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Companies Act, 2013

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ABSTRACT

The Companies Act 2013 replaced the age old Companies Act 1956. The Companies Act 2013 makes comprehensive provisions to govern all listed and unlisted companies in the country. It implemented many new sections and repealed the relevant corresponding sections of the Companies Act 1956. This is a landmark legislation with far-reaching consequences on all companies incorporated in India. In order to address the corporate governance requirements in unlisted companies which are more in number, a number of provisions are incorporated in the Companies Act 2013. The listed companies in India are obliged to comply with a more stringent requirement as provided under the listing agreement especially clause 49 of the stock exchange listing agreement. Apart from the provisions under the listing agreement, the listed companies have to comply with a number of regulations promulgated by Securities and Exchange Board of India (SEBI) under the SEBI Act. However, unlisted companies unless it is a material subsidiary of a listed company do not have to comply with any of the SEBI Regulations or listing agreement. There is a host of public limited companies and private companies which are very large in size with substantial exposure to public due the nature of their business. Apart from this most of the companies in India both public and private depends largely on bank borrowings. Taking into account the fact that healthy banking sector is an essential element of the overall ecosystem of the country's economy, it is important to ensure that the companies which have large exposure to bank borrowings are managed in a prudent manner and follow sound corporate governance practices.

This report makes an attempt to study various provisions in the Companies Act 2013 incorporated with a view to implement and improve the corporate governance practices generally in companies in India as the corporate governance provisions in the listing agreement are applicable only to listed companies. Under the Companies Act 2013, companies fulfilling certain conditions are required to comply with the provisions related to corporate governance. The objective behind this is to protect interest of other stakeholders including those of minority shareholders and the Government.

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I. INTRODUCTION

The history of Indian Company Law began with the Companies Act 1850, which was modeled on the British Companies Act 1844. Between 1850 and 1882, the Companies Act was amended many times and the Act of 1882 replaced all the previous laws and remained in force till 1912 though amended many times. The Indian Companies Act 1913 was based on British Companies Act 1908. Subsequent amendments were made in 1914, 1915, 1920, 1926, 1930, 1932, and 1936. The amendment in 1936 was based on the lines of the British Companies Act of 1929 and became operative from 15th Jan, 1937. After Independence it was found that companies Law should again be amended and hence on the recommendations of the Bhabha Committee report, chaired by Mr. C.H. Bhabah, the President of India gave his assent on 18th Jan 1955 and it came into effect from 1st April 1956. The Companies Act, 1956 has undergone changes by amendments in 1960, 1962, 1963, 1964, 1965, 1966, 1967, 1969, 1971, 1977, 1985, 1988, 1996, 1999, 2000, 2002 (Amendment), 2002 (Second Amendment), and 2006. The Companies Act, 1956 was also amended by enactment of Depositories Act, 1996. Based on the recommendations of Shastri Committee, the Companies (Amendment) Act, 1960 introduced several new provisions relating to various aspects of company management which were overlooked in the 1956 Act. Liberalised Foreign Direct Investment policies after 1991 are tempting foreign investors who are looking towards India as an attractive investment destination. Moreover, the financial development of any nation depends on strong investor protection and good governance. The debacles at the National And International level compelled the government to think whether the existing Indian Companies 1956 is sufficient enough to protect and preserve the interest of the home as well as the foreign investors. This thinking process made the government think about a change in the existing companies 1956. The recently enacted Companies Act, 2013 is landmark legislation with far-reaching consequences on all companies incorporated in India. The New Companies Act, 2013 is replacing old Companies Act, 1956. The New Companies Act, 2013 makes comprehensive provisions to govern all listed and unlisted companies in the country. The New Companies Act, 2013 corresponded with Companies Act, 1956, consist of 29 Chapters, 470 Sections and 7 Schedules. The Act in a comprehensive form purports to deal with relevant themes such as investor protection, inclusive agenda, fraud mitigation, internal control, director responsibility and efficient restructuring. The Act is also quite outward looking and in several areas attempts to harmonize with international requirements. Indian companies will have to closely examine these developments to develop a clear strategy at ensuring compliance per the new requirements. The present paper traces the corporate governance reforms brought in by the new

Companies Act, 2013 and their implications. Failures at The National And International Level, Globalised and Liberalised business were some of the major causes that led to the change in the existing Companies Act 1956, but the Satyam Scandal proved to be the last nail in the coffin, as far as the change is concerned.

II. Companies act, 2013

It has been a long time in waiting but India finally enacted its new Companies Act 2013 at the end of August 2013. The Companies Bill was passed by the Lok Sabha on 18 December 2012 and in the Rajya Sabha on 8 August 2013. It received Presidential Assent on 29th August 2013 thereby creating the Companies Act 2013. The new Companies Act, replaced the old Companies Act 1956, which although amended approximately 25 times was still considered to be out of date and inadequate compared to the legislation regulating companies in many other jurisdictions. It took four years to implement the Companies Act since it was first introduced as a Companies Bill in 2009 but not all of its provisions will come into force immediately as a number of them require the Indian Government to draft rules and regulations for their implementation. Some of the provisions of the Companies Act 2013 that did not require any additional rules or regulations for their implementation were brought into force on 12 September 2013, following a notification by the Ministry of Corporate Affairs. However, these provisions only represented 98 out of the 470 sections of the Companies Act and it has caused confusion because businesses still have to look at both the old Companies Act and the new Companies Act to interpret the current law. Many argued that the whole of the Companies Act should have been brought into force at one time, whilst other believe that a step by step approach provides businesses with time to get to grips with the new provisions.

It contains 29 Chapters divided into 470 sections and 7 schedules and 95 definitions. However, the new law also makes extensive reference to sub-ordinate legislation in the form of rules, which form an integral part of the new law governing companies in India. Pursuant to the powers vested under the Companies Act, 2013, the it has also finalized the rules under each chapter, most of which had been notified.

Comparison of Companies Act 1956 and Companies Act 2013

Indian Companies Act 2013 has fewer sections (470) than Companies Act 1956 (658). The new act empowers shareholders and gives high value for Corporate Governance.

Details	1956 Act	2013 Act
Parts	13	NA

Chapters	**26**	**29**
Sections	**658**	**470**
Schedules	**15**	**7**

Objectives of the Companies Act 2013

Following are the objectives of the Companies Act 2013 –

- To develop the economy by encouraging entrepreneurship
- Creating flexibility and simplicity in the formation and maintenance of companies.
- To encourage transparency and high standards of corporate governance.
- To recognize new concepts and procedures to facilitate ease of doing business while protecting interests of all the stakeholders.
- To enforce strict action against fraud
- To set up institutional structure in the form of various authorities, bodies and panels.
- To cater to the need for more effective and time bound approvals and compliance requirements

Key Highlights of Indian Companies Act 2013

- The maximum number of members (shareholders) permitted for a Private Limited Company is increased to 200 from 50.
- One-Person company.
- Section 135 of the Act which deals with Corporate Social Responsibility.
- Company Law Tribunal and Company Law Appellate Tribunal.

Salient features of the Companies Act 2013

There are more than 450 + sections, 7 schedules and 29 chapters, some of the new and important point introduced in the act are given below-

Introduction of One Person Company (OPC)

It's a Private Company having only one Member and at least One Director. This concept is already prevalent in the Europe, USA, China, Singapore and in several countries in the Gulf region. It was first recommended in India by an expert committee (headed by Dr. J.J. Irani) in 2005. The one basic pre-requisite to incorporate an OPC is that the only natural-born citizens of India, including small businessmen, entrepreneurs, artisans, weavers or traders among others can take advantage of the 'One Person Company' (OPC) concept outlined in the new Companies Act. The OPC shall have minimum paid up capital of INR 1 Lac and shall have no compulsion to hold AGM (Annual General meeting).

A small Company

It means a company, other than a public company, paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or turnover of which as per its last profit and loss account does not exceed two Crore rupees or such higher amount as may be prescribed which shall not be more than twenty Crore rupees. The 2013 Act provides exemptions to Small Companies primarily from certain requirements relating to board meeting, presentation of cash flow statement and certain merger process.

Minimum members for private company

The new act has increased the limit of the number of members from 50 to 200.

Immediate changes in stationery

The letterhead, bills or invoices, quotations, emails, publications & notifications, letters or other official communications, should bear the full name of contact person, address of company's registered office, Corporate Identity Number (CIN No. which is a 21 digit number allotted by Government), Telephone number, fax number, Email id, contact website (if any).

Articles of Association

It is compulsory to adopt Table F as standard set of Articles of Association of the Company with relevant changes to suite the requirements of the company. Further, every copy of Memorandum and Articles (MOA) issued to members should contain a copy of all resolutions / agreements that are required to be filed with the Registrar of companies (ROC).

Commencement of Business

For all the companies (public/private company) registered under Companies Act 2013 needs to file the following with the Registrar of Companies (ROC) in order to commence their business –

- A declaration by the director in prescribed form stating that the subscribers/ promoters to the memorandum have paid the value of shares agreed to be taken by them
- A confirmation that the company has filed a verification of its registered office with the Registrar of companies (ROC)

In the case of a company requiring registration from any sectoral regulators such as RBI, SEBI etc., approval from such regulator shall be required prior to starting the business.

Financial Year

The Companies Act 1956 Act provided companies to elect financial year. The Companies Act 2013 Act eliminates the existing flexibility in having a financial year different than 31 March. The 2013 Act provides that the financial year for all companies should end on 31 March, with certain exceptions approved by the National Company Law Tribunal. Companies should align the financial year to 31 March within two years from 01 April 2014.

Eligibility age to become Managing Director or whole time Director

The eligibility criteria for the age limit has been revised to 21 years as against the existing requirement of 25 years.

Number of directorships held by an individual

Section 165 of this act provides that a person cannot have directorships (including alternate directorships) in more than 20 (twenty)companies, including ten (ten) public companies. It provides a transition period of one year from 1 April 2014 to comply with this requirement

Board of Directors and Disqualifications for appointment of director

The 2013 Act requires that the company shall have a maximum of 15 directors (earlier it was 12) and appointing more than 15 directors will require special resolution by shareholders. Further, it requires appointment of at least one woman director on the board for prescribed class of companies. It also requires that company should have at least 1 resident director i.e. who has stayed in India for a total period of not less than in the previous calendar year. All existing directors must have Directors Identification Number (DIN) allotted by central government. Directors who already have DIN need not take any action. However, Directors not having DIN should initiate the process of getting DIN allotted to him and inform the respective companies on which he is a director. The Company, in turn, has to inform the registrar of companies (ROC).

Independent Directors

The 2013 Act defines the term "Independent Director" . In case of listed companies, one third of the board of directors should be independent directors. There is a transition period of 1 (one) year form 01 April 2014 to comply with this requirement. The 2013 Act also provides additional qualifications/ restrictions for independent directors as compared to the 1956 Act. Section 150 enables manner of selection of independent directors and maintenance of databank of independent directors and enables their selection out of data bank maintained by a prescribed body

Resident Director

Every Company must have at least one director who has stayed in India for a total period of 182 days or more in previous calendar year. For existing companies, the compliance need to be made before 31st March 2015.

Loans to director

The Company cannot advance any kind of loan / guarantee / security to any director, Director of holding company, his / her partner/s, his/ her relative/s, Firm in which he or his relative is partner, private limited in which he is director or member or any bodies corporate whose 25% or more of total voting power or Board of Directors is controlled by him.

Appointment of managing director, whole time director or manager

The re-appointment of a managerial person cannot be made earlier than one year before the expiry of the term instead of two years as per the existing provision of section 317 of the 1956 Act. However, the term for which managerial personnel can be appointed remains as five years. Further, the 2013 Act lifts the upper bar for age limit and thus an individual above the age of 70 years can be appointed as key managerial personnel by passing a special resolution.

Key Managerial Personnel (KMP)

The Provisions relating to appointment of KMP includes (i) the Chief Executive Officer (CEO) or the managing director (MD) or the manager (ii) the company secretary (iii) the whole-time director; (iv) the Chief Financial Officer (CFO); and (v) such other officer as may be prescribed is applicable only for Public Limited Companies having paid up capital more than 10 crores and Private Limited Companies are exempted from appointment of KMPs.

Attending Board Meetings

As per section 167 of the Act, a Director shall vacate his/her office if he/she absents himself from all the meetings of the Board of Directors held during a period of 12 (twelve months) with or without seeking leave of absence of the Board. Simply speaking, attending at least one Board Meeting by a director in a year is a must else he has to vacate his/her office.

Board meetings

At least 7 days notice to be given for Board Meeting. The Board need to meet atleast 4 times within a year. There should not be a gap of more than 120 days between two consecutive meetings.

Appointment of Statutory Auditors

Every Listed company can appoint an individual auditor for 5 years and a firm of auditors for 10 years. This period of 5 / 10 years commences from the date of their appointment. Therefore, those companies who have reappointed their statutory auditors for more than 5 / 10 years, have to appoint another auditor in their Annual General Meeting for year 2014.

Other specialized services which cannot be provided by Statutory Auditors

The Statutory Auditor of the Company cannot give following specialized services directly or indirectly to the company –

- Accounting and book keeping services
- Internal audit
- Design and implementation of any financial information system
- Actuarial services
- Investment advisory services
- Investment banking services
- Rendering of outsourced financial services
- Management and/or any other services as may be prescribed

Provisions regarding Auditors

a) Every Company shall at its first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its 6th AGM and thereafter till the conclusion of every 6th meeting.

b) Company resolve that the auditing partner and his team in the audit firm shall be rotated at such intervals as may be resolved by members, or the audit shall be conducted by more than one Auditor.

c) Gvt. Companies, the First Auditor shall be appointed by the C&AG within 60 days from incorporation and on failure to do so, the board within next 30 days and on failure to do by the board, the members will appoint the auditor within 60 days.

d) For existing Companies C&AG shall appoint auditor within the period of 180 days from the commencement of the financial year.

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e) In case the Company has audit committee, then all appointment of Auditors including filling of casual vacancy shall be made after taking into account the recommendations of the committee.

f) All the AGMs shall now be mandatorily attended by the auditor or through his representative who shall also be qualified to be the Auditor unless otherwise exempted by the Company.

g) Unqualified Auditor's Report need not to be read out in the AGM.

h) Along with the approval of CG, the permission of the shareholders by way of Special Resolution is also required for the removal of an auditor.

i) It has been clarified that in case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to the Company or its directors or officers.

j) No special notice required for removing an Auditor, where the retiring Auditor has completed, a consecutive tenure of 5 (individual) years or 10 (audit firm) years as the case may be.

k) Limit in respect of max. number of companies in which a person may be appointed as auditor is 20 companies.

l) The remuneration of the Auditor of a Company shall now fixed in its general meeting or in such manner as may be determined therein. The Board may fix remuneration of the first auditor appointed by it.

m) Specific penalty has been prescribed for contravention of provisions related to appt. of auditors, i.e. on default Company shall be punishable with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees and any officer who is in default shall be punishable with imprisonment for a term which may extend to one year.

Corporate Social Responsibility (CSR)

The company has to constitute a CSR committee of the Board and 2% of the average net profits of the last three financial years are to be mandatorily spent on CSR activities by an Indian company if any of the following criteria is met:

- Net worth of Rs.500 crores or
- Turnover of Rs. 1000 crores or more or

- Net profit of Rs. 5 crores or more

Contributing to Incubators, which has been notified by the Government of India, is eligible for spending under CSR. This is a prosperous time for incubators and entrepreneurs and can really change the entrepreneurial eco system in India.

Financial statements

Financial Statements are now defined under the Act as comprising of the following. All companies (except one person Company, small company and dormant company)are now mandatorily required to maintain the following, which may not include the cash flow statement) –

- A balance sheet as at the end of the financial year
- A profit and loss account / an income and expenditure account for thefinancial year, as the case may be
- Cash flow statement for the financial year
- A statement of changes in equity (if applicable)
- Any explanatory note annexed to, or forming part of, any document referredto in sub-clause (i) to sub-clause (iv)

Shares

A share in the share capital of the company, including stock, is the definition of the term 'Share'. This is in accordance with *Section 2(84) of the Companies Act, 2013*. In other words, a share is a measure of the interest in the company's assets held by a shareholder. The Memorandum and Articles of Association of the company prescribe the rights and obligations of shareholders. Further, a shareholder must have certain contractual and other rights as per the provisions of the Companies Act, 2013.

Section 44 of the Companies Act, 2013, states that shares or debentures or other interests of any member in a company are movable properties. Also, they are transferable in the manner prescribed in the Articles of the company. Further, *Section 45 of the Act* mandates the numbering of every share. This number is distinctive. However, if a person is a holder of the beneficial interest in the share, then this rule does not apply (example: share in the records of a depository).

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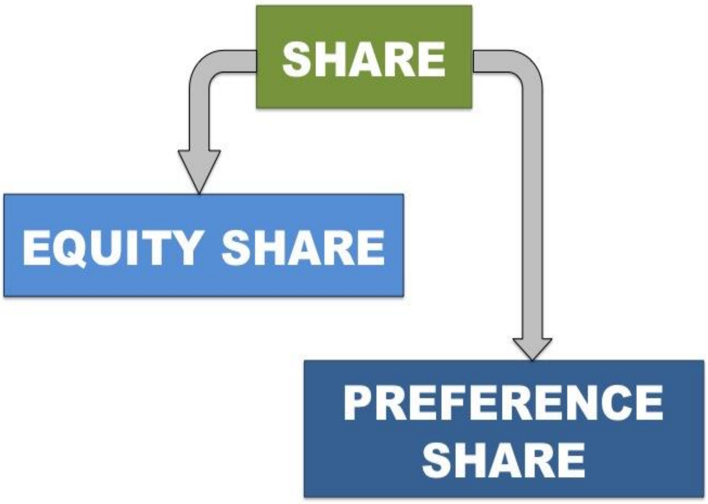
Kinds of Share Capital



According to Section 43 of the Companies Act, 2013, the share capital of a company is of two types:

1) Preferential Share Capital

2) Equity Share Capital

Preferential Share Capital

The preferential share capital is that part of the Issued share capital of the company carrying a preferential right for:

- Dividend Payment – A fixed amount or amount calculated at a fixed rate. This might/might not be subject to income tax.
- Repayment – In case of a winding up or repayment of the amount of paid-up share capital, there is a preferential right to the payment of any fixed premium or premium on any fixed scale. The Memorandum or Articles of the company specifies the same.

Equity Share Capital – Equity Shares

All share capitals which is not preferential share capital is Equity Share Capital. Equity shares are of two types-

- With voting rights
- With differential rights to voting, dividends, etc., in accordance with the rule.

In 2008, Tata Motors introduced equity shares with differential voting rights – the 'A' equity shares. According to the issue,

1)Every 10 'A' equity shares have one voting right

2)'A' equity shares get 5 percentage points more dividend than the ordinary shares.

Due to the difference in voting rights, the 'A' equity shares traded at a discount to ordinary shares with complete voting rights.

Deeming of Capital as Preferential Capital

In certain cases, capital is deemed as preferential capital even though it is entitled to either or both of the following rights:

1) For dividends, apart from the preferential rights to amounts specified above, it can participate (fully or to a certain extent) with capital not entitled to the preferential rights.
2) In case of a winding up, apart from the preferential right of the capital amounts specified above, it can participate (fully or to a certain extent), with capital not entitled to preferential rights in any surplus remaining after repaying the entire capital.

How Are Shares Issued?

Details to be provided in a share certificate

Every share certificate issued in India should contain the below mentioned:

1. Name of issuing Company
2. CIN no. (Corporate Identification Number) of such Company
3. Address of the company's registered office
4. Name of owners of such shares
5. Folio number of member
6. Number of shares which is represented by such share certificate
7. An amount which is paid on such shares
8. Distinct number of the shares

The timeframe for issuing share certificates

After the incorporation of the company, the company needs to issue the share certificates within two months from incorporation date. Where additional shares are allotted to the new or existing shareholders, the share certificates should be issued within two months from allotment date.In a case related to the share transfers, the share certificates should be issued to transferees within a period of one month of receipt of the instrument of transfer by such Company.

Procedures for issuing share certificates

Board Meeting & Allotment of shares

A board meeting is called for deciding about allotment of shares. The board of directors assigns a committee of directors known as allotment committee. The allotment committee would then decide about allotment of shares.

Once allotment committee provides its report with respect to allotment of shares, the Board then approves such report and then passes the resolution for allotting shares to the respective applicants.

Once shares are allotted by the allotment committee, the company secretary sends the letters of allotment to the respective members. The allotment letter refers to a letter that notifies the applicant that the company has allotted a certain number of shares to him. This letter of allotment is considered as the share certificate till issuance of the final certificate.

Register of members

The company secretary then prepares a Register of members from the lists of application received and allotment sheets. Register of member provides information about the shareholders and details of the shares which are allotted to them.

Preparing and Printing Share Certificates

The company secretary must arrange the form of the share certificate according to the form suggested by the Articles of Association. The secretary must get the form printed together with all the required details as per the provisions of the governing law. The secretary needs to fill all the details in share certificate with help of the application register and allotment sheets.

The secretary also needs to ensure that the share certificate is signed by two directors of the company. The secretary needs to sign the share certificate. The secretary also needs to ensure that the company's seal and revenue stamp is affixed on each of the share certificates. Once certificates are in order, a board meeting is called for passing the resolution for issuing share certificates.

Intimation and dispatch of share certificate

The company secretary needs to inform all the shareholders that share certificates are ready and would be delivered in exchange of allotment letters and bankers receipt confirming payment of the allotment money. A public notice should be issued for the general information of the members.

Members who surrender their allotment letters, share certificate are dispatched by the registered post to them. The local shareholders as per their preference can also collect the share certificates personally from company's registered office or from agency appointed for dispatching the share certificates.

Penalty for breach

Where a company makes any default in complying with provisions relating to issue of share certificates, such company would be punishable with a fine that wouldn't be less than INR 25,000 but could extend to INR 5,00,000 and every defaulting officer of such company would be punishable with a fine that wouldn't be less than INR 10,000 but could extend to INR 1,00,000.

III. Issues faced by the Act

The Companies Act, 2013 which came into effect prematurely misses the component of being a rational piece of legislature. In India where family companies account for 2/3rds of India's GDP the Act has failed to take into consideration the nature of such private companies. For example a prohibition on loans to directors and related entities, except with the fulfillment of certain unreasonable conditions for private companies under Section 185 is a rigorous provision not only in the Indian context but is not provided for anywhere in the word. Private companies wherein which ownership of capital is closely held should be regulated with discretion. Though the exemption notification dated 5th June 2015 provided some relief, there is more scope to reduce the procedural burden for private companies from mere compliance with the letter of the law considering investors in a private company are a known group of people.

Small and medium enterprises (SMEs) in India employ 40% of the workforce but generate only 17% of the GDP. The concept of small companies was introduced as an incentive to corporatize small businesses but with limited exemptions available these companies are hardly spared from the wrath of the Act. A need also exists to bring a larger number of companies in India within the purview of small companies for a simplified regulatory framework in the country.

Inconsistent with the Listing Agreement which exempts smaller listed companies from compliance with the provisions of Clause 49, certain provisions relating to corporate governance are made mandatory to all companies listed on a recognized stock exchange by virtue of the Act.

Finally, another problem is that the Act has failed to consider the practical difficulties which will be faced by the non-residents of foreign owned and controlled companies where 50 per cent of the equity is held by a non-resident or where non-residents have the power to appoint a majority of its directors in the company as a result of certain provisions.

Problems Faced by Private Companies:

- *Delegated legislature*

The power to make exemptions for private companies has been shifted from the legislature to the executive, mostly common in taxation laws where it is much needed to being about changes more frequently. This has led to uncertainty on the applicability of certain provisions for private companies in the future.

- ***Limited exemptions***

Also while, in the earlier Act, some 80 odd sections did not apply to private companies, the Notification consists of only 14 exemptions, and that too, laden with conditions.

- ***Postal ballot***

The provision of passing certain resolutions by postal ballot under the erstwhile Companies Act, 1956 was only applicable to listed public companies. **Section 110 of the Companies Act, 2013** provides that every company having more than 200 members shall pass the prescribed resolutions by postal ballot. Several private companies have more than 200 members including past and present employees to whom this provision is now applicable.

- ***Acceptance of deposits***

In case private companies wish to accept money from depositors exceeding one hundred percent of its paid up share capital and free reserves they will have to issue circular including financial position of the company, take credit rating, open deposit repayment reserve account, take a deposit insurance etc under **Section 73(2) clause (a) to (e)** making it almost impossible for private companies to do so without making a plethora of compliances.

- ***Appointment of directors***

The power to prescribe the manner of appointment of directors in private companies in has been taken away. As per **Section 152 (2) the Act**, unless otherwise provided directors of private companies will be appointed by the shareholders. While this could not be the intent of the legislature which makes the provision more restrictive for private companies than for public companies, the Notification provides no relief in this regard. The power to appoint casual directors is also rested with the shareholders.

- ***Private placement requirements***

A private company cannot make a public offer. Influenced by episodes like Sahara there is an excessive procedural burden of passing a special resolution, opening of a separate bank account, circulation of offer letter, multiple filing requirements every time there is an issue of shares in private companies under **Section 42 and Section 62(1)(c).**

- ***Rights issue***

Provisions of rights issue did not apply to private companies earlier. The requirement of issue of shares to existing holders as their pre-emptive right in case of public companies to prevent dilution of capital is also extended to private companies under **Section 62(1)(a)**.

- ***Loans to directors and related entities***

Though **Section 185** has been exempted for private companies vide the Notification, it is subject the condition that the private company is a company (i) in whose share capital no other body corporate has invested any money (ii) the borrowings of such a company from banks or financial institutions or any body corporate is than twice of its paid up share capital or fifty crore rupees, whichever is lower; and (iii) has no default in repayment of such borrowings subsisting at the time of making transactions under this Section. The above conditions seem unreasonable as there may be several private companies in whose capital body corporates have made an investment which will be excluded from the exemption. The requirement to protect the investor interest in private companies is unwarranted since there is no public shareholding involved.

- ***Restrictions on loans and investments***

The Companies Act 1956 exempted private companies from **Section 372A** relating to loans and investments. The corresponding provision **Section 186** not only extends to private companies but also includes loan/guarantee/security to any ‘person’ which includes interest free or concessional loans to its employees.

- ***Related party transactions***

The requirement of obtaining shareholders approval for related party transactions under **Section 188** continues to be another obstacle. Since the concept of obtaining approval to prevent abuse of power by directors in related party transactions is theoretical in private companies where there is no distinction between management and ownership.

Problems Faced by Small Companies:

Definition-

Only a private company can be classified as a small company. The Ministry of Corporate Affairs passed the Companies (Removal of Difficulties) Order 2015 on 13th February 2015 to amend the definition of a small company under Section 2(85) as a company whose paid up capital does not exceed Rs. 50 lacs *and* turnover as per last profit and loss account does not exceed Rs. 2 crores.

Thus companies which were falling within the ambit of small companies before the Order will now classify as non-small companies.

• *Exemptions available*

Currently, exemptions are available to small companies only with respect to following 4 provisions under the Act as follows:

i. The cash flow statement is not required to be prepared as per **Section 2(40)** of the Act.

ii. The Annual return can be signed by a director or a company secretary as per **Section 92(1)** of the Act.

iii. It is required to hold only 2 board meetings in a year i.e. one in every half year as per **Section 173(5)** of the Act.

iv. Merger and amalgamation between two or more Small Companies may take place in a simplified manner as per **Section 233(1)** of the Act.

Thus apart from the above exemptions the Act applies equally to a company classified as a small company and benefits of a one person company are not extended to a small company.

The exemptions of a small company in India are not available to a holding or a subsidiary company under the Act.

Compared to the exemptions in other countries the number and nature of exemptions are not substantial. In Hong Kong there is no reporting requirement for small companies under Section 359 of Cap 622. Section 205C of the Companies Act of Singapore also exempts small companies from audit requirements. The UK Companies Act 2006 provides for a small companies regime making a distinction for small companies with respect to accounts and reporting under part 15, filing obligations under Section 444 and audit requirements under Section 477.

Problems Faced by Small Listed Companies:

The Listing Agreement exempts listed companies-

(i) with equity share capital of less than Rs 10 crore

(ii) having net worth not exceeding of Rs 25 crore

(iii) listed on SME and SME-ITP platforms of the stock exchanges from compliance with **Clause 49** which pertain to corporate governance. The Act however fails to make any distinction between listed companies as a result of which the following provisions apply to such small listed companies only by virtue of the Act.

Problems Faced by Foreign Owned or Controlled Companies:

• As per **Section 96(2)** every annual general meeting of a company shall be held either at the registered office of the company or at some other place within the same city, town, village where the registered office of the company is situated. As per **Rule 18** of the Companies (Management and Administration) Rules 2014 the place of an extraordinary general meeting shall be in India.

• As per **Section 149(3)** the foreign owned and controlled companies are mandatorily required to have atleast one resident director on the board.

• As per **Part I of Schedule V** of the Act dealing with the eligibility criteria for the appointment of a Managing Director or Manager without the approval of the Central Government. A person must be resident in India and includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India-

(i) for taking up employment in India; or

(ii) for carrying on a business or vacation in India. Even if a Managing Director is a non resident as per **Schedule V** he shall not be eligible for appointment unless he obtains employment visa before entering India.

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