

KEY CHANGES - PRIVATE LIMITED COMPANIES COMPANIES ACT, 2013



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Content

OVERVIEW

Why there was a need for change? Benefits of re-enacting the new Company Law

Silent features of New Companies Act, 2013

Changes having immediate implementation - applicable to Private Limited Companies

MANAGEMENT, ADMINISTRATION & OTHERS

Key change in definitions applicable to private companies

Relative, Related Party & RPT (Loan to directors or specified person)

Strengthening Board Framework

Meeting (Board and General) and related matters

GOVERNANCE AND OTHERS

Mandatory application of Corporate Social Responsibility

Mandatory implementation of Internal audit by private limited companies

Other provisions

Why there was a need for change? Benefits...

Why there was need for change?

- Big scams like Satyam, Sahara etc. influenced to change the existing law.
- For smooth and seamless application of corporate governance to all companies.
- Old Companies Act was a voluminous document, very procedural in nature and prescribed certain quantitative limits which were irreverent on account of changes in economy.
- Change in any provision requires an amendment of the law through the parliamentary process.

Benefits of re-enacting the new Companies Law:

- Bringing flexibility & adoption of Internationally accepted practices
- Self regulation with more disclosure
- Stringent punishment for violation
- Effective protection for different sections of society

Silent features of The Companies Act, 2013:

<u>Companies Act, 2013</u>	<u>Companies Act, 1956</u>
29 Chapters	13 Parts
470 Sections	658 Sections
7 Schedules	15 Schedules
<ul style="list-style-type: none"> • Till date total 282 Sections & Rules for 23 chapters are notified • Substantial part of the Act is from Rules (418 places it has prescribed word) 	

<u>New chapters added</u>	<u>Chapter number</u>
Registered Valuers	Chapter 17
Government Companies	Chapter 23
Companies to Furnish Information or Statistics	Chapter 25
Nidhis	Chapter 26
National Company Law Tribunal & Appellate Tribunal	Chapter 27
Special Courts	Chapter 28

Changes having immediate implementation:

<u>Sl. No.</u>	<u>Changes</u>
1	Print new business letters, bills, letter heads etc with Corporate Identification Number (CIN)
2	Mandatory application of Corporate Social Responsibility (CSR)
3	Mandatory implementation of Internal Audit
4	To have at least one resident director on board
5	Restriction on non-cash transaction involving directors
6	Cash flow statement compulsory part of financial statement except OPC, Dormant and small company
7	Consolidated financial statement is mandatory for any company having subsidiary, associate or joint venture.
8	To check limits of borrowing capacity, limits of its investments, loans and guarantees
9	Pvt. Ltd companies also can not provide loan to directors or interested parties.
10	Pending share application money and loan taken from director's relative or member to be refunded.

Key changes in definitions:

Private company - section 2(68):

“Private company” means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,-

- (i) restricts the right to transfer its shares;
- (ii) except in case of One Person Company, limits the number of its members to **two hundred**

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that:

- (A) persons who are in the employment of the company; and
- (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and
- (iii) prohibits any invitation to the public to subscribe for **any securities** of the company;

Major Changes:

- maximum number of members, which a private company can have, is increased to 200 from the existing limit of 50.
- Prohibited from inviting the public for subscription of any securities including shares and debentures.

Acceptance of deposit by Private Ltd company:

Major changes:

- ✓ Acceptance of deposit or loan from director's relative and members are excluded now, hence only acceptance of money from directors is allowed. (Companies Acceptance of Deposits Rules, 2014)
- ✓ Director has to declare in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others.
- ✓ Private company have received any loan from any person other than director, then they have to file a statement in Form DPT-4 up to June 30, 2014.
- ✓ Such unsecured loan to be refunded immediately otherwise will be treated as deposit under new rules.
- ✓ Any amount brought in by promoters by way of unsecured loan in pursuance of the stipulation imposed by the lending institution can get exemption till the loan of lending institution are repaid not thereafter.
- ✓ Pending share application money to be allotted within 60 days from the date of receipt or to be refunded within 15 days after completion of such sixty days, otherwise will be treated as deposit under these new rule.

Key definitions:

Associate company - section 2(6):

- Associate company means a company in which that other company has significant influence but which is not a subsidiary or joint venture company.
- “Significant influence” means control of at least 20% of total share capital, or of business decision under an agreement. However, as per Accounting Standard AS 23 significant influence is defined as "the power to participate in financial and/or operating policy decisions of the investee but not control over those policies”.

Control shall include - Section 2(27):

- To appoint majority of the directors or
- To control the management or policy decisions of the company through shareholding or management rights or shareholder agreements or voting agreements or any other manner.

As per Section 2(87), holding and subsidiary relationship relating to exercises and controls more than half of the total share capital includes preference shares and convertible preference shares.

Key definitions:

One person company (OPC) - section 2(62):

- OPC means a company which has only one person as a member. However, where the paid up share capital of an One Person Company exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, it shall cease to be entitled to continue as a One Person Company.

Small Company - Section 2(85): means a company (other than a public company, holding company or subsidiary company)

- whose paid-up share capital does not exceed 50 Lakh rupees (higher limit may be prescribed, shall not be more than 5 crore rupees) OR
- Turnover as per last profit and loss account does not exceed two crore rupees (higher limit may be prescribed, shall not be more than 20 crore rupees)

Key Managerial Personnel - section 2(51):

- Chief Executive Officer or managing director, or the manager
- the Company Secretary, the Chief Financial Officer, the whole time director
- Such other officer as may be prescribed.

Relative, Related party & Transactions:

Relative section 2(77):

- Categories of relatives reduced to a major extent.
- New Relatives added - Step Father, Step Brother, Step Sister (Previously step daughter was a relative but not step father who is now a relative.)

Related party - Section 2(77) New definition: with reference to a company means:

- a director or his relative;
- a key managerial personnel or his relative;
- a firm, in which a director, manager or his relative is a partner;
- a private company in which a director or manager is member or director;
- a public company in which a director or manager is a director or holds along with his relatives more than 2% of its paid up capital;
- any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- any person on whose advice, directions or instructions a director or manager is accustomed to act;
- a holding, subsidiary or an associate company a fellow subsidiary;
- Such other person as may be prescribed.

Related party transactions (Section 188)

**Board approval required for following RPTs,
provided the transactions are being made on arm
length basis.**

Leasing of property

**Disposing of, or
buying, property**

**Sale, purchase or supply
of any goods or material**

**Appointment of any
agents**

**Appointment of
any related party
to any office or
place of profit**

**Contract for underwriting
the subscription of
securities or derivatives**

Requires prior approval by Special resolution:

✓ for Companies having paid up share capital of Rs 10 crores or more

OR

✓ Transactions made for

- in the case of sale of goods or services exceeding 25% of the annual turnover,
- in the case sale of property or leasing transaction exceeding 10% of its net worth or availing of services directly or through agent
- Payment of remuneration to related person exceeding limit of Rs. 2.50 lac per month
- Remuneration for underwriting of securities exceeding 1% of net worth

Loan to directors or specified persons (Section 185)

Save as otherwise provided in this Act, no company (both Public Company (including Private company)) are prohibited to make any loan, guarantee given or security provided to directors or to any other person in whom director is interested **except to MD & WTD under prescribed circumstances.**

To any other person in whom director is interested:

- any director of the lending company, or of its holding company or any partner or relative of such director
- any firm in which any such director or relative is partner
- Any private company of which any such director is a director or member
- Any body corporate of which not less than 25% of total voting power may be exercised or controlled by any such director, or by two or more such directors
- any body corporate, the BOD, MD or Manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

Non-cash transactions with Directors of a Company or Directors of its holding, subsidiary or associate company requires prior approval of shareholders in general meeting (Section 192)

Loan to directors or specified persons (Section 185)

Few questions?

- Whether it shall be interpreted that Section 186 “Loan and Investment by Company” is an enabling provisions for restrictions provided in section 185?
- Whether holding company can give loan to its wholly owned subsidiary,
- Whether holding company can provide any guarantee or security against loan taken by its subsidiary which is a not wholly owned subsidiary.
- Whether a Company can grant loan to any other limited company, in which there are common directors.
- Whether a company can grant loan to any private company where none of the directors are director or member, however relatives of such director are director or member in such private company.
- Whether a company can grant loan to any body corporate where directors of its holding company have more than 25% of voting power in such body corporate.
- Whether a subsidiary company can fund to its holding company.

Strengthening Board Framework

- At least one director must be in India for 182 days or more in previous calendar year of a company. (concept of Resident director introduced) - Section 149(3)
- Permanently debars from directorship of a company if a person has been convicted of any offence and sentenced to imprisonment of 7 years or more. (Section-164)
- Two new grounds for disqualification of directors has been introduced:
 - convicted of the offence dealing with RPT at any time during last 5 years.
 - He has not obtained Director Identification Number (DIN)
- Disqualification of directorship under section 274(1)(g) of Companies Act, 1956, defaulting company covers Private Company also.
- Maximum number of directorship can be 20 (should not exceed 10 public companies). However by way of special resolution in general meeting a company can specify any lesser number of directorship. (Section-165)
- Appointment of Managing Director, Whole Time Director or Manager to be approved by special resolution in a General Meeting.
- Appointment of each director to be voted individually . (Section - 162)
- As per section-180, Private companies which have borrowed money in excess of its paid up capital and free reserves are required to pass special resolution. Borrowed money does not include short term loan which is repayable within one year.

Strengthening Board Framework

- The new Act has specifically defined the duties of directors like to act in good faith in order to promote the objects, shall exercise his duties with due and reasonable care, skill, diligence etc.
- Directors or members who is interested in any contract can not cast his vote on that matter.
- Every listed company and every other public company having a paid-up share capital of ten crore rupees or more shall have whole-time key managerial personnel who shall be officer in default and shall be liable for offence punishable under the provisions of Companies Act, 2013.
- Pursuant to the provisions of Articles of Association and by passing a special resolution, Company now may pay Sitting fees for directors except Managing and Whole time directors up to Rs 1 Lac per meeting.
- Board report has been made more informative and describes the Company's performance and various compliances. More information like financial performance, conservation of energy, foreign exchange inflow/outflow, CSR compliance, if any.
- A Company shall not make any investment through not more than two layers of investment companies (Section 186). Exemption to private limited company for loans and investments under 372 A of Old Act, is now removed.

Strengthening Board Framework

- Provisions relating to appointment of Managing Director is also applicable to Private Companies. Meaning MD, WTD or Manager can not be appointed for a term exceeding 5 years at a time. (Section-196)
- Further issue of shares now applicable to private company also. (Section-62)
Meaning, Pvt. Ltd companies have to issue further shares on right basis. For issue of shares to non-members and non employees, a special resolution is required to be passed and the price should be determined by a registered valuer.
- Commencement of business declaration has to be filed by Private Limited Company. (Section-11).
- Maximum number of directors have been increased from 12 to 15. (Section-149).
- Consent to act as director to be filed with ROC within 30 days. (Section-152).
- Now Private Limited companies are not allowed to issue shares other than equity & preference shares, issue shares with disproportionate rights in regard to dividend, surplus and with disproportionate voting rights.

Board Meetings & related matters:

- First Board meeting to be held on 30 days of incorporation of company.
- Notice of Board meeting shall be given to all directors, whether he is in India or outside India by hand delivery or by post or by electronic means.
- At least one independent director to be present at a Board Meeting called at shorter notice to transact urgent business.
- In case of absence of independent directors from board meeting, decisions taken at meeting shall be circulated to all the directors and shall be final if ratified by a independent director.
- At least 4 Board meetings should be held each year, with a gap of not more than 120 days between two Board meetings (no requirement of holding Board Meeting in every quarter).
- Director shall vacate office if he absents himself from all the Board meetings happened during a period of twelve months with or without leave approval. (Section -167).
- Director can participate in the Board meeting through video conferencing or other audio visual mode.

Board Meetings through Video Conferencing:

Directors can participate through video conferencing or through other audio visual means provided the meeting should be recorded and stored properly. Major responsibility casted upon the Chairman of the company & Company Secretary.

MATTERS NOT TO BE DEALT IN MEETING THROUGH VIDEO CONFERENCING:

- approval of financial statement,
- board's report,
- approval prospectus,
- audit committee meeting for consideration of accounts and
- approval of matter relating to acquisition, merger etc

General Meetings & related matters:

- One Person Company not required to hold AGM.
- First AGM to be held with in 9 months from closure of first Financial Year and in any other case, within a period of six months, from the date of closing the financial year.
- AGM to be held on between business hours i.e. 9 AM to 6 PM on any day that is not a national holiday and at the registered address of the Company.
- Notice of AGM may be sent to electronic mode and auditors attendance is mandatory.
- Single person not to be proxy for more than 50 members
- Postal ballot applicable to all companies

Corporate Social Responsibility (whether desirable for brand building):

Corporate Social Responsibility (CSR) Obligations have been introduced under section 135 of the Companies Bill, 2013. The companies will have to mandatorily spend 2% of their average net profit for CSR activities.

CSR Provisions in Companies Bill 2013 applicable to every company having;

1. Net worth of Rs. 500 Crore or more, or
2. Turnover of Rs. 1000 Crore or more or
3. Net profit of Rs. 5 Crore or more

During any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of 3 or more directors, out of which at least 1 director shall be an independent director. The Board's report under clause 134(3) shall disclose the composition of the Corporate Social Responsibility Committee.

Internal and Secretarial Audit:

Internal Audit is mandatory by Law to certain prescribed companies as follows:

- All listed company or,
- Public company: Having Paid up share capital Rs. 50 crore or more, Turnover Rs. 200 crores or more, outstanding borrowing from banks or public financial institutions Rs 100 crore or more, outstanding deposits of Rs 25 crore or more at any point of time during preceding financial year or,
- Private company: Turnover Rs 200 crore or more, outstanding borrowing from banks or public financial institutions Rs 100 crore or more at any point of time during preceding financial year.

Secretarial audit is mandatory for:

- All listed company or
- Public company having paid up share capital of Rs 50 crore or more, turnover of Rs 250 crore or more.

Other provisions (key changes):

- Financial statement covers mandatory presentation of cash flow statement and statement of changes in equity.
- Financial year should end on 31st March every year. Exemption may be availed for following different financial year on specific request made to Tribunal in the case of companies whose financial statement are required for consolidation outside India.
- Mandatory to print company's CIN number, phone number, fax number, registered address and website address in all business letters, billheads, letter paper, all notices and official publications. Any name change during last two years should be mentioned in all above referred documents.
- Return to be filed within 15 days with the Registrar with respect to increase or decrease by two percent or more in the shareholding of each promoter and each of the top ten shareholders of the company.
- Dividend cannot be declared and paid if company has defaulted in payment of deposits accepted before commencement of this Act. There is no mandatory requirement to transfer to reserve before declaration of dividend.

Other provisions (key changes):

- Unclaimed dividend should be transferred to a separate account (i.e. Unpaid dividend account) to be opened with a scheduled bank within seven days and statement to be uploaded on company's website within 30 days.
Claim for dividend after 7 years would not be extinguished.
- Preparation and audit of consolidated financial statements have been mandatory in cases where company has one or more subsidiaries or associates or joint ventures.
- Revision of financial statement or board's report can be possible in respect of any three preceding financial years after obtaining approval from Tribunal.
- As per Companies Act, 2013, depreciation to be computed as per useful live method.
- As per Companies Act 2013, no companies can issue shares at a discount.
- The Companies Act, 2013 has widened the scope of Employee Stock Options (ESOPs) and accordingly now company can also issue ESOPs to whole time as well as part time directors, officers and employees of its holding company or subsidiary companies.
- The Companies Act, 2013 permits companies to maintain book of accounts including minutes and registers on paper or electronic form.

Thank You

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