employees to act on its behalf.

Subscription of securities on private placement: The 2017 Amendment Act has **completely substituted subsections 1-10 of section 42.** While most provisions are similar to the earlier version, the significant changes include:

- Private placement offer and application should not carry any right of renunciation (there was no similar provision in the 2013 Act).
- Requirement to file return of allotment with the Registrar within 15 days from the date of allotment instead of 30 days.
- Specific restriction on utilisation of monies raised through private placement unless the allotment is made and the return of allotment is filed with the Registrar. **- Effective from 9 February 2018**

Implication: The intent of MCA in completely revamping this section is to simplify the requirements of the provisions, particularly with respect to extensive disclosures and cumbersome procedures. MCA has issued draft Companies (Prospectus and Allotment of Securities) Amendment Rules, 2018 on 15 February 2018. These rules were subject to comments, with the last date of comments being 7 March 2018. These rules would come into effect on the date of their publication on the Official Gazette.

Annual General Meeting: The amendment to section 96 allows **unlisted companies to hold AGM in any place in India,** if a consent is received from all members in advance **- Effective from 9 February 2018**

Implication: This amendment is intended to bring about ease in doing business

Filing of resolutions and agreements: : The 2017 Amendment Act has amended section 117 as below:

- **It removes the provision related to filing of documents within extended time lines** of 270 days.
- Additionally, it has **reduced the penal provisions** with respect to the quantum of fines.
- Further, it has **omitted the requirement to file resolutions** which accord consent for sale of an undertaking and borrowings above specified limits.
- It also clarifies that the provisions of **this section do not apply to a banking company** in respect of resolutions passed to grant loans, or give guarantees or provide security relating to certain transactions in the ordinary course of its business.
- The **penalty amounts have been reduced**.

Implication: This amendment is one of the examples of removing inconsistencies within the 2013 Act apart from ensuring ease of doing business. The requirement to file documents relating to sale of undertaking and borrowings above specified limits was covered by section 117(3)(a) itself and it was redundant to include it again under section 117(3)(e). Consequently, the same has been omitted.

Right to stand for directorship: Section 160 provided that a director, other than a retiring director, is eligible for reappointment on submission of his application or recommendation by some member, along with the prescribed **amount of deposit**.

The 2017 Amendment Act has **now included a proviso** stating that the requirement to deposit the prescribed amount will not be applicable for directors who are recommended either by the Nomination and Remuneration Committee ('NRC') or by the Board of Directors.

Implication: The need to deposit the prescribed sum of money posed certain issues such as in case of persons outside India recommended by the Board or independent directors who were eligible for reappointment. Consequently, considering that these appointments will be recommended by the NRC or the Board, the need to deposit the amount has been removed in such cases.

Reducing compliance requirements

Small Company: The 2017 Amendment Act has **increased the following thresholds** defined under section 2(85) for a company to be considered as a small company:

- Threshold for paid up share capital has been increased from INR 5 crore to INR 10 crore
- Threshold for turnover for the immediately preceding financial year has been increased from INR 20 to INR **100 crore.** **- Effective from 9 February 2018**

Implication: Small companies get some benefits in terms of lower compliance requirements (eg: the cash flow statement need not be presented in financial statements, only one meeting of the Board through the year, etc). Although the benefits are not too many, this amendment would result in more companies meeting the definition of a small company and being able to avail such benefits.

Annual Return: There are quite a **few changes in section 92 with respect to the annual return**, which is required to be filed by the company with the Registrar. The changes include:

- Requirement to disclose indebtedness of the company no longer exists.
- Details regarding Foreign Institutional Investors (FIIs) need not include names, addresses, countries of incorporation, etc.
- Abridged version of annual return to be prescribed for one person company, small company and other classes of companies as may be prescribed.
- The requirement to include extract of annual return in the Board's report has now been replaced with the need to place a copy of the annual return on the website of the company, if any and only the web-link needs to be disclosed in the Board's report.
- The additional benefit of filing annual return within an extended period of 270 days on payment of additional fees has now been removed. **- Effective from 9 February 2018**

Implication: Filing of annual return has been a significant topic of discussion in the recent past on account of the fact that non-filing of annual return by the company for consecutive years led to disqualification of directors. Consequently, while not being very significant changes on their own, these changes are of relevance considering the implications they tend to have on director disqualification.

With respect to the amendments, it was a redundant exercise to include extracts of the annual return in the board's report since the necessary information is available in various sections of the annual report. Consequently, removal of such requirement is a practical move by MCA. Also the other significant change is with respect to the timelines within which the annual return is required to be filed with the Registrar. Under the existing provisions, the company had to file the annual return within 60 days of the AGM date. However, there was also a provision which allowed companies to file the same within an extended period of 270 days subject to payment of additional fee. Such provision of filing within extended timelines has now been removed.

Sweat equity shares: Section 54(1)(c) has been omitted. This provision prohibited companies from issuing sweat equity shares unless on the date of issue, a year had passed since the date of commencement of the company.

Implication: This amendment would enable companies to issue sweat equity shares, of a class of shares already issued, **at any time after the company commences business** without having to wait for one year. Again, a practical option given to help start-ups which may choose to issue shares to their employees instead of cash benefits.

Acceptance of deposits by companies: Section 73 has been amended as below:

- The requirement to deposit in a separate bank account 15 per cent of the amounts maturing during the next financial year has **now been increased to 20 per cent.** Also, now such amount will need to be deposited on or before 30 April each year. No such timeline existed currently.
- The requirement to **provide deposit insurance has been omitted**. This requirement was already deferred till March 31, 2017 or till such time that a deposit insurance product was available, whichever was earlier.
- Rather than barring companies which had committed a default in repayment of either deposits or interest thereon from accepting deposits, the amendment **now makes the option to accept deposits available for companies that have made good the default and a period of 5 years has lapsed since the date of making good such default**. **- Effective from 9 February 2018**

Implication: Barring the first amendment, which increases the cash flow burden on the company, the other amendments are practical and much-needed. The need to provide deposit insurance was not a practical solution in trying to protect the interest of the investors. This issue was further amplified since there are no products being offered by insurance companies as they are unable to assess the risks and the likely exposure as noted by the CLC in their February 2016 report. Consequently, it is quite a relief that this requirement has now been omitted by the 2017 Amendment Act.

Another aspect that was creating practical issues for companies was the prohibition from accepting deposits for companies that had defaulted on repayment of either deposits or interest thereon in the past. Again, it is quite a relief that prohibition lasts only if it is a continuing default. If the company has made good the default, it is again eligible to accept deposits after a period of 5 years from the date when the company made good the default.

Repayment of existing deposits: The requirement to repay the existing deposits (accepted as per the provisions of 1956 Act) under section 74(1)(b) within 1 year from the commencement of the section or the date when the payments were due (whichever is earlier) has **now been extended to 3 years from the commencement.** Further, the proviso to the amended sub-section brings in the fact that any renewal of deposits will need to be in compliance with the requirements of 2013 Act. **- Effective from 9 February 2018.**

Implication: While this amendment aligns with the related rules, there is no practical implication since the period of 3 years from the commencement of this section has already expired.

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Clarifying requirements

Dividend

Declaration and payment of dividend: Section 123 has been amended to **include a proviso** which deals with the fact that certain items such as unrealised gains, notional gains or revaluation of assets and any fair value changes, should be excluded while computing profits.

Further the provisions relating **to declaration of interim dividend** have been amended.

Implication: The amendments clarify the implementation issues related to declaring dividends. Companies were facing issues with respect to interpretation of the provisions related to interim dividend. The ambiguity related to whether interim dividend for a particular financial year could only be declared during that particular financial year period, thus, restricting the ability of companies to declare interim dividend after the close of the financial year, but before the AGM. Consequently, sub-section 3 has now been substituted which clarifies that interim dividend can be paid both during the financial year as well as at any time between closure of financial year and holding of AGM. Further, it has also been clarified that interim dividend can be paid out of either surplus in the profit or loss account or out of profits of that financial year.

Directors

Independent Directors: In relation to independent directors, section 149 has been amen ded as below:

- The 2017 Amendment Act has **revised the eligibility criteria** for ID. Earlier the section prohibited any kind of pecuniary relationship between the proposed ID and the company, its holding, subsidiary, or associate company or their promoters or directors during the preceding two years and the current financial year. The amendment now excludes remuneration received by the ID as well as any other transaction which does not exceed 10 per cent of his total income or such other amount as prescribed.
- With respect to relatives of IDs, the section prohibited all 'pecuniary relationships or transactions'. The 2017 Amendment Act now **prescribes limits for specific pecuniary relationships between relatives of the directors and the company**, its holding, subsidiary, or associate company or their promoters or directors rather than a general threshold. The revised sub-section relates to security or interest in the company, indebtedness, guarantee or security in connection with debt and any other pecuniary transaction or relationship.
- It also provides that where a relative is an employee, the restriction relating to employment will not apply for the employment during preceding three financial years.

In relation to resident directors, the 2017 Amendment Act now requires at least 1 director to have stayed in India for a period of 182 days during a **financial year** instead of calendar year. For a newly incorporated entity, this limit would apply proportionately for the period of incorporation.

Implication: The amendment specifies thresholds for the pecuniary relationships between a relative of a director and the company which is likely to provide a more rational eligibility criteria, rather than the blanket, general restriction imposed earlier. While there is an attempt to align the requirement to the definition of ID as per regulation 16 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('SEBI LODR'), it is not entirely the same, though the amendment provides much-needed clarity on the definition of ID.

The amendment related to resident director addresses practical issues faced by corporates, particularly in setting up new entities by applying the requirement proportionately.

Appointment of additional director, alternate director and nominee director: The amendment to section 161 **prohibits an existing director** in a company to be appointed as an alternate director in the same company. Earlier only persons holding alternate directorship for any other director in the company were prohibited from being appointed as alternate directors.

Further, the amendment also **extends the ability to fill casual vacancy of a director** by the Board in case of private companies also (which was till now restricted only to public companies). However, all such appointments should be approved by the members in the immediate next general meeting.

Implication: Currently, there is no restriction on an existing director from being appointed as an alternate director. The same individual acting as a director as well as an alternate director for another director could lead to conflict of interest as well as ambiguity in the computation of quorum. To address this situation, the CLC had suggested inclusion of such a restriction.

Further, the amendment in relation to allowing casual vacancies in the private companies to be filled by the Board will go on to empower the Boards of private companies as well.

Disqualifications for appointment of director: The 2017 Amendment Act **has inserted a proviso**, which provides that if a person is appointed as a director of a company which has defaulted under section 164(2)(a) relating to filing of financial statements and annual return and 164(2)(b) relating to deposits, he shall not be disqualified for a period of 6 months from the date of appointment.

Further, one of the provisos has been substituted which provides that if a director of a private company has been disqualified under section 164(1)(d), 164(1)(e) or 164(1)(f), **the disqualification will continue to apply despite the fact that an appeal or petition has been filed against the order of conviction or disqualification**. Earlier, the disqualification did not take effect if there was an appeal or petition filed within 30 days and until expiry of seven days from the date on which such appeal or petition is disposed of.

Implication: This is a significant amendment and is expected to have a considerable impact in the current scenario, where MCA has disqualified a sizeable number of directors owing to defaults related to submission of financial statements and/or annual return. The amendment allowing a grace period of 6 months for a newly appointed director ensures that the person getting appointed does not attract a disqualification for the defaults done before she/he was appointed and also provides a time period to set the default right.

The amended proviso rationalises of the provisions applicable to appointment of a director and a sitting director. A sitting director had to vacate his office on conviction even if an appeal had been preferred against such conviction and sentence as per section 167, whereas the earlier provisions under section 164 allowed an extended period till the appeal or petition is disposed of.

Number of directorships: The 2017 Amendment Act provides that for the purpose of ascertaining the limit of directorships under section 165, **the directorship in a dormant company would not be considered.**

Implication: This is a welcome amendment considering such companies would be inactive or may have insignificant transactions, therefore not having any impact on the Director's time. This amendment would incentivise directors to take up directorships of such dormant companies.

Vacation of office of director: The 2017 Amendment Act **inserts a new proviso** under section 167(1)(a) stating that in case a director incurs a disqualification under section 164(2), his office will become vacant in all companies where he holds directorship, except in the company which is in default under section 164(2).

It further provides that for any disqualification incurred by the director under section 167(1) (e) or 167(1)(f), the office will not be vacated:

1. for 30 days from the date of conviction or order of disqualification;
2. in case an appeal or petition is filed within 30 days or a further appeal or petition if filed, then till the expiry of 7 days from the date the appeal or petition/ further appeal or petition is disposed of.

Implication: The first amendment ensures that directors are not required to vacate the office in the company for the disqualifications related to the company. It is essential to note, that in the current scenario, all the directors will have to vacate office for disqualification under section 167(1) and no new director can be appointed as a director, as the new director would also attract disqualification under 164(2). Consequently, the rationale for this amendment is that the vacancy of an office should be triggered only where a disqualification is incurred in a personal capacity and therefore, the scope of Section 167(1)(a) should be limited to only disqualifications under Section 164(1).

Refer comments on page 20 relating to section 164.

Resignation of director: The 2017 Amendment Act **now gives an option instead of mandating** the director to forward a copy of his resignation to the Registrar under section 168.

Implication: This amendment removes the administrative hassle for a director who has already resigned from the company to send the resignation along with detailed reasons of his resignation to the Registrar. Companies still need to mandatorily file information regarding such resignations.

Board, committees and their powers

Board meetings: The 2017 Amendment Act **provides flexibility to directors** under section 173 to attend board meetings through video conferencing or any other audio-visual mode, provided the quorum for physical presence is met.

Implication: This amendment brings about ease in doing business while retaining the requirement to maintain quorum through physical presence. The complete bar on attending meetings through video conferencing or any other audio-visual mode was quite unnecessary and did not serve any purpose since there was already a minimum required physical presence to meet the quorum.

Amendments in relation to audit committee: Section 177 has been amended as below:

- With respect to listed companies, audit committees are now required to be constituted only by listed **public** companies instead of every listed company.
- It further provides that in case of related party transactions (other than those covered under section 188), if the audit committee does not approve certain transactions, the audit committee will make its recommendations to the Board. The Board will have to consider these recommendations and approve these related party transactions **even if they were otherwise not covered under the approval requirement of section 188.**
- The 2017 Amendment Act also provides that where directors or officers of the company enter into related party transactions involving less than INR 1 crore without obtaining the approval of the Audit Committee, such transactions will have to be ratified by the Audit Committee within a period of three months from the date of transaction. In the absence of ratification, such transactions will be voidable at the option of the Audit Committee. Further, if the transaction is with the related party to any director or is authorised by any other director, the director concerned will need to indemnify the company against any loss incurred by it.
- The above requirement related to transactions other than the ones covered by section 188, do not apply to transactions between a holding company and its wholly owned subsidiary company.

Implication: The flexibility provided to the Audit committee to ratify transactions that were initially not approved by them is similar to the flexibility provided to the Board of Directors under section 188.

Further, by not requiring audit committee approval for transactions between holding company and its wholly owned subsidiary company not falling under section 188, the 2017 Amendment Act aligns the requirement to those under the SEBI LODR.

Nomination and Remuneration Committee and Stakeholders Relationship Committee: With respect to listed companies, under section 178, NRCs are now required to be constituted only by listed **public** companies instead of every listed company.

Now, the NRC is **only required to specify the manner of evaluation of performance** of board, its committees and IDs either by the board or the NRC or **by an external agency**. The NRC will review the implementation and compliance of the above. Earlier section 178(2) required the nomination and remuneration committee to evaluate every director's performance.

The 2017 Amendment Act now requires the remuneration policy to be placed on the website of the company. The salient features of the policy, along with the changes made to the same and the link to the policy on the website should be specified in the Board's report. Earlier the remuneration policy itself was required to be included in the Board's report.

Implication: The amendment requiring the NRC to only recommend a method to evaluate the performance ensures avoidance of duplication of efforts. This is considering IDs are already required to carry out review of performance of non-independent directors and the Board as a whole separately as per Schedule IV requirements and the Board is also required to carry out its evaluation under section 134(3)(p). Incorporating only a summary of the remuneration policy with a link to the same on the website in the Board's report, is a practical amendment.

Restriction on powers of Board: In order to fix the maximum borrowing limits that the Board can approve under section 180(1)(c), the 2017 Amendment **Act now requires security premium to also be included** in the computation along with paid up share capital and free reserves. It is relevant to note that the Board will continue to require a consent by the company through a special resolution before it can exercise it powers to approve the borrowings.

Implication: Securities premium is now required to be considered for fixing the maximum borrowing limits along with paid up share capital and free reserves, which is appropriate, since securities premium also forms part of the capital of the company.

Disclosure of interest by director: A specific addition has been done in the exceptions to application of section 184(5) by including **body corporates.**

The **minimum fine of INR 50,000** for the purpose of contravention with the requirements related to disclosure of concern/interest has now been **omitted**.

Implication: The interest of a director is also assessed with reference to a body corporate, however the exemptions were limited only to companies. Consequently, in order to align the exemptions with section 184(2), body corporates have now been included in section 184(5).

It is essential for a director to disclose every concern or interest as required under sub-section (1), or any change thereto, so that the company is aware of such concerns or interests of the director. However, imposing the minimum fine of INR 50,000 for every infraction was considered to be on the higher side, and thus the provision for minimum fine has been removed.

Calculation of profits: As per the 2017 Amendment Act, **profit on sale of investment will not need to be excluded** for the purpose of calculation of profits in case of investment companies, under section 198.

Further it **allows deduction of brought forward losses relating to any year** insofar as such losses have not been deducted in any subsequent year.

Also, in terms of amounts for which credit should not be given, the 2017 Amendment Act **adds the following to the list,** 'any amount representing unrealised gains, notional gains or revaluation of assets'.

Implications: The amendments have now clarified that profit on sale of investment for investment companies will not be excluded for the purpose of calculation of profits as that is their main business activity. Also, section 198 of 2013 Act does not provide for the deduction of brought forward losses of the years prior to the commencement of the 2013 Act. This has now been rectified by adding a requirement to deduct losses related to any year insofar as such losses have not been deducted in any subsequent year.

Other areas

Net worth: The definition of net worth under section 2(57), **will now include debit or credit balance of profit and loss account** while computing the same. **- Effective from 9 February 2018**

Implication: This amendment clarifies an existing practice since it was not clearly explained in the definition. The addition was done considering net worth reflects the intrinsic value of the company and debit/credit balance of profit and loss account is very much a part of it.

Public Company: The 2017 Amendment Act now defines a public company under section 2(71)(a) as a company that is **both** not a private company and has a minimum paid up share capital as prescribed. Earlier, the conditions were mutually exclusive. **- Effective from 9 February 2018**

Implication: This amendment would ideally reduce the number of companies that would meet the definition of public companies.

Valuation by registered valuers: Under section 247, a valuer is **now disqualified from valuing any asset**, if he had any interest in such an asset, at any time during three years prior to his appointment, and three years after s/he has conducted the valuation of the said asset.

Implications: Section 247 (2) (d) of the 2013 Act currently has a very open-ended restriction and provides that valuer should not undertake valuation of any assets in which he has a direct or indirect interest, or becomes so interested at any time during or after the valuation of assets.

Since there was no time limit prescribed, in the 2017 Amendment Act, a period of three years before appointment for valuation and three years after valuation, has now been inserted.

Application of sections 34 to 36 and Chapter XX – Now under section 391, provisions of Chapter XX **shall apply mutatis mutandis for closure of the place of business of a foreign company** in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed.

Implication: The amendment ensures that provisions of Chapter XX will apply only if the foreign company had raised monies which have not been repaid or redeemed.

Fee for filing, etc: Section 403 deals with late filing of documents along with payment of fee and additional fee. Currently, it allows late filing of documents within a period of 270 days along with payment of additional fee.

Certain provisos have now been added to the section in order to distinguish between filing of annual return (section 92) and financial statements (section 137) and other filings required under the 2013 Act.

Consequently, the first amended proviso now deals with section 92 and 137 and does not prescribe an outer limit (such as the 270 days prescribed earlier) for delayed filing. It requires that any delayed filing beyond the timeline prescribed in the respective section will now need to be done along with the payment of additional fee which is prescribed as a minimum of INR 100 per day and may further be prescribed at different amounts for different classes of companies.

The second proviso deals with all other delayed filings which need to be submitted along with payment of additional fee.

The amendment also addresses defaults on two or more occasions and requires payment of higher additional fee in such cases.

Implications: Owing to the cases of delay in filing under section 92 and 137, the 2017 Amendment Act has enhanced additional fees substantially to deter non-compliance. Also, the prescribed additional time limit of 270 days in case of filing the annual return and the financial statements has been removed. This could significantly impact companies which were filing the annual return or financial statements beyond the time stipulated under section 92 or 137, respectively.

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Harmonisation with other laws and accounting standards

Information in prospectus: The 2017 Amendment Act has **replaced the requirements of section 26(1) (a), 26(1)(b) and 26(1)(d).** These sections dealt with the information and reports to be included in the prospectus. Section 26 (1)(i) now requires every prospectus to carry information and reports on financial information that has been specified by the Securities and Exchange Board of India ('SEBI') in consultation with the Central Government.

Implication: This amendment is aimed at harmonizing the provisions with SEBI requirements and avoiding a regulatory overlap. Since SEBI has prescribed the detailed requirements to be disclosed in the offer documents in the SEBI LODR, this amendment helps in ensuring that the 2013 Act does not prescribe provisions which are already covered by SEBI.

Return to be filed with Registrar in case promoters' stake changes: Section 93 has been omitted – **Effective from 09 February 2018**

Implication: Section 93 requires listed companies to file a return with the Registrar, in a prescribed form with respect to changes in the number of shares held by promoters, and top ten shareholders. This information is also required to be filed with Stock Exchanges/SEBI, and was thus leading to duplication of reporting for listed companies. Consequently, the requirement has now been removed from the 2013 Act.

Prohibition on forward dealings in securities of company by director or key managerial personnel and prohibition on insider trading of securities: Section 194 and 195 have been omitted.

Implication: The 2013 Act vide Sections 194 and 195 restricts forward dealing by directors and KMPs and insider trading by any person including directors and KMPs respectively. The aforesaid provisions are seemingly applicable in respect of both private and public companies. However, the concepts of forward dealings in securities and insider trading prohibitions may not be entirely relevant in case of private companies. For example, restrictions on insider trading prohibitions may pose practical issues in the context of the rights of first refusal that are frequently contained in the shareholders' agreements of private companies. Consequently, these provisions have been omitted considering that they are largely relevant in the context of listed companies and SEBI regulations are comprehensive in the matter (and also apply to companies intending to get listed).

Turnover: The 2017 Amendment Act has **substituted the definition of turnover** under section 2(91) to read as follows: "turnover" means the gross amount of revenue recognized in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year;'. **- Effective from 09 February 2018**

Implication: The earlier definition of 'turnover' was tagged to 'realization of amounts' rather than amounts recognized in the financial statements. The term turnover is used in several places across the 2013 Act in the context of setting thresholds or for ascertaining applicability of certain provisions. Consequently, this is a relevant and much needed amendment since it harmonizes the definition of turnover with the accounting standards and makes it easier for companies to comply with the related requirements of the 2013 Act.

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Ensuring internal consistency and rectifying omissions

Several liability of members in certain cases: **Sub-section 3A has now been inserted in the 2013 Act.** The insertion provides the implications when the number of members falls below the minimum prescribed and the company continues to operate as such for more than 6 months. In such cases, the members of the company will be severally liable for payment of debts contracted by the company during such period and may be severally sued. **- Effective from 9 February 2018**

Implication: This insertion essentially restores the relevant compliance requirements of 1956 Act (Section 45). While the 2013 Act mandated the minimum number of members for private and public companies (2 and 7 respectively), it did not specify the consequences, where the number falls below such minimum requirement. This amendment now clarifies the consequences and the period within which the default should be made good failing which the violation of the requirement is triggered.

Voting rights: Section 47 now provides that voting rights of every member of the company is **now also subject to section 188(1)** which deals with related party transactions. **- Effective from 09 February 2018**

Implication: This amendment now aligns the requirement with section 188(1) which restricts related parties to vote on resolutions or approve any contract or arrangement that may be entered into by the company, in which they are interested.

Extraordinary general meeting: The 2017 Amendment Act **has included a proviso to section 100(1)**, thereby requiring a company, other than a wholly owned subsidiary of a company incorporated outside India, to hold an extraordinary general meeting at a place in India.

Implication: The requirement of having the EGM in a place in India was earlier included as an explanation to Rule 18(3)(ix) of the Companies (Management and Administration) Rules 2014. This has now been made part of the Act by including it in section 100. The amendment also exempts wholly-owned subsidiaries of companies incorporated outside India from this requirement.

Postal Ballot: The 2017 Amendment Act amended section 110 by permitting companies which are required to **conduct voting using electronic means**, to transact certain items in general meetings, which were earlier required to be mandatorily transacted through postal ballot.

Implication: Considering voting using electronic means provides that no shareholder is deprived of her/his right to vote on resolutions in case she/he cannot attend the AGM/general meeting, this amendment does away with the irrelevant requirement to transact through postal ballot.

Eligibility, qualifications and disqualifications of auditors: With respect to the persons who are not eligible to be appointed as an auditor of a company under section 141, one of the restrictions was on 'any person whose subsidiary or associate company or any other form of entity, is engaged as on the date of appointment in consulting and specialised services as provided in section 144'.

The above **restriction has been replaced** with a person who, **directly or indirectly**, renders any services referred to in section 144 to the company or its holding company or its subsidiary company. The term 'directly or indirectly' is referred back to the explanation to section 144.

Implication: This amendment widens the scope of disqualifications by extending it to 'indirect' rendering of services as well. It also attempts to align the eligibility criteria with the provisions related to restriction on the auditor on providing certain services.

Powers and duties of auditors and auditing standards: Owing to the amendment to section 143, the auditor of the holding company **now has the right to access the records** of associate company in addition to the subsidiaries in so far as it relates to the consolidation of its financial statements.

Further, the reporting requirement related to internal financial control systems has **now been replaced** with 'internal financial controls with reference to financial statements'. This clarification was already provided in the related Rules.

Additionally, the auditor **now has to comment** on certain aspects related to managerial remuneration. Refer comments on page 10 & 11 related to managerial remuneration and related reporting requirements.

Implication: The amendments are practical and are an attempt to align the requirements in the section with those in the rules. Refer comments on page 11 relating to additional reporting requirements.

Companies capable of being registered: Under section 366, the 2013 Act allowed conversion of partnership firms, etc. into companies registered under 2013 Act. However, it allowed conversion of only those entities which had seven or more members.

The 2017 Amendment Act **now replaces the need** for seven or more members with 'two or more members', provided that in case of members less than seven, the conversion would be to a private company.

Implications: Since various entities referred to in the section (which can be registered under the 2013 Act) could be formed even with less than seven persons, restriction for the entities to consist of seven or more members was reviewed. Therefore, the 2017 Amendment Act has reduced the number of members with a proviso that in such case the conversion would result in a private company.

Application of Act to foreign companies: The amendment to section 379 clarifies that sections 380 to 386 (both inclusive) and sections 392 and 393 **will apply to all foreign companies**.

It also provides that the Central government **may exempt any class of foreign companies,** that it specifies in an Order with respect to the same, from any of the provisions of sections 380 to 386 and sections 392 and 393.

Implication: Section 379 of the 2013 Act provides that where not less than 50 per cent of the paid-up share capital of a foreign company is held by one or more citizens of India, or companies/body corporates incorporated in India, such companies shall comply with the provisions of Chapter XII, and other provisions of the Act, as may be prescribed, with regard to the business carried on by it in India, as if it were a company incorporated in India.

This created an ambiguity as to whether the provisions of Chapter XXII, were applicable to those body corporates that were covered within the definition of Section 2(42), but did not fall within the category indicated in Section 379 of the 2013 Act.

Now the 2017 Amendment Act clarifies that the remaining body corporates as covered within the definition of foreign company, will also need to comply with the provisions of Chapter XXII, as applicable.

Debentures, annual return, registration of charges, books of account and their inspection: Section 384 has been amended to provide that the provisions of section 92 and section 135 **shall apply to a foreign company as they apply to a company** incorporated in India.

Implication: Section 92 relates to filing of annual returns. Further, this amendment makes the requirements of section 135 relating to CSR applicable to foreign companies as well. It should be noted that Rule 3 of Companies (Corporate Social Responsibility Policy) Rules, 2014 already covered foreign companies as defined under section 2(42) under the applicability requirements.

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Rationalisation of penalties

Civil liability for misstatements in prospectus: Section 35 now exempts a person from liability if he proves that, **in relation to a misleading statement purported to be made by an expert**, he had reasonable ground to believe that all such statements made by an expert in the prospectus were a correct and fair representation of the statement and that the person making the statement was competent to make the statement. **- Effective from 9 February 2018**

Implication: Before this amendment, directors could not rely on statements made by experts as a defense of a civil liability, though such a defense was available under the 1956 Act and also available under the international securities law. In view of the above, the amendment to section 35 now enables directors to defend themselves from a civil liability for misstatement in the prospectus by an expert, if he is able to prove that he reasonably believed that all statements made by the expert were correct and fair.

Punishment for contravention of section 73 or section 76: Amendment to section 76A **replaces the fine of INR 1 crore with INR 1 crore or twice the amount of deposit accepted by the company, whichever is lower.** Further it **takes away the option of compounding** in this section. **- Effective from 9 February 2018**

Implication: This amendment is significant since it reduces the amount of fine in certain cases (where the amount of deposits is less than INR 50 lakh) by referencing it to the amount of deposits accepted by the company. However, it also takes away the option to compound offences and avoid imprisonment. Consequently, all contraventions related to acceptance of deposits will now be subjected to both penalty as well as imprisonment.

Constitution of National Financial Reporting Authority: The amendment to section 132 **reduces the penalty** in case of audit firms (where professional or other misconduct is proved) to INR 5 lakh from INR 10 lakh.

Also, the provisions related to setting up of an Appellate authority under subsections 6 to 9 have been omitted.

Implication: Penalties across various provisions have been rationalised. Consequently, the penalty in case of audit firms has also been reduced and it now stands at INR 5 lakh which may extend to 10 times of the fee received where professional or other misconduct is proved.

Removal, resignation of auditor and giving special notice: Under section 140, the penalty for not filing the statement related to resignation by an auditor is currently INR 50,000 which could extend up to INR 5 lakh. This has **now been amended** to INR 50,000 or the remuneration of the auditor, whichever is less.

Implication: As discussed earlier, the penalties across various sections have been rationalised.

Punishment for contravention: The penalties for punishment for contravention by auditors, under section 147, has now been rationalised as follows:

Particulars	2013 Act	2017 Amendment Act
For non-compliance with provisions of section 139, 143, 144 or 145	Fine of INR 25,000 which may extend to INR 5 lakh	Fine of INR 25,000 which may extend to INR 5 lakh **or four times the remuneration of the auditor, whichever is less**
For non-compliance with the above sections knowingly or willingly	Fine of INR 1 lakh which may extend to INR 25 lakh	Fine of **INR 50,000** which may extend to INR 25 lakh **or eight times the remuneration of the auditor, whichever is less**

In terms of payment of damages (in case of conviction), the auditor was earlier liable to pay damages to the company, statutory bodies or authorities or any other persons for loss arising out of incorrect or misleading statements of particulars in her/his audit report. The term **'other persons' has now been specified as 'members or creditors of the company'.**

Further, in case of criminal liability of the firm, with respect to liability other than fine has been **restricted to only the concerned partner or partners** who acted in a fraudulent manner or abetted or colluded in any fraud.

Implication: The liabilities of auditors have now been rationalised and the limits have been referenced to the auditor's remuneration which appears to be a more reasonable basis. Further, it has given cognizance to the fact that auditors cannot be held responsible to any 'other person' and has ring-fenced the liability to pay damages only to the members or creditors (if there is any loss incurred).

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Appendix: List of notified amendments as on 09 March 2018

The table below lists the sections amended by the Companies (Amendment) Act 2017 and also indicates the effective dates, wherever notified.

Section Number	Title of section	Effective date*
Section 2(6)	Associate company	Not yet effective
Section 2(16)	Charge	9 February 2018
Section 2(28)	Cost Accountant	9 February 2018
Section 2(30)	Debenture	9 February 2018
Section 2(41)	Financial Year	9 February 2018
Section 2(46)	Holding Company	9 February 2018
Section 2(49)	Interested Director	9 February 2018
Section 2(51)	Key Managerial Personnel	9 February 2018
Section 2(57)	Net worth	9 February 2018
Section 2(71)	Public Company	9 February 2018
Section 2(72)	Public Financial Institution	9 February 2018
Section 2(76)	Related Party	9 February 2018
Section 2(85)	Small Company	9 February 2018
Section 2(87)	Subsidiary Company	Not yet effective
Section 2(91)	Turnover	9 February 2018
Section 3(A)	Members severally liable in certain cases	9 February 2018
Section 4	Memorandum	26 January 2018
Section 7	Incorporation of a company	9 February 2018
Section 12	Registered office of company	9 February 2018
Section 21	Authentication of documents, proceedings and contracts	Not yet effective
Section 26	Matters to be stated in prospectus	Not yet effective
Section 35	Civil liability for misstatements in prospectus	9 February 2018
Section 42	Offer or invitation for subscription of securities on private placement	9 February 2018
Section 47	Voting rights	9 February 2018
Section 53	Prohibition on issue of shares at discount	9 February 2018
Section 54	Issue of sweat equity shares	Not yet effective
Section 62	Further issue of share capital	Not yet effective
Section 73	Prohibition on acceptance of deposits from public	9 February 2018
Section 74	Repayment of deposits, etc., accepted before commencement of this Act	9 February 2018
Section 76A	Punishment for contravention of section 73 or section 76	Not yet effective
Section 77	Duty to register charges, etc.	9 February 2018
Section 78	Application for registration of charge	9 February 2018

Section Number	Title of section	Effective date*
Section 82	Company to report satisfaction of charge	9 February 2018
Section 89	Declaration in respect of beneficial interest in any share	Not yet effective
Section 90	Investigation of beneficial ownership of shares in certain cases	9 February 2018
Section 92	Annual return	9 February 2018
Section 93	Return to be filed with Registrar in case of promoters' stake changes	9 February 2018
Section 94	Place of keeping and inspection of registers, returns, etc.	Not yet effective
Section 96	Annual general meeting	Not yet effective
Section 100	Calling of extraordinary general meeting	Not yet effective
Section 101	Notice of meeting	Not yet effective
Section 110	Postal ballot	Not yet effective
Section 121	Report on annual general meeting	Not yet effective
Section 123	Declaration of dividend	Not yet effective
Section 129	Financial statement	Not yet effective
Section 130	Re-opening of accounts on Court's or Tribunal's orders	Not yet effective
Section 132	Constitution of National Financial Reporting Authority	Not yet effective
Section 134	Financial statement, Board's report, etc.	Not yet effective
Section 135	Corporate Social Responsibility	Not yet effective
Section 136	Right of member to copies of audited financial statement	Not yet effective
Section 137	Copy of financial statement to be filed with Registrar	Not yet effective
Section 139	Appointment of auditors	Not yet effective
Section 140	Removal, resignation of auditor and giving of special notice	Not yet effective
Section 141	Eligibility, qualifications and disqualification of auditors.	Not yet effective
Section 143	Powers and duties of auditors and auditing standards	Not yet effective
Section 147	Punishment for contravention	Not yet effective
Section 148	Central Government to specify audit of items of cost in respect of certain companies	Not yet effective
Section 149	Company to have Board of Directors	Not yet effective
Section 152	Appointment of directors	Not yet effective
Section 153	Application for allotment of Director Identification Number	Not yet effective
Section 157	Company to inform Director Identification Number to Registrar	Not yet effective
Section 160	Right of persons other than retiring directors to stand for directorship	Not yet effective
Section 161	Appointment of additional director, alternate director or nominee director	Not yet effective
Section 164	Disqualifications for appointment of director	Not yet effective
Section 165	Number of directorships	Not yet effective
Section 167	Vacation of office of director	Not yet effective
Section 168	Resignation of director	Not yet effective
Section 173	Meetings of Board	Not yet effective

Section Number	Title of section	Effective date*
Section 177	Audit Committee	Not yet effective
Section 178	Nomination and Remuneration Committee and Stakeholders Relationship Committee	Not yet effective
Section 180	Restrictions on powers of Board	Not yet effective
Section 184	Disclosure of interest by director	Not yet effective
Section 185	Loan to directors, etc.	Not yet effective
Section 186	Loan and investment by company	Not yet effective
Section 188	Related party transactions	Not yet effective
Section 194	Prohibition on forward dealings in securities of company by director or key managerial personnel	Not yet effective
Section 195	Prohibition on insider trading of securities	Not yet effective
Section 196	Appointment of managing director, whole –time director or manager	Not yet effective
Section 197	Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits	Not yet effective
Section 198	Calculation of profits	Not yet effective
Section 200	Central Government or company to fix limit with regard to remuneration	Not yet effective
Section 201	Forms of, and procedure in relation to, certain applications	Not yet effective
Section 216	Investigation of ownership of company	Not yet effective
Section 223	Inspector's report	Not yet effective
Section 236	Purchase of minority shareholding	Not yet effective
Section 247	Valuation by registered valuers	Not yet effective
Section 366	Companies capable of being registered	Not yet effective
Section 374	Obligations of companies registering under this Part	Not yet effective
Section 379	Application of Act to foreign companies	Not yet effective
Section 384	Debentures, annual return, registration of charges, books of account and their inspection	Not yet effective
Section 391	Application of sections 34 to 36 and Chapter XX	Not yet effective
Section 403	Fees for filing, etc.	Not yet effective
Section 406	Power to modify Act in its application to Nidhis	Not yet effective
Section 409	Qualification of President and Members of Tribunal	Not yet effective
Section 410	Constitution of Appellate Tribunal	Not yet effective
Section 411	Qualification of Chairperson and Members of Appellate Tribunal	Not yet effective
Section 412	Selection of Members of Tribunal and Appellate Tribunal	Not yet effective
Section 435	Establishment of Special Courts	Not yet effective
Section 438	Application of Code to proceedings before a Special Court	Not yet effective
Section 439	Offences to be non-cognizable	Not yet effective
Section 440	Transitional provisions	Not yet effective

Section Number	Title of section	Effective date*
Section 441	Compounding of certain offences	Not yet effective
Section 446	Application of fines	Not yet effective
Section 447	Punishment for fraud	Not yet effective
Section 458	Delegation of Central Government of its powers and functions	Not yet effective

* Status as on 09 March 2018

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