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An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

September 2013 / Issue–26

Special issue on Companies Act 2013

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Companies Act 2013 – New Dimensions

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The Companies Bill 2012, tabled in the Indian Parliament in 2011 was passed by the Lok Sabha on December 18, 2012 and thereafter by the Rajya Sabha on August 08, 2013. The Bill received the assent of the President on August 29, 2013 and was notified in the Official Gazette on August 30, 2013. The Companies Act, 2013 (2013 Act) is progressive, aims at better governance and a higher level of transparency & disclosures, and endeavours to harmonize various laws relating to companies under the Companies Act, SEBI regulations and Listing Agreements. Ministry of Corporate Affairs has also published the Draft Rules for a total of 16 chapters (Draft Rules) for public comments. So far, 98 Sections of the 2013 Act have been notified with effect from September 12, 2013. In this paper, we attempt to draw a comparative analysis of the 2013 Act with the provisions of the Companies Act, 1956 (1956 Act).

I. Incorporation and ancillary matters

A. Types of Companies

The 2013 Act has introduced following new concepts and types of private limited companies:

- **Small company:** A private company with a paid-up share capital not exceeding INR 50 lakhs (or such higher amount as may be prescribed which shall not be more than INR 5 crore), or with a turnover (as per its last profit and loss account) not exceeding INR 2 cr (or such higher amount as may be prescribed which shall not be more than INR 20 crore) is a 'small company'. "Turnover" means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year. However, the concept of small company shall not apply to a holding company or a subsidiary company or a non-profit company registered with charitable objects.

  Relaxations to small companies:

  - 2 Board meetings may be held in each half of a calendar year provided the gap between 2 meetings should not be less than 90 days;
  - Not required to prepare Cash Flow Statement as one of the mandatory financial statements; and
  - Annual Return may be signed just by its Company Secretary (CS) or any Director in absence of CS.

- **One Person Company:** A private company with only a sole member is 'one person company'. Its Memorandum of Association (MOA) shall indicate the name of another person, with his consent, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company ("Successor"). The Draft Rules provide that only a natural person may be a member or the successor. This will enable the unorganised sector of proprietorship firms with unlimited liability to transform into the organised version of a private limited company with limited liability.

  Relaxations to One Person Companies:

  - All the relaxations applicable to small companies
  - May have a single director;
  - Not required to hold any general meeting - the relevant resolution may be communicated by the sole member to the company and entered in the minutes-book;
  - Not required to hold any Board Meeting where there is only one director. The relevant resolution may be communicated by the sole director to the company and entered in the minutes-book;

- **Dormant Company:** A company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, may apply to the Registrar of Companies (ROC) for according them the status of 'Dormant Company'. This status may be retained by the company by filing such documents and by paying such annual fee to the ROC. This concept shall be specifically helpful for investors who are anticipating award of a project in future or simply desire to hold an asset.

- **Private Company may have 200 Members:** The maximum number of members for a private company has now been increased to 200 from 50 under the 2013 Act, thus enabling a private company to reach out to more investors.

B. Incorporation of companies

New requirements for incorporation of all kinds of companies:

a) Furnishing of correspondence address till the registered office is established;

b) Filing of affidavit from each of the subscribers and from the first directors, that he qualifies to act as designated;

c) Filing of declaration by a professional, person named in the Articles as director, manager or secretary to comply with the procedures laid down;

d) Filing of particulars of interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate.

Certificate of incorporation no longer conclusive evidence of incorporation: The 2013 Act provides that if a company has been incorporated with misrepresentation or suppression of material facts, the Tribunal may pass orders for regulation of the management of the company (including changes in its memorandum and articles); or directing that liability of the members be unlimited; or directing removal of the name of the company from the register of companies; or for the *winding up* of the company.

C. Incorporation of Companies with Charitable Objects

Widening of Objects: The scope of "charitable objects" with which companies can be incorporated has been widened to include promotion of sports, education, research, social welfare, protection of environment or any *such other* object.

Conversion: Companies with charitable objects may get converted in any other type of company under the 2013 Act on compliance with certain conditions as may be prescribed.

D. Registered office of the company

Registered Office to be followed by correspondence address: At the time of filing of the application, the companies are merely required to provide a correspondence address till the registered office is established. Thereafter, within 15 days of incorporation, the company is required to have a registered office. The verification of registered office has to be filed by the company within 30 days of incorporation. This will also require the submission of the title documents or the rent agreement in respect of the registered office premises.

Change in Registered Office: Notice of any subsequent change of registered office has to be filed with the ROC within 15 days of the change instead of 30 days as provided in the 1956 Act.

E. Commencement of Business

Restrictions on commencement of business are now applicable to private companies as well. Now any company having a share capital shall not commence any business or exercise any borrowing powers unless:

→ The verification of registered office has been filed by the company; and

→ A declaration is filed by a director to the effect that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the paid-up share capital of the company is not less than INR 5 lakh in case of a public company and not less than INR 1 lakh in case of a private company as on the date.

In the event the declaration is not filed by the director within 180 days of incorporation, the name of the company may be removed by the ROC from the Register of Companies.

F. Name of the Company

The 2013 Act removes the restriction on the name for the proposed company not being identical to that of an LLP.

G. Articles of Association

Entrenchment: The Articles of Association (AOA) may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only with a higher percentage threshold of shareholders' approval than is normally required for a special resolution. . Such provisions can be made either at the time of formation of the company; or by amendment of the articles authorized by unanimous consent of the members in case of a private company or by a special resolution in case of a public company. Notice of entrenchment provisions has to be given to the ROC. This will boost the confidence of the private equity investors, allowing them to negotiate certain protective clauses under their investment agreements to be entrenched in the articles such that these may be amended only with their prior approval, even if their shareholding goes below the 25%+ limit and the promoters of their respective portfolio companies have majority voting power.

II. Promoter and Holding Companies

A. Promoter

"Promoter" means a person (a) who has been named as such in a prospectus or is identified by the company in the annual return; or (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act (not including persons acting merely in a professional capacity).

Significant provisions applicable to a Promoter:

- Civil as well as criminal liability for misstatement in prospectus;
- Liable for penal provisions in case of contravention of provisions governing private placement of shares;
- Requirement to ensure disclosure of his particulars in the Annual Return; and
- Requirement to furnish the shareholding interest (of 2% or more) in other companies to be stated in the Explanatory Statement to the Notices calling general meetings.
- Liable for fraud in certain situations

B. Holding and Subsidiary Company

Ownership of share capital not limited to equity: Subsidiary in relation to another company means a company in which the holding company controls the composition of the Board of Directors; or exercises or controls more than one-half of the *total share capital,* either at its own or together with one or more of its subsidiary companies.

"Control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner. The definition is wide and may have the unintended consequence of normal minority protection rights being construed as joint control and being a deemed promoter.

"Associate Company" in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of such other company and includes a joint venture company. For this purpose, 20% shareholding shall be deemed as significant influence.

III. Share Capital

A. Further issue of shares

Rights Issue: Provisions relating to rights issue of shares that required public companies to offer shares pro rata to all the existing shareholders has now been applicable to a private company..

ESOP: Shares may be issued by the company to its employees under ESOP by passing a special resolution and subject to the conditions to be prescribed under the rules. ESOPs can be issued to employees, directors or employees of a company or of its holding and subsidiary company or companies.

Preferential Issue: Issuance of shares to any person in any other case shall require to be authorized by a special resolution and subject to the conditions to be prescribed under the rules. Further, price of the shares to be issued as such, should be determined by a registered valuer, subject to such conditions as may be prescribed.

B. Private Placement

Private Placement Offer Letter: Requirement of issuance of a Private Placement Offer Letter has been mandated under for all companies including private companies, issue of securities under private placement. Private placement offer should not be made to more than 50 persons in a financial year (except ESOP). All offers can be made only to such persons whose names are recorded by the company and that such persons shall receive the offer by name.

Utilization of Share Application Money: Allotment of securities should be completed within 60 days from the date of receipt of the amount towards subscription of securities, which cannot be received in cash. If not, the company is liable to repay the amount within 15 days from the completion of 60 days. If the company fails to repay the application money within 75 days, it shall be liable to repay that money with interest at the rate of 12% per annum from the expiry of the 60th day. Application money shall be kept in a separate bank account and shall not be utilised for any other purpose.

C. Shares with differential rights

The 1956 Act permitted a private company to issue shares of various classes, each of which could have different rights in terms of dividend, voting or any other special rights. While public companies were required to meet the stipulated conditions for issuing such shares, private companies had been exempted from the same. However the 2013 Act now requires the private companies also to comply with the rules to be framed in this regard, in order to be able to issue shares with differential class rights.

D. Bonus Shares

Approval of Shareholders: Any company may issue bonus shares, if authorised by its AOA and approved by the shareholders, out of free reserves, securities premium and capital redemption reserve account. Revaluation Reserves cannot be utilized for issuance of bonus shares. A company that issues bonus shares must first ensure that there is no default in repayment of deposits or payment of interest on the same and that all statutory dues of employees has been fully paid.

Free Reserves: Under the 1956 Act, "Free Reserves" was explained under the definition of 'net worth' previously as reserves created out of profits and share premium account but does not include reserves created out of revaluation of assets, write back of depreciation provisions and amalgamation. "Free Reserves" have now been defined as the reserves available for distribution for dividends as per latest audited balance sheet. However any amount representing unrealized gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, shall not be treated as free reserves. Thus 'free reserves' do not include share premium, which has been included in the definition of 'Net Worth', which means the aggregate of paid up share capital, all reserves created out of profits (excluding revaluation reserves) and securities premium after deducting accumulated losses and deferred expenditures not written off, as per the audited balance sheet. This definition does not specifically include 'accumulated profits' but the reserves created out of profits; however, logically profits have to be considered for determination of net worth.

E. No issue of shares at discount

Only sweat equity shares may be issued at a discount. There is a complete prohibition on issue of shares in any other case at a discount.

F. Preference Shares

Term of preference shares for infrastructure projects: A company may issue preference shares, the term of which may even exceed the generally allowed period of 20 years in case of 'infrastructure projects', subject to redemption of such shares as may be prescribed on an annual basis at the option of the shareholder. The term "infrastructural projects", inter-alia, includes transportation, agriculture, water management (including water supply or distribution), telecommunication, industrial, commercial and social development and maintenance (including tourism, hotels and entertainment centres), power, petroleum, natural gas and housing.

G. Share Certificates

Under the 2013 Act, the certificates of all securities allotted, transferred or transmitted have to be delivered to the holders of securities by the company within:

- 2 months from date of incorporation or allotment for shares
- 1 month from date of receipt of instrument of transfer / intimation of transmission – in case of transfer / transmission of shares; and
- 6 months from date of allotment – in case of allotment of debenture.

H. Transfer of Securities

Time limit for submission of instrument of transfer: Under the 2013 Act, the instrument of transfer has to be delivered to the company within a period of 60 days from date of execution. If an application for transfer of partly paid shares is made by the transferor alone, a no objection certificate has to be furnished by the transferee.

No restriction on contractual arrangements: The 2013 Act recognises contractual arrangements in respect of transfer of securities of a public company despite stating that the securities or interests held by a member of a public company shall be freely transferable. This brings much needed clarity on the ensuing debate of restrictions in transfer of shares of a public company and puts to rest the different principles laid down by various judicial precedents. On account of this, henceforth, provisions such as tag along and drag along rights, ROFO (Right of First Offer) and ROFR (Right of First Refusal) and put and call options that are common in joint venture agreements have been granted legitimacy, providing relief to private equity and strategic investors who rely on such contractual protections.

I. Buy-back of shares

The provisions relating to buy-back under the 1956 Act prohibited any offer of buy-back within 365 days of the preceding offer, where such preceding offer was made pursuant to resolution of the Board of Directors (without special resolution) for buy-back upto 10% of the paid-up equity share capital and free reserves. The 2013 Act prohibits an offer of buy back for a period of 1 year from the date of closure of the preceding offer of buy-back under all circumstances. . Another change introduced by the 2013 Act is the requirement to transfer to the Capital Redemption Reserve (CRR) Account, a sum equal to the nominal value of the shares bought-back, where a company buys-back its shares out of free reserves or securities premium account. The 1956 Act did not require creation of CRR for buy-back out of securities premium There should be no default in repayment of principal or interest to deposit holders before an offer of buy back can be made. The norms for buy back of listed securities have also been made more stringent.

IV. Dividends

Transfer to Reserves: Transfer of certain portion of profits to the reserves of the company is not mandated anymore and left to the discretion of the company.

Interim Dividend may be declared during any financial year out of the surplus in the profit and loss account (i.e., profits of the previous years) and/or out of profits of the financial year in which such interim dividend is sought to be declared.

V. Debts, Loans and Investments

A. Issue of Debentures

Convertible Debentures may be issued under the 2013 Act made by passing a special resolution. The issue of convertible debentures is no longer subject to any rules or the approval of the Central Government.

Secured Debentures may be required to be issued in conformity with such terms and conditions as may be prescribed in the rules.

Perpetual Debentures: There is no provision for issuance of perpetual debentures in the 2013 Act unlike the 1956 Act. The 2013 Act provides that a company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue. However, no maximum term for debentures has been prescribed.

Appointment of Debenture Trustees: No company can now issue a prospectus or make an offer or invitation to the public or to its *members exceeding 500* for the subscription of its debentures, unless the company has, before such issue or offer, appointed debenture trustee(s) and the conditions governing the appointment of such trustees shall be such as may be prescribed. The 1956 Act required such appointment only when the prospectus was issued to public.

B. Loans and Investments

Loans to non-executive Directors: The provisions regarding extension of loans to directors are now applicable to private companies as well as to loans made by holding companies to subsidiary companies. Loans to directors or subsidiaries have now been equated to loans to any person u/s 186.

Loans to Executive Directors: However, restrictions on loans to directors will not apply to loans extended to Managing Director or Whole Time Director as part of the conditions of service, extended by the company to all its employees or pursuant to a scheme approved by special resolution.

Limitation on layers of investments: Under the 2013 Act, companies have been prescribed to make investments through not more than two layers of investment companies (subsidiaries), such restriction may have an impact on infrastructure and realty projects that require ring fencing for lenders as well as promoters. However, this restriction will not apply where a company is acquiring a company incorporated outside India and such foreign company has investments subsidiaries beyond 2 layers.

Restrictions on loans, guarantees and investments which were earlier applicable only to the public companies under the 1956 Act, have now been made applicable to all companies (including private companies). Further, the companies are now restricted to give any loan, guarantee or security in favour of any person, which would include not only other companies but also firms, LLPs and individuals (including directors). Even the investments, loans and guarantees by a holding company to its subsidiaries shall be equally restricted.

C. Registration of charges

"Charge" under the 2013 Act has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage. The definition of "Charge" under the 1956 Act was limited to include a mortgage.

Registration with in 300 days by the company: Under the 2013 Act, any charge created on assets or undertakings of the company has to be registered only by the company within 30 days from creation of charge. However, the ROC may allow registration of charges within a period of 300 days from creation of charge on payment of additional fees. In the event registration is not done within 300 days also, the company has the option of seeking an extension from the central government. These provisions providing timelines for registration are applicable to both charges created within or outside India. Under the 1956 Act, a foreign charge had to be registered within 30 days of the instrument being received in India.

Registration by the beneficiary: An option has been provided to the beneficiary of a charge to get the charge registered upon failure of the company to do so. However, in light of the provisions, such person need not initiate the registration process for a period of 300 days from creation of charge as that is the additional time available to the company. In order to get the charge registered, the interested party has to issue a 14 days' notice to the company.

VI. Directors and Management

A. Board of Directors

Maximum of 15 Directors: The 2013 Act provides that any company (including a private company) can have a maximum of 15 directors and a provision for a higher number of directors requires approval by a special resolution of the shareholders.

Resident Director: At least one director of the company should be a person who has lived in India for not less than 182 days in the previous calendar year. All companies shall be required to comply with this requirement within one year of notification of this provision.

Woman Director: As per the Draft Rules, every listed company shall, within 1 year, and every other company having a paid-up share capital of INR 100 Crore or more shall within 5 years, of notification of this provision, appoint at least 1 woman director.

B. Key Managerial Personnel

Definition and Scope: The 2013 Act introduces the definition of *"Key Managerial Personnel"* (KMP) to mean the Chief Executive Officer (CEO) or the Managing Director (MD) or the Manager; the Company Secretary;

the Whole-time Director; the Chief Financial Officer (CFO); and any such other officer as may be prescribed. KMP has been included within the definition of "Officer in Default" and consequently, where there is no KMP, all the directors shall be deemed as the officers in default, provided no specific director has been specified by the Board and has given his consent for compliance of any specific provision.

Compulsory appointment: Certain class of companies as may be prescribed, shall be required to appoint a "whole-time" key managerial personnel comprising an MD or CEO or manager and in their absence a WTD; and a Company Secretary; and a CFO. The 2013 Act also provides that an individual will not be eligible for appointment or re-appointment as chairperson of the company as well as MD or CEO, after the commencement of the 2013 Act unless the same is permitted by the AOA or the company is not engaged in multiple businesses. A whole time key managerial personnel cannot hold office in more than one company at the same time, with the exception of the subsidiary company or is the managing director of both companies and has been so appointed with the consent of all the directors present at the Board meeting. A whole time key managerial personnel holding such positions at the commencement of the 2013 Act will be required to choose one company for their appointment within 6 months.

C. Independent Directors

Requirement of appointment: Every listed company shall have at least one-third of the total strength of the board as independent directors. As per the Draft Rules, all public companies having minimum paid up share capital or net worth of INR 100 Crore; or public companies having aggregate outstanding loans/ borrowings/debentures / deposits exceeding INR 200 Crore shall also be required to have a minimum of one-third of its directors as independent director. A company may appoint an independent director from the data bank maintained by authorised agencies. It shall also be necessary for a private company to have independent director where it is required to constitute a CSR committee. Currently, the listing agreement provides that if the same person is the Chairman and Managing Director or the chairman is a promoter, at least half of the Board should comprise independent directors.

Process and term of appointment: Appointment of independent director has to be approved at the general meeting and the explanatory statement to the notice of general meeting has to contain the justification for choosing the particular candidate for appointment as independent director. An independent director will hold office for 5 years and may be re-appointment on passing of a special resolution and after disclosure in the Board's report. An independent director cannot hold office for more than 2 consecutive terms. However, such independent director may be re-appointed on expiry of 3 years of his ceasing to be an independent director, if he has not been associated with the company in any manner, directly or indirectly.

Liability for contraventions by the company: An independent director or non-executive director will not be immune from liability for acts or omissions of the company done with their knowledge (attributable through Board processes) or consent or his failure to act diligently.

D. Alternate Directors

Alternate Director may now be appointed in place of any director in case such director is absent from India for a period of at least 3 months. Alternate of an independent director has to be an independent director only.

E. Maximum number of directorship

No person shall hold more than 20 directorships, including private companies, out of which there may be maximum 10 public companies.

F. Resignation and vacation of office

Resignation: The resignation of a director shall now take effect from the date the notice of resignation is received by the company.

Vacation of Office: The office of a director shall stand vacated in the event, *inter-alia*, he absents himself from all Board meetings held during 12 months irrespective of the fact that he sought leave of absence from the Board or not.

G. Related Party Transactions

Related Party 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 a 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 share 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 (except in professional capacity);
- any person on whose advice, directions or instructions a director or manager is accustomed to act (except in professional capacity);
- any company which is:
  - a holding, subsidiary or an associate company of such company; or
  - a subsidiary of a holding company to which it is also a subsidiary;
- such other person as may be prescribed.

Related Party Transactions mean the following types of transactions:

- sale, purchase, supply of goods or materials;
- selling, disposing of, buying, leasing of property;
- availing or rendering services;
- appointment of any agent for purchase or sale of goods, materials, services or property;
- related party's appointment to office or place of profit in the company, its subsidiary or associate company; and
- underwriting the subscription of any securities or derivatives of the company.

Approval(s) required: For entering into any related party transactions, every company shall require the consent of its board of directors, vide a resolution passed at a board meeting and certain companies shall also require a special resolution to be passed prior to entering into related party transactions. Such companies as per the Draft Rules are:

- companies having a paid-up share capital of INR 1 cr or more;
- companies, in case of which, the transaction(s) to be entered into individually or taken together with previous transactions during a financial year –

  (i) exceeds 5% of the annual turnover or 20% of the net worth of the company as per the last audited financial statements of the company, whichever is higher; or

  (ii) relates to appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding INR 1 lakh; or

  (iii) is for a remuneration for underwriting the subscription of any securities or derivatives of the company exceeding INR 10 lakhs.

Board resolution or special resolution may also be passed to ratify the related party transactions within 3 months from the date on which such contract or arrangement was entered. No government approval is required.. The definition of related party is very wide and so is the definition of relative and read together will make it extremely difficult for individuals to keep track of the business dealings of not only their relatives but also the relatives of their partners in the case of firms and key managerial personnel in the case of companies.

Arm's Length Transaction: None of the aforementioned provisions shall be applicable in respect of arm's length transactions. "Arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

H. Non-Cash Transactions

Prior approval of shareholders shall be required, through a resolution to be passed at a general meeting, for a company to enter into any non-cash transactions with a director of the company, or its holding/subsidiary/associate company or any person connected with the director, for acquisition or disposal of assets.

I. Insider Trading

A provision relating to prohibition on insider trading has been introduced in the 2013 Act which shall apply even to a private company. No person including any director or key managerial personnel of a company shall enter into insider trading. Such a prohibition shall not affect communications required to be made in the ordinary course of business or profession or employment or under any law. "Insider Trading" has been defined as (i) an act of subscribing, buying, selling, dealing in any securities of the company by any director or key managerial personnel or officer of the company by the use of non-public price sensitive information or (ii) an act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person. "Price-sensitive information" means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company. As a result of this restriction, the directors of even a private company may not subscribe, buy or sell the shares of the company.

J. Board Meetings

First Board Meeting of every company should be held within 30 days of incorporation. The requirement of holding minimum 4 meetings every year has been retained. However, the time gap between 2 meetings should not exceed 120 days. Board meetings may be held by video conferencing or other audio visual means and same should record date and time of the meeting.

Minimum Notice of 7 days has to be issued for a board meeting and a shorter notice may be issued on the condition that minimum one independent director,if any, is present at such board meeting convened with shorter notice. In the event of absence of independent director from board meetings decisions taken are to be circulated to all directors and they shall be final only on ratification by at least one independent director, if any.

Non-Interested Quorum: As per the 2013 Act, the quorum for board meetings of even a private company has to be non-interested. In the event, the number of interested director exceeds or is equal to two third of total strength of the Board, then the non-interested director present at the meeting, not being less than two, shall be considered as quorum. Hence, for all board meetings the minimum quorum cannot be less than two non-interested directors. Where it is not possible, the transaction shall be required to be passed by general meeting. Private limited companies that have only two directors and are closely held may have to hold a number of general meetings in a year (even if the directors are the only two shareholders) only in order to comply with this requirement.

Circular Resolutions: The board resolutions passed by circulation have to be approved by majority of non-interested directors who may be present anywhere but not necessarily in India, as was required under the 1956 Act.

Secretarial Standards: Every company shall now be required to observe secretarial standards with respect to general and Board meetings. As per the Secretarial Standards-1 applicable to the Board meetings, the notice of the meetings should also be accompanied by the agenda and notes setting out the details of the resolution to be passed. The minutes of the meetings shall also be required to be circulated for comments of all the directors before their finalization.

K. General Meetings

Length of Notice: A general meeting of a company may be called by giving not less than 21 clear days' notice either in writing or through electronic mode. Shorter notice consent to be accorded from not less than 95% of the members entitled to vote.

Quorum for Public Companies: Minimum quorum required to hold the general meeting of a public company, has been revised as follows:

(i) 5 members personally present if the number of members is not more than 1000;

(ii) 15 members personally present if the number of members is more than 1000 but up to 5000;

(iii) 30 members personally present if the number of members exceeds 5000.

However, the quorum for a meeting adjourned for lack of quorum is still kept "members present" i.e., minimum 2 members.

Voting by Postal Ballot has been allowed for all the companies in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting.

Electronic Voting: Voting through electronic means have been introduced in respect of such class companies and in such manner as may be prescribed.

Special Resolutions for additional matters: Unlike the 1956 Act, special resolutions are now required to be passed for the following purposes:

- Disposal of Undertaking by way of sale, lease or otherwise. Disposal may be of the whole or substantially the whole of the undertaking(s) of the company. Here, "undertaking" shall mean an undertaking in which the investment of the company exceeds 20% of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year. "Substantially the whole of the undertaking" in any financial year shall mean 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year; and
- Borrowing of money where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves.

L. Secretarial Audit

Every listed company and other prescribed companies shall be required to conduct a secretarial audit and annex the same to the Board's report.

VII. Returns and Records

A. Annual Return

Common Form: The provisions governing preparation of annual returns is now same for all classes of companies. Under the 1956 Act there were separate provisions for preparation of annual returns by companies with and without share capital.

Additional details: A company shall be now required to furnish additional details, as on the close of the FY, regarding its holding, subsidiary and associate companies; promoters, directors, key managerial personnel (with changes in the preceding FY); meetings of members or classes of members and various committees and attendance; remuneration of directors and key managerial personnel; its members and debenture-holders along with changes therein since the close of the previous FY; any penalties imposed on the company or its directors or officers and matters relating to certification of compliances, disclosures made, meetings held, etc. as may be prescribed.

Intimation of changes: In the event of a change in the shareholding of promoters and / or top 10 shareholders of a listed company, a return has to be sent to the ROC within 15 days of such change.

B. Books of Accounts and Financial Statements

Electronic mode: Books of accounts can now be maintained in electronic mode.

Branch accounts: Books of accounts even of branch offices have to be kept at the registered office of the company. With respect to branch offices outside India periodical returns have to be sent to India.

Financial statements in relation to a company, to be presented before its annual general meeting (AGM), includes –

(i) a balance sheet as at the end of the financial year;

(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

(iii) cash flow statement for the financial year;

(iv) a statement of changes in equity, if applicable; and

(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub-clause (iv).

Statement of subsidiaries: The financial statement to be placed before the general meeting shall include a separate statement containing salient features of the financial statement of subsidiary companies (including joint ventures and associate companies). These were earlier to form a part of Board Report but are now clubbed under financial statements to be presented at the AGM.

Re-opening of books: A company cannot open its books of accounts except pursuant to an order of the court or tribunal on an application by the central government, Income tax authorities, SEBI or any other statutory or regulatory body or other person concerned. However, voluntary revisions to the accounts for 3 preceding financial years may be made after an application for the same is made by the company and an order confirming the same is passed by the Tribunal. Copy of Tribunal's order and the revised accounts shall have to be filed with the ROC.

Financial Year: Under the 1956 Act, a "financial year" meant period for which accounts were placed before the AGM whether such period was a year or not. The 2013 Act has introduced the concept of a uniform "financial year"i.e. period ending on the 31st day of March every year, and where a company is incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up. However, on an application made by a company or its foreign holding company or its foreign subsidiary, which is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may allow change in the financial year of the company. Existing companies shall be required to align its financial year as per this requirement within a period of 2 years from the notification of this definition.

C. AGM Report

Every listed company shall prepare a Report on each Annual General Meeting in the prescribed manner, including confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the 2013 Act and file the same with the ROC within 30 days of the conclusion of the AGM.

VIII. Corporate Social Responsibility

Requirement: The 2013 Act has introduced a new concept of Corporate Social Responsibility (CSR). Companies which are required to comply with the CSR are companies having net worth of INR 500 Crore or more, or companies having turnover of INR 1000 Crore or more, or companies having net profit of INR 5 Crore or more.

CSR Committee: A CSR committee has to be formed comprising of minimum 3 directors, at least one of whom shall be independent. This requirement is applicable uniformly to public as well as private companies.

CSR Expenditure: The Board has to ensure that at least 2% of the average net profits of the last 3 financial years is utilized towards CSR initiatives. In case of failure to do so, the Board's report shall disclose the reasons for the same. The CSR Committee will be responsible for formulation of a CSR Policy and recommendation of the same to the Board; recommending the amount of expenditure to be incurred on such activities; and monitoring the CSR Policy of the company.

IX. Other Committees

A. Audit Committee

Requirement: Every listed company and such other prescribed companies shall constitute an audit committee. As per the Draft Rules, such companies are companies with paid-up capital or net worth of INR 100 Crore or more; or companies which have aggregate outstanding loans/borrowings/debentures/deposits exceeding INR 200 Crore. Under the 1956 Act, an Audit Committee was required only for public companies having paid-up capital of INR 5 Crore or more.

Composition: The Audit Committee shall consist of a minimum of 3 directors with independent directors forming the majority. Within one year of commencement of the 2013 Act, existing Audit Committee's have to be reconstituted so as to ensure compliance with the 2013 Act.

Role: The Audit Committee shall recommend appointment and remuneration of auditors, review auditor's independence and performance report, examine financial statements etc. Every listed company which accept deposits from public and has borrowed from banks and public financial institution in excess of INR 50 crore will also be required to constitute a vigil mechanism through the Audit Committee to report any genuine concerns to the company.

B. Nomination & Remuneration Committee

Requirement: The companies required to constitute Audit Committee shall also be required to constitute a Nomination and Remuneration Committee.

Composition: The committee shall comprise of 3 or more non-executive directors (half of them being independent directors).

Role: The role of the committee is to identify persons qualified to be appointed as directors and in senior management, to recommend their appointment and removal to the Board and to evaluate performance of every director. The committee will also formulate the criteria for such appointments and also recommend a policy to the Board relating to remuneration of directors and key personnel and other employees.

C. Stakeholders Relationship Committee

The Board of every company with more than 1000 shareholders, debenture holders, deposit holders and other security holders at any time during a financial year shall be required to constitute a Stakeholders Relationship Committee consisting of a chairperson (a non-executive director) and other members as decided by the board. The committee's main role shall be to consider and resolve grievances of security holders.

X. Auditors

First Auditors: The first auditors of the company had to be appointed by the Board within 30 days of incorporation of the company and on failure to do, by the members at the general meeting within 90 days.

Term of appointment: The auditors to be appointed at first AGM shall hold office till conclusion of the sixth AGM and thereafter till conclusion of every sixth AGM. Further, no listed company (and other prescribed companies) shall appoint or reappoint any individual as auditor for a term exceeding 5 consecutive years and any firm as auditor for more than 2 terms of five consecutive years. As per the Draft Rules, the prescribed companies are companies having paid up share capital of INR 100 Crore or more or net worth of INR 100 Crore or more, whichever is higher or; companies which have outstanding loans or borrowings or debentures or deposits (aggregate) exceeding INR 200 Crore.

Restriction on re-appointment: On completion of the term, an individual or an audit firm shall not be eligible for re-appointment for a further period of 5 years. In the event, other audit firm(s) have common partner(s) as the appointed audit firm, such other firms(s) shall also not be eligible for appointment for a period of 5 years from the completion of term of such firm whose term is completed.

Intimation of appointment: The company is now required to intimate to the ROC within 15 days of the meeting at which appointment of the auditor is made, the fact of its appointment. Earlier the auditor was required to inform the ROC within 30 days of his acceptance to act as auditor.

Resignation: An auditor who has resigned from his office is now required to file a statement with the company and the ROC within 30 days of resignation, stating reasons for resignation.

Removal: The Tribunal may *suo motu* or an application by the Central Government or any other person concerned order removal/change of an auditor if it is established that such auditor has acted in a fraudulent manner or abetted any fraud, directly or indirectly.

Non-Audit Services: The non-audit services that the auditors are not permitted to provide to the company (directly or indirectly) or to its holding/its subsidiary are 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 services; and any other kind of services as may be prescribed.

Internal Audit: Certain classes of companies may be prescribed to appoint an internal auditor, who shall either be a CA or a cost accountant or such other professional as the Board may decide. The Draft Rules provide that every listed company, every public company having paid up share capital of INR 10 Crore or more and every other public company which has any outstanding loans or borrowings from banks or public financial institutions exceeding INR 25 Crore or which has accepted deposits of INR 25 Crore or more at any point of time during the last financial shall be required to appoint internal auditors, who may also be an employee of the company.

XI. Foreign Companies

New definition includes agent and e-commerce: "Foreign company" has been re-defined so as to include within its ambit any company or body corporate incorporated outside India which—

(a) has a place of business in India whether by itself or *through an agent,* physically or *through electronic mode;* and

(b) conducts any business activity in India in any other manner.

Foreign companies owned by Indians: Further, where not less than 50% of the paid-up share capital (equity or preference) of a foreign company is held by citizens or companies or bodies corporate of India, such foreign company shall comply with the provisions of Chapter XXII and other prescribed provisions of the 2013 Act, with regard to the business carried on by it in India as if it were a company incorporated in India. Consequently, foreign companies operating in India through agents or through electronic mode or foreign companies of which 50% shares are held by Indians (citizens or bodies corporate) shall also have to register in India and file its annual accounts with the ROC.

XII. Mergers and Acquisitions

Merger with foreign companies: The 2013 Act now allows mergers of Indian companies with such foreign companies that are domiciled in the jurisdictions notified by the Government. The approval of the RBI shall be a pre-requisite.

Fast track mergers: The 2013 Act also provides for fast-track mergers of small companies and mergers of holding companies and their wholly owned subsidiaries, which may be effected without approaching the Tribunal. However it is mandated that such mergers be approved by 90% of each class of shareholders and creditors instead of the requirement of 75% majority as in the case of companies other than the ones covered in this category. Further, the directors are required to file 'Declaration of Solvency' with the Registrar of Companies. Also required is an advance notice to ROC and Official Liquidators (OL), who may give their comments on the scheme within 30 days. The comments and concerns of ROC & OL should be addressed by companies before seeking approvals from shareholders and creditors for the scheme.

Notice to statutory authorities: One major incorporation in the 2013 Act is that notice of meeting to approve a merger/amalgamation has to be sent to the Central Government, Income Tax Department, SEBI, RBI, ROC, CCI, Official Liquidator, respective Stock Exchanges and such other regulators as maybe prescribed for seeking their representations, if any, within 30 days from the date of receipt of such notice. There is a general concern that this requirement may delay approvals for mergers when there is a dispute between the company and any statutory authority.

Meeting of creditors: The meeting of creditors can be dispensed with if creditors holding 90% or more value of total debt of the company approve the scheme by way of an affidavit.

Dissenting shareholders: The 2013 Act provides that only persons holding 10% or more of the shareholding; or having 5% or more of the total outstanding debt can object to a merger/amalgamation.

Acquisition of minority: The 2013 Act also empowers the transferee company to compulsorily acquire shares of the dissenting shareholders where the scheme has been approved by 90% (in value) of shareholders whose transfer is involved. The 2013 Act also enables the acquirer of shares to notify the company of its intention to acquire minority stake, in the event of such acquirer becoming holder of 90% of the issued share capital of the transferee company. The Act provides for acquisition of shares of minority shareholders without their consent when an acquirer owns 90% of the voting strength of a company; likewise there is an obligation on the acquirer to make an offer at the highest negotiated price to acquire the shares of the balance shareholders once it acquires at least 90% of the shareholding.

XIII. Class Action Suits

The 2013 Act empowers the members, depositors or any class of them (a prescribed minimum) to file an application with the Tribunal for adequate remedy if they are of the opinion that the management or affairs of any company are being conducted in a manner prejudicial to the interests of the company, its members or depositors.

As per the Draft Rules and the 2013 Act, the requisite number of minimum members for this purpose shall be as follows:

(a) 100 or more for companies having share capital or 10% or more of the total members, whichever is less; or members holding 10% or more of the issued share capital;

(b) one-fifth or more of total members in case of company not having share capital.

The minimum number of depositors is 100 or 10% of total number of depositors, whichever is less.

XIV. Removal of name from Register of Companies

The ROC may remove the name of the company from the Register of Companies in the following cases:

(a) Failure of a company to commence business within 1 year from incorporation; or

(b) Failure of subscribers to pay the subscription due from them within 180 days of incorporation and declaration to this effect not being filed; or

(c) Failure of a company not carrying on any commercial activity for 2 preceding financial years to file for obtaining status of dormant company.

A company can on its own motion also file for removal of its name from the register, on satisfaction of certain conditions as prescribed.

XV. Winding Up

Modes of Winding up: The 2013 Act provides for only 2 modes of winding up – (i) voluntary winding up and (ii) winding up by the Tribunal.

Company Liquidator: In case of a voluntary winding up, the liquidator to be appointed by the company has to be appointed from a panel of professionals to be maintained by the Government. In case of winding up by the Tribunal, the liquidator shall be appointed by the Tribunal.

Summary Procedure: Where the assets of the company do not exceed INR 1 Crore and it belongs to the prescribed class of companies, a summary procedure for winding up may be followed for winding up.