

An Overview of The Companies Act, 2013

Presentation

By

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The Companies Act, 2013

Historical background

- Companies Act, 1956 (30,000 cos.)
- 25 amendments till date (more than 8,00,000 cos.)
- Corporate scams and build up for new Bill
 - Concept paper in 2004
 - Setting up of JJ Irani Committee
 - New Companies Bill, 2008 based on recommendations of JJ Irani Committee
 - New Companies Bill, 2009
 - Reference to Standard Committee on Finance and its report in August, 2010
 - New Companies Bill, 2011

The Companies Act, 2013

Time line

- 18th Dec, 2012 passed by Lok Sabha
- 8th August, 2013 passed by Rajya Sabha
- 29th August, 2013 got President's assent
- 30th August, 2013 gazetted as Act no 18 of 2013

CA, 2013 vs. CA, 1956

- 29 chapters against 13 in CA,1956
- 470 sections against 658 sections in CA,1956
- 7 schedules against 15 in CA, 1956

CA, 2013 vs. CA, 1956

- Substantial part of law shall be in the form of rules to be prescribed in due course. More than 400 Rules are likely.
- Applicability to the entire nation, no regional exemptions.
- Very few exemptions to private limited companies as compared to under CA,1956.
- Very steep penalties and very harsh prosecution provisions.
- Very strict regime for company auditors.

The Companies Act, 2013

- On 8th Sept, 2013 First Set of Draft Rules issued.
- Till 18th Nov, 2013- 6th Trench of Draft Rules have been issued.
- 12th Sept, 2013 Part of Section 2 and 97 more sections became applicable.
- 18th Sept, 2013 Clarification on the Notification dated 12.9.2013 –relevant provisions of the CA, 1956 which correspond to 98 sections of CA 2013 cease to have effect from that date.

Sections of CA,2013 which became applicable w.e.f. 12.9.2013

- Part of Section 2
 - Section 19
 - Sections 21-25,
 - Sections 29-40
 - Sections 44,45
 - Sections 49-51
 - Sections 57-60
 - Section 65
 - Section 69
 - Section 70
 - Section 86
 - Section 91
 - Section 100
 - Sections 102-107
 - Sections 111 -114
 - Section 116
 - Section 127
 - Sections 161-163
- Section 176
 - Section 180-183
 - Section 185
 - Section 192
 - Sections 194,195
 - Section 202
 - Section 379
 - Section 382,383
 - Section 386
 - Section 394
 - Section 405
 - Sections 407-414
 - Section 439
 - Sections 443 - 453
 - Sections 456-463
 - Sections 467 -470

Sec 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;

Sec 2(71)- Public company

- Means a company which—
- (a) is not a private company;
- (b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed:
- Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles ;

Sec 2(51)- Key Managerial Personnel

“key managerial personnel”, in relation to a company, means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer and
- (v) such other officer as may be prescribed.

Sec 2(60)- Officer who is in default

- means any of the following officers of a company, namely:—
- (i) whole-time director;
- (ii) key managerial personnel;
- (iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;
- (iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- (v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- (vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- (vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

Section 34 -Criminal liability for misstatements in prospectus

- This section does not have similar provision as of Sec 63 (2) of the CA,1956 that provided that a person shall not be deemed to have authorised the issue of a prospectus by the reason only of his having given-
 - (a) the consent required to the inclusion therein of a statement purporting to be made by him as an expert,
 - (b) the consent to act in the capacity as auditor, legal advisor, attorney, solicitor, banker or broker of the company or intended company.

Section 35 -Civil liability for misstatements in prospectus

- Makes a distinction between misstatement in prospectus and misstatement with intention to defraud.
- For former part, the company , director, promoter or one who has authorised the issue or an expert shall be liable to compensate to every person who has sustained loss or damage.
- For later part, they shall be personally responsible without any limitation of liability for all the losses or damages.

Section 36- Punishment for fraudulently inducing persons to invest money

- Word 'shares or debentures' is replaced by 'Securities' to provide a wider expression for penalty, for fraudulently inducing persons to invest money.
- Fraudulently inducing someone to enter into, or to offer to enter into any agreement to obtain credit facilities from any bank or financial institution was not punishable under **Sec 68** of the CA, 1956 . The CA, 2013 makes this punishable.

Section 37-Action by affected persons

- The act has introduced a new provision enabling class action by persons or group of person affected due to misstatement in prospectus or inducing persons to invest money.
- A suit may be filed under sections 34 or 35 or 36.

Section 38- Punishment for personation for acquisition, etc. of securities

- Act provides punishment for acquisition etc. of 'securities' Imprisonment upto 10 years and also amount equal to fraud or 3 times more. If public interest is involved, minimum 3 years in jail.
- Under the 2013 Act, where a person has been convicted under this section the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person.

Sec 86- Contravention of provision relating to registration of charges

- Corresponding to section 142 of CA, 1956
- CA, 2013 provides for imprisonment for a term which may extend to 6 months for 'Officer-in default'.
- CA, 1956 provided for only financial penalties.

Sections 180 and 181

- Sec 180- Restrictions on powers of the board.
- Sec 181- Contribution to bonafide and charitable funds etc.
- Corresponding to section 293 of CA, 1956.
- Sec 293 was not applicable to private limited company but Section 180 and 181 are applicable to private companies also.

Sec 185- Loans to directors and others

- Restrictions on loan by a company
- Shall apply to book debts in the nature of loan.
- Restriction on loan to its directors and to ‘others in which director is interested’
- Restriction to apply on loan given directly or indirectly
- “Others in which director is interested” is defined.
- Exception is loan to MD/WTD in case the company has policy to give loan to its employees
- Another exception is to NBFCs provided the minimum bank rate is charged.

Sec 192- Restriction on non-cash transactions involving directors

- This new section regulates arrangements in respect of acquisition of assets for consideration other than cash between a company and a director of the company or its holding company or its subsidiary or its associate or person connected with such director.
- This section provides that such arrangements shall require prior approval by a resolution in general meeting.

New Concepts

- One Person Company
- Small Company
- Dormant Company
- Law enforcement through NCLT, NCLAT & Special Courts.
- Quality assurance and monitoring through NFRA.

One Person Company(OPC)

- Definition in - section 2(62) – a company which has only one person as a member.
- Incorporation of OPC – section 3
 - as a private company
 - MOA to indicate the name of other person who shall become member in case of death or his incapacity to contract
 - Consent of that person to be filed
 - Member can change the name of other person any time
 - Other person can withdraw his consent any time
- ‘One Person Company’ to be mentioned in bracket below the name – second proviso to section 12(3).

Small Company

- Definition in section 2(85)
 - Other than a public company
 - Paid up capital does not exceed Rs. 50 Lakhs
 - Turnover in the last year does not exceed Rs. 2 Crores
 - It is not a holding company or a subsidiary co.
 - It is not a co. registered under section 8
 - It is not a co. governed by any special Act.

Dormant Company

- No definition in Section 2.
- Section 455 The following companies can apply to Registrar to obtain the status of a Dormant company:
 - A company formed and registered for a future project or to hold an asset or intellectual property
 - And has no significant accounting transaction
 - Any transaction other than: Payment of fee to Registrar.
 - Payment to fulfill the requirement of this Act or any other law.
 - Allotment of Shares. Payment for maintenance of office or record.
 - Or an **inactive company** (a company which has not file its financial statements and annual returns with the Registrar for the last two years)

Law enforcement

- NCLT- powers of High court, CLB and BIFR are being transferred to NCLT.
- Appeal against NCLT orders before NCLAT.
- Special Courts, Mediation & Conciliation panel for speedy trial of offences under the Act.
- Powers to ROC to make enquires and inspections
- Serious Fraud Investigation Office (SFIO)- a separate agency for investigation of corporate frauds.

National Financial Reporting Authority (NFRA)

- Section 132- Body with advisory role having quasi-judicial powers for ensuring compliance.
- make recommendations to the Central Government on formulation and laying down of accounting and auditing policies and standards for adoption by companies and their auditors and
- monitor and enforce the compliance with accounting standards and auditing standards by companies and their auditors.

New Initiatives

- Corporate Social Responsibility (CSR)
- Class Action suit
- Fast Track merger/amalgamation
- Sick Company & Rehabilitation and Insolvency Fund
- Entrenchment provision
- Fraud and disgorgement of gain
- Use of electronics in management

CSR

- Section 135 read with Schedule VII
 - applicable to a co with capital of Rs. 500 Crores or more or
 - Turnover of Rs. 1000 Crores or more or
 - Net profit of Rs. 5 Crores or more during any financial year
- To spend in every financial year at least 2% of the average net profits of the co during the three immediately preceding financial years
- Local area to be given preference, activities as mentioned in Schedule VII
- To constitute a CSR Committee to formulate policy and monitor its implementation.

Class Action Suit

- Section 37- Suit which can be filed by any person, group of persons or any association of persons affected- against misstatement in prospectus (Section 34) and inducement to invest money (Section 36)
- Section 247- Application by prescribed number of members or depositors may file class action for seeking action against mismanagement.

Fast Track Mode for Merger/Amalgamation

- Section 233
 - Two or more small companies
 - Holding and its WOS companies
 - Such other class as may be prescribed
- Process
 - Proposed scheme to be issued to Registrar and OL for their objections/suggestions
 - Members of all the companies in their respective general meetings to approve with at least 90%
 - Each company to file declaration of solvency with Registrar
 - Scheme to be approved by 90% in value of the creditors
 - Approved scheme to be filed with the Central Govt., Registrar and OL
 - If Registrar and OL has no objections, the Central Govt. may confirm the merger/amalgamation
 - Transferor co(s) shall be deemed to have dissolved without process of winding up.

Sick Company

- Section 253- Only criteria of sickness is non payment to secured creditors representing 50% or more of its outstanding debts, with in 30 days from notice to pay.
- Applicability shall not be restricted to industrial companies

Rehabilitation and Insolvency Fund

- Section-269 fund to be established for rehabilitation, revival and liquidation of the sick companies.
- Contribution by the companies voluntarily.
- Company which contributed is entitled to withdraw funds, in the event of proceedings for winding up, for payment to workmen, protecting the assets and to meet incidental costs during proceedings.
- Withdrawal restricted up to the amount contributed.
- Fund to be managed by the Central government.

Entrenchment Provision

- Entrenchment to the effect that specified provisions of the AOA may be altered only if conditions or procedures more restrictive than those applicable for special resolution are met or complied with.
- Section 5- the articles may contain provisions for entrenchment provided these are made:
 - either on the formation of the company or
 - subsequently with the unanimous consent of all the members in the case of private company and by special resolution in the case of public company and
 - such provisions are to be notified to the Registrar.

Fraud

- Explanation to Section 447 defines 'fraud'.
- Any act or omission, concealment of the fact or abuse of position committed by any person himself or by other person in connivance in any manner, with intent to deceive, to gain undue advantage from or to injure the interest of the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.
- Section 447- punishment for fraud
 - Imprisonment not less than 6 months to 10 years and
 - Fine which shall not be less than the amount of fraud or 3 times of such amount.

Disgorgement of gains

- Section 38- provides for punishment for person for acquisition of securities in fictitious name(s), or through multiple applications in different combination of names under Section 447.
- Once convicted under that, the court may order disgorgement of gains, if any made and seizure and disposal of securities in possession.
- The amount received to be credited to Investor Education and Protection Fund under Section 124.

Use of electronics in management

- Voting through electronics means by members – Section 108
- Central Govt. to prescribe rules for the class of companies and manner to exercise such voting.
- Board meetings through video conferencing or other audio visual means ---Section 173 (2).
- Provided proceedings are capable of recording with date and timing and recognition of participants.
- Central govt. to prescribe the item which can not be dealt with in a meeting with video teleconferencing.

New Professional opportunities

- Representations before NCLT, NCLAT
- Internal Administrator for Revival
- Company Liquidator
- Registered Valuer

Internal Administrator for revival

- Section -259
- To be selected from databank maintained by the Central Government

Company Liquidator

- Section 2(23) definition of ‘Company Liquidator’
- To be appointed by Tribunal in case of winding up by Tribunal and by the company or creditors in case of voluntary winding up.
- A panel to be maintained by the Central government for the purpose.

Registered Valuer

- Section – 247 valuation of assets, properties , stocks, goodwill or other assets to estimating net worth of the company to be done by a qualified professional named as ‘ Registered Valuer’.
- To be appointed by the Audit committee and in its absence by the BOD.
- Serious consequences for contravention including refund of remuneration and payment of damages.

THANK YOU

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