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THE COMPANIES (AMENDMENT) ACT, 2017



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PREFACE

Dear Reader,

The Companies (Amendment) Act, 2017, ("**Amendment Act**") has received the President's assent on 3 January 2018, after receiving the Rajya Sabha's approval on 19 December 2017, and Lok Sabha's approval on 27 July 2017.

Highlighted below are the key features of the Amendment Act and changes that the Amendment Act proposed to bring in the Companies Act, 2013 ("**Act**").

We believe that a reader of this Quick Guide would be benefitted with the uncomplicated yet holistic analysis of the key changes proposed in the Amendment Act.

We do hope this makes for an interesting read. We respect every reader's opinion and your feedback is welcome.

ELP Corporate & Commercial Team



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THE COMPANIES (AMENDMENT) ACT, 2017

1. *Enforcement of the Amendment Act.*

Though the Amendment Act has received the President's assent, its provisions have not come into force yet. The Central Government has been empowered to enforce the Amendment Act and/or different provisions of the Amendment Act on different dates. Therefore, the analysis in this Quick Guide has been done as per the text of the Amendment Act, and the changes so proposed will come into effect once the respective provisions are notified.

2. *Private Placement*

The Amendment Act has proposed to substitute a completely new section 42, and following are the key changes to be noted:

A. No right of renunciation.

Once the new section 42 is notified, the private placement offer letters cannot provide for a right of renunciation. There is no such prohibition under the extant section 42.

B. More than one offers allowed at the same time.

Extant section 42 prohibits fresh offer or invitation unless the allotments with respect to any offer or invitation made earlier has been completed or that offer or invitation has been withdrawn or abandoned by the company.

The new section 42 will dilute this prohibition and contemplates more than one issue of securities to such class of identified persons as may be prescribed, however, such offer cannot exceed maximum number of persons to whom an offer can be made (which is 200 as on date). This move will come as a breather for companies intending to raise moneys from different investors around the same time. However, the Central Government will prescribe the class of persons to whom such offer can be made.

C. Bar on utilisation of application money.

The application money cannot be utilised by the company unless a return of allotment has been filed with the Registrar of Companies. There is no such requirement under the extant section 42.

D. Lesser time to file return of allotment and penalty imposed.

The time period for filing the return of allotment in form PAS-3 has been proposed to be reduced to 15 days from the date of allotment as compared to extant 30 days. For failure to file the return of allotment in the period mentioned above, the company, its promoters and directors shall be liable to a penalty for each default of INR 1,000 for each day during which such default continues but not exceeding INR 25,00,000.

E. Penalty capped at INR 2 Crores for failure to comply with section 42.

For making an offer or accepting monies in contravention of section 42 by a company, the penalty may extend to the amount raised through the private placement or INR 2 Crore, whichever is lower. Extant section 42 provided the penalty to be the higher of, the amount involved in the offer or invitation or INR 2 Crores.

F. Requirement of keeping record of private placement offer letter/filing with ROC removed.

The Amendment Act has proposed that the requirement of keeping a record of the private placement offer letters is not required and companies will be no more required to file the same with the Registrar of Companies. This may result in hindrance in the due diligence process in relation to the title of the securities.

3. Issuance of shares at discount to creditors | Vis-à-vis resolution plan under the Insolvency and Bankruptcy Code, 2016 and debt restructuring schemes by RBI.

As per extant section 53 of the Act, issuance of shares at a discount is prohibited in totality. However, this prohibition has been proposed to be relaxed in favour of issuance of shares at discount when company's debt is converted into shares in pursuance of a statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

It is interesting to note that the phrase "statutory resolution plan" has not been defined under the Amendment Act, and it would have been helpful if an explanation was provided for the same to understand whether such statutory resolution plan will encompass the resolution plans approved by the National Company Law Tribunal (NCLT) in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). However, in view of what Insolvency and Bankruptcy Board of India (IBBI) and the Ministry of Corporate Affairs have said in their press releases dated 5 January 2018 ([available here](#)) and 8 January 2018 ([available here](#)), respectively, it seems that intention of the proposed amendment in section 53 is to cover resolution plans approved under IBC.

Following is the relevant extract from the press release:

"Section 53 of the Companies Act, 2013 prohibited issuance of shares at a discount. The Amendment Act now allows companies to issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan such as resolution plan under the Code or debt restructuring scheme."

4. Preferential allotment mapped with requirements of private placement and Chapter III.

The Amendment Act has proposed that the issuance of shares on preferential basis under section 62(1)(c) would specifically require compliance with the provisions of Chapter III of the Act which includes requirements of section 42 (private placement) of the Act.

5. Rights issue / Notice can be sent by courier and other delivery modes.

It is proposed that the notice for rights issue can also be sent by way of courier or any other mode having proof of delivery. As per the extant provisions, the delivery can be made only by registered post or speed post or through electronic mode.

6. Restriction on voting rights of member / Linked with restrictions placed for related party transactions

Language in section 47 of the Act has been proposed to be modified to provide that voting rights of a member to vote on every resolution placed before the company is also restricted as per the ground provided under section 188 of the Act which deals with related party transactions.

7. Issuance of sweat equity shares / Bar of 1 year from the commencement of business removed / Move aimed to help start-up retain talent.

As per the extant provisions, a company cannot issue sweat equity shares for a period of one (1) year since the date on which the company has commenced business. This restriction has been proposed to be removed by the Amendment Act, and once notified, will enable the start-up companies to incentivise talent pool by issuance of sweat equity shares at any time.

8. Emphasis on identifying beneficial owners / New concept of “significant beneficial owner” and register of such owners / Attempt to lift the corporate veil to identify real owners.

A. What constitutes beneficial interest in shares.

As per extant section 89 of the Act, if the name of a person is entered in the register of members of a company as the holder of shares in that company and if he does not hold the beneficial interest in such shares, such person is required to make a declaration to the company specifying the name and other particulars of the person who holds the beneficial interest in such shares.

This section however does not clarify what constitutes beneficial interest in shares. In view of ambiguities existing around this provision, the Amendment Act has proposed to explain that beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to—

- i. exercise or cause to be exercised any or all of the rights attached to such share; or
- ii. receive or participate in any dividend or other distribution in respect of such share.

For example, the above explanation will cover the voting arrangements entered into between various parties.

The newly inserted section 90 proposed by the Amendment Act deals with the concept of significant beneficial ownership and the obligations around such concept. It provides as follows:

B. Who is a “significant beneficial owner” (SBO).

It means every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than 25% or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in section 2(27) (*which defines the term “control”*), over the company.

Since the aforementioned definition has not been restricted to Indian citizens, intent seems that it will include foreign citizens also.

C. Obligations and liabilities of an individual SBO.

- i. Every individual who is a SBO in relation to a company is required to declare his beneficial interest to the company, however, the Central Government is empowered to exempt certain class of person from making such declaration.
- ii. It will be interesting to see whether the exemption provided under extant section 89 to a trust which is created, to set up a mutual fund or venture capital fund or such other fund as may be approved by the Securities and Exchange Board of India, will be made available for section 90 as well;
- iii. Failure by an individual who is a SBO to make a declaration as required above will result into fine which shall not be less than Rs. 1 Lakh but which may extend to Rs. 10 Lakh and where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 for every day after the first during which the failure continues;
- iv. Further, if any person wilfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he shall be liable to action under section 447, which attracts penalty for commission of fraud.

D. Rights, obligations and liabilities of a company vis-à-vis SBO

- i. Companies will be obligated to maintain register of interest declared by individuals who are SBOs, and are required to file the prescribed details with the Registrar of Companies;
- ii. The section also obligates the company to question any person (whether or not such person is a member) about his status as a SBO or his knowledge of a SBO where the company knows or has reasonable cause to believe so, and any such person is obligated to reply to the same within thirty (30) days of such notice given by the company. Failure by such person to give the information to the company or to give unsatisfactory information could result in the company approaching the NCLT to require suspension of rights related to the shares in question. This provision can be potentially misused by persons in control of the company.
- iii. If a company has failed to maintain register or to file the information with the Registrar of Companies or denies inspection of the register to a member, the company and every officer of the company who is in default will be punishable with fine which shall not be less than Rs. 10 Lakhs but which may extend to Rs. 50 Lakhs and where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 for every day after the first during which the failure continues.

E. Central Government empowered to inspect / investigate to determine true persons

In view of the aforementioned clarity and concept of SBO, the Central Government is also empowered to investigate into the affairs of a company to determine true owners.

9. Associate, Subsidiary, Holding Company | Scope clarified | Test vis-à-vis total voting power introduced as compared to total share capital.

The Amendment Act has proposed to clarify the scope of associate companies, holding companies and subsidiary companies, and such clarification will result into adducing clarity to who all are related parties (as per section 2(76)), which all entities need to consolidate their financial statements (as per section 134), etc.

A. Associate Company

As per the extant provisions of the Act, “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 the company having such influence and includes a joint venture company. Further, the explanation provides that the expression “significant influence” means control of at least 20% of total share capital, or of business decisions under an agreement.

As per the Amendment Act, the expression “significant influence” has been clarified further, and the expression “joint venture” too has been defined.

- i. As per the changes proposed, for significant influence, the test is now control of at least 20% of total voting power (instead of total share capital), or control of or participation in business decisions under an agreement;
- ii. The expression “joint venture” means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

B. Holding Company

As per the extant provisions of the Act, the way the expression “holding company” is defined, it does not seem to include the foreign entities, as it starts with “means a company”, and the term “company” as per the Act means companies incorporated under the Act or under any previous company law. As foreign entities are also holding companies, such ambiguity has been proposed to be removed by providing an explanation in section 2(46) to say that the term “company” includes any body corporate.

C. Subsidiary Company

As per the extant definition of the expression “subsidiary company”, one of the test to determine subsidiary status of a company is exercise or control of more than one-half of the total share capital either alone or together with one or more of subsidiary companies. However, this test takes into its consideration even the preference share capital as the term used is total share capital.

In order to remove the aforementioned ambiguity, the expression “total share capital” is proposed to be replaced with the expression “total voting power”, since the equity share capital should be the basis for determining holding/subsidiary status.

10. Acceptance of loan by companies | Borrowing limits enhanced | Special resolution requirement relaxed.

As per the extant provisions, there is a requirement to pass special resolution for a company to borrow money, if the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its (i) paid-up share capital, and (ii) free reserves.

However, such norm has been eased with special resolution requirement only if money to be borrowed exceed aggregate of its (i) paid-up share capital, (ii) free reserves, and (iii) securities premium account. Therefore, the company can avail higher borrowing limits without passing a special resolution.

11. Advancement of loans etc. to directors / interested persons | Alleged correlation between section 185 and section 186 removed | Allowed for certain categories of interested person | Penalties added for officers in default.

A new section 185 is proposed to be inserted by the Amendment Act, and following are the notable changes:

- i. Extant section 185 begins with the phrase ‘*Save as otherwise provided in this Act*’, and due to this, an interpretation has existed that what is not permitted under section 185 can be done under section 186 of the Act which section also deals with advancement of loans by companies. However, the Amendment Act has proposed to remove this phrase, and it seems that what is not permitted under section 185 will not be allowed to be done under section 186 either.
- ii. Extant section 185 imposes an embargo on advancement of any loan, or on giving any guarantee or on providing any security by a company to any person in whom any of the director of the company is interested, except in cases of wholly-owned subsidiary / subsidiary / companies in the business of lending / managing director / whole-time director. These exceptions available under the extant section 185 have been retained under the newly proposed section 185 as well, however, the prohibitions have been relaxed in terms of what is provided below.
- iii. The Amendment Act has proposed to relax the above prohibition and has proposed to permit a company to advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by following persons if a special resolution is passed and loans are utilised by borrowing company for its principal business activities:
 - (a) any private company of which any such director is a director or member;
 - (b) any body corporate at a general meeting of which not less than 25% of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
 - (c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors,

of the lending company.

However, the aforementioned relaxation in (iii) above is not available for following persons:

- (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
- (b) any firm in which any such director or relative is a partner.

Extant section 185 does not impose any penalty on officer of the company who is in default, and had imposed penalties against the company and the directors. Now, the new section 185 has specifically provided that every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than Rs. 5 Lakh but which may extend to Rs. 25 Lakhs. Therefore, officer in default of both lending as well as borrowing entity are amenable to these penalties.

12. Loans and investment by companies | Meaning explained for principal business as acquisition of securities | Exemption extended for rights issues by foreign entities.

The Amendment Act has proposed to replace the extant section 186(11) with a new text and proposes to clarify the circumstances for what constitutes principal business as acquisition of securities, as section 186 (except layering restrictions under section 186(1)) is exempted for non-banking financial companies (**NBFCs**) whose principal business is acquisition of securities or for investment companies (which are essentially those companies whose principal business is the acquisition of shares, debentures or other securities).

As per the Amendment Act a company is said to have its principal business as acquisition of securities, if following tests are fulfilled:

- (a) if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or
- (b) if its income derived from investment business constitutes not less than 50% as a proportion of its gross income.

This is a welcome move and will extend clarity on applicability of exceptions under section 186.

The exceptions under section 186(11) are also proposed to be extended to investments in shares allotted as part of rights issues made by body corporates (companies incorporated outside India).

13. Related parties – scope expanded | Related party transactions | Related parties of promoters and relatives can vote | Unauthorised related party transactions made voidable by shareholders and audit committee.

A. Related parties – scope expanded to include foreign body corporates and investing / ventures company

As per the extant definition of section 2(76), a body corporate incorporated outside India could not be treated as a related party if such party was:

- 1) a holding, subsidiary or an associate company of the company in question; or
- 2) a subsidiary of a holding company to which the company in question is also a subsidiary;
- 3) since the contemplation was that one of the above should be an Indian company.

This has been proposed to be modified by the Amendment Act to provide that aforementioned entities will also be treated as related parties even if they are not Indian companies.

Further, the Amendment Act has proposed to include body corporates within the scope of related parties if they are investing companies or the venturer of the company in question. Such entities will include body corporates whose investment in the company in question would result in the company becoming an associate company of the body corporate.

B. Related parties of promoters and relatives can vote

Extant section 188 imposes a bar on a member of the company to not vote on resolution requiring members approval for any contract or arrangement which may be entered into by the company, if such member is a related party. Such restriction has been creating practical difficulties in cases of group entities and promoter controlled entities.

To remove this difficulty, now the Amendment Act has proposed that the aforementioned prohibition will not be applicable to a company in which 90% or more members, in number, are relatives of promoters or are related parties.

C. Unauthorised / unratified related party transactions made voidable by shareholders / audit committee

- (a) *Voidable by shareholders.* Though extant section 188 contemplates ratification of an unauthorised related party transactions by the shareholders, it did not provide for calling such transactions voidable at the option of shareholders. It only provides that unauthorised related party transactions / unratified related party transactions could only be called voidable at the instance of board of directors. This disconnect has been proposed to be removed under the Amendment Act, and has rightfully, allowed the shareholders also to call an unauthorised / unratified transaction voidable.
- (b) *Voidable by audit committee.* The audit committees of listed public companies are also empowered to exercise the option of calling certain related party transactions as voidable. Such right can be exercised in case any transaction involving any amount not exceeding Rs. 1 Crore is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three (3) months from the date of the transaction.

14. General Meetings: Relaxations for place of meetings | Requirements changed for calling of general meetings at shorter notice.

A. AGMs at any place in India for certain companies

The Amendment Act has proposed that an annual general meetings (AGMs) of an unlisted company can be held at any place in India if consent is given in writing or by electronic mode by all the members in advance.

Notably, the term “unlisted company” is not defined by the Amendment Act, however, the term “listed company” is defined in the Act to mean a company which has any of its securities listed on any recognised stock exchange. Therefore, taking a clue from this, it seems that aforementioned relaxation will not be available to a private company which has its debt securities listed on a recognised stock exchange.

B. EGMs allowed to be held outside India for certain companies

The Amendment Act has proposed that that an extraordinary general meeting (EGM) of a wholly owned subsidiary of a company incorporated outside India, can be held outside India. As per the extant provisions, there is no such recourse available.

C. Requirements modified for calling of AGMs / EGMs at shorter notice

- i. Unlike an AGM, where in order to call a meeting at shorter notice, consent of not less than 95% of the members entitled to vote at such meeting, is required as per the extant provisions, different treatment has been proposed by the Amendment Act to call for an EGM at shorter notice.
- ii. It provides that to call for an EGM at shorter notice, in the case of a company having share capital, if consent is given by members of the company:
 - (a) holding majority in number of members entitled to vote; **and**
 - (b) who represent not less than 95% of such part of the paid-up share capital of the company as gives a right to vote at the meeting.
- iii. Interestingly, the Amendment Act has envisaged that, at an AGM / EGM, resolutions may be taken up which may affect a member of a company who is entitled to vote only on some resolution(s) to be moved at a meeting and not on the others, and therefore, the Amendment Act has proposed that such members shall be taken into account for the purposes of calculating the thresholds for calling an AGM / EGM at shorter notice. However, such counting will be done only in respect of the resolution(s) where they are entitled to vote and not in respect of the other resolution(s) where they are not so entitled.
- iv. Further, it also raises few important questions in case of a preference shareholder about the instances wherein he is entitled to vote, especially in view of the language used in section 47 which provides that:

“Every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and...”.

15. Meetings of board of directors | Matters prohibited by video-conferencing allowed if physical quorum is present.

A. Prohibited matters by video conferencing allowed if physical quorum is present

On one hand, section 174 of the Act provides that participation of the directors by video conferencing or by other audio-visual means will be counted for the purposes of quorum, and on the other hand, section 173 of the Act, provides that certain matters cannot be dealt with in a meeting through video conferencing or other audio-visual means, for example, approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

The possibility of dealing with such prohibited matters is now made possible by the Amendment Act proposing that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio-visual means in such meeting on any such matter. The move will help the companies which have directors across the globe to take up such matters as long as physical quorum is present, and will save up time and cost for discussing such matters.

16. Key managerial personnel (KMPs) - Another class of personnel added | Appointment / Remuneration of MD/ WTDs / Managers / Directors - Lesser Central Government's interference | Creditor's prior approval required.

A. Another class of personnel added to KMPs

As per the extant definition, "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.

Now, the Amendment Act, also proposes to include in KMP's ambit such other officer, not more than one level below the directors who is in whole-time employment, designated as KMP by the board of directors. Such inclusion will help the companies to identify KMPs beyond the earlier class of personnel mentioned, for the purposes of assigning responsibilities under the Act.

A. Existing applications pending before Central Government for seeking approvals vis-à-vis appointments and remuneration of MDs/WTDs/Managers to abate | Need shareholders' blessings

One of the key changes that the Amendment Act proposes to bring is minimal intervention by the Central Government in cases of appointment and remuneration of MDs/WTDs/Managers. Also, the Amendment Act aims to give more power to the general body of shareholders for such appointments and remuneration.

In light of the aforementioned spirit, the Amendment Act has proposed that once the Amendment Act is enforced, any pending applications made to the Central Government under the erstwhile Section 197 will abate,

and the company will then be required to obtain shareholders' approval within one (1) year of such commencement under the modified provisions.

B. MDs/ WTDs/ Manager above the age of 70 years can be appointed without passing a special resolution | Central Government given discretion in such matters

Extant section 196 of the Act has imposed a prohibition on companies to appoint or continue the employment of any person as managing director, whole-time director or manager who has attained the age of 70 years, except if such appointment is approved by a special resolution.

Now as per the Amendment Act, even if such special resolution could not be obtained, such person can still be appointed provided following two conditions are fulfilled:

- i. Ordinary resolution test. During the process of obtaining approval vide special resolution, if votes cast in favour of the motion exceed the votes, cast against the motion; and
- ii. Central Government to approve. The board of directors is required to make an application to the Central Government and the Central Government is of the opinion that such appointment is most beneficial to the company.

Though the Amendment Act has proposed to relax the requirement of special resolution, the parameters that will be used by the Central Government to arrive at its conclusion regarding the appointment being most beneficial to the company, are not clear.

Also, it will be interesting to see if such decision of the Central Government will be subject to scrutiny, either by NCLT or some other authority.

C. Central Government's approval required for appointment if not in compliance with Part I of Schedule V.

Extant section 196 (4) of the Act provides that appointment / terms and conditions of appointment / remuneration, of a managing director, whole-time director or manager will require the Central Government's approval where such appointment is in variance to the conditions specified in Schedule V of the Act.

Notably, Schedule V of the Act is divided into four parts: (i) Part I deals with conditions to be fulfilled for appointment without requiring the Central Government's approval, (ii) Part II deals with remuneration in cases company has profits, or has no profit or inadequate profit, (iii) Part III deals with requirements of certification in compliance with Schedule V and of passing resolution at shareholders' meeting for appointments, and (iv) Part IV deals with the Central Government's power to exempt certain companies from the provisions of Schedule V.

Now the Amendment Act has instead proposed that appointment / terms and conditions of appointment / remuneration, of a managing director, whole-time director or manager will require the Central Government's approval where such appointment is in variance to the conditions specified in Part I of Schedule V of the Act.

The intent here seems that the Central Government's approval is required only in cases where Part I of Schedule V is not followed, however, Part II of Schedule V also covers situation where the Central Government's approval is not required for certain actions. Also, the opening of section 196(4) still reads as "*Subject to the provisions of*

section 197 and Schedule V,” therefore, it needs to be seen clearly whether the intent is supported by the language changes made in section 196(4) of the Act.

D. Approvals vis-à-vis remuneration under section 197 of the Act

- i. Remuneration in excess of 11%. It is proposed by the Amendment Act that the companies in their general meeting may, without the approval of the Central Government, authorise the payment of remuneration exceeding 11% of the net profits of the company, subject to the provisions of Schedule V of the Act. As per the extant provisions, such act requires the Central Government’s approval.
- ii. Increase in individual caps of remuneration to directors / managers now needs special resolution. As per the extant provisions, for remuneration exceeding the following limits, an ordinary resolution is sufficient, however, as per the Amendment Act, the same will need a special resolution. This seems to indicate that the companies which are making profits need to involve the shareholders in such process.

Remuneration payable to	Limit
Any one MD; or WTD or manager	Not exceeding 5% of the net profits of the company
More than one MD; or WTD or manager	Not exceeding 10% of the net profits of the company to all such directors and manager
Director, who is neither MD nor WTD	<ul style="list-style-type: none"> • 1% of the net profits of the company, if there is a MD or WTD or manager; or • 3% of the net profits in any other case

iii. Only shareholders’ resolution not sufficient | Creditor’s prior approval needed

The Amendment Act has proposed that any remuneration towards directors / managers will need creditors prior approval, and merely a shareholders’ resolution is not sufficient. Though as per the extant provisions, there is a similar requirement in cases of remuneration payable by companies having no profit or inadequate profit without Central Government approval, however, this requirement is proposed to be introduced by the Amendment Act for any remuneration payable in cases where shareholders’ approval is required.

Newly inserted requirement provides that if a company has defaulted in payment of dues to any:

- bank; or
- public financial institution; or
- non-convertible debenture holders; or
- other secured creditor,

then the prior approval of such bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, will be required to be obtained by the company before obtaining the approval in the general meeting.

iv. Remuneration capped for companies having no profit or inadequate profit | Provision of the Central Government’s approval removed

Extant section 196(4) of the Act has permitted the companies which have no profit or inadequate profit to exceed the remuneration payable as per the provisions of Schedule V after having obtained the Central Government's approval.

The Amendment Act has proposed that the provision of Central Government's approval should be omitted, and seems that such change may result into such companies left with no option but to stick to the payment terms and caps provided in Schedule V of the Act. Further, the Central Government will have no role in determining the remuneration to directors / managers for such companies.

v. Refund of money by directors | Time period imposed | No Central Government approval needed for waiver | Creditor's prior approval needed for waiver

There is no time-period provided for a director to refund sums received by him in excess of the limits prescribed under section 197. The Amendment Act has proposed to impose a two (2) year timelines or such lesser period as may be allowed by the company, for refund of such money.

Further, as per the extant provisions, the companies can waive such refund provided Central Government has permitted such waiver, now the Amendment Act has proposed to allow this waiver without approaching the Central Government by:

- passing a special resolution to this effect; and
- obtaining prior approval of the creditors as mentioned in (iii) above.

17. Directors | Period of stay relaxed for resident directors | Independent directors can have pecuniary relationships | Pecuniary transactions of relatives of independent directors specified | Regime change for disqualification and vacation of directors | Existing director cannot act as an alternate director | Requirement of filing DIR-11 made optional for resigning directors.

A. Resident Director | Period of stay relaxed

In view of the Companies Law Committee's recommendation that it would be more appropriate that the residence requirement is made applicable for the current financial year rather than previous calendar year, the Amendment Act has proposed that every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two (182) days during the financial year.

The requirement of period of resident director for newly incorporated companies will accordingly stand reduced proportionately at the end of the financial year in which such company is incorporated.

The above move will help the companies to fulfil the residence requirement, as for some companies it had become practically difficult to appoint directors who had stayed in India for one hundred and eighty-two (182) days in previous calendar year, or they were appointing directors who were not connected with the business of the company.

B. Independent Directors | Pecuniary relationship with company, and its affiliates to not act as a ground of ineligibility to qualify as an independent director

The Amendment Act has recognised that a person may have genuine pecuniary transactions with a company and such transactions should not render such a person ineligible for appointment as an independent director on the board of such company.

Keeping in mind the same, the test of materiality has been proposed to be introduced, and the extant provisions of the Act wherein any pecuniary relationship of a person with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year, would render such person for appointment as an independent director on the board of such company, will be done away with.

The materiality test provides that remuneration as such director or having transaction not exceeding 10% of his total income or such amount as may be prescribed, will not disqualify such director's appointment as an independent director.

C. Independent Directors | Stricter scrutiny for pecuniary transactions of relatives of independent director | Relative's employment with company / affiliates does not act as disqualification

- (a) The Amendment Act has proposed to clarify the nature of transactions of relatives of a person which will render him ineligible for appointment as an independent director. The extant text results into disqualification if a person's relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to 2% or more of its gross turnover or total income or Rs. 50 Lakhs or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year.

The Amendment Act has clarified the transactions which will fall within the purview of the aforementioned transactions, as where any relative:

- (i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two (2) immediately preceding financial years or during the current financial year: Provided that the relative may hold security or interest in the company of face value not exceeding Rs. 50 Lakhs or 2% of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;
- (ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two (2) immediately preceding financial years or during the current financial year;
- (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two (2) immediately preceding financial years or during the current financial year; or

- (iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii) above.
- (b) Further as per the proposal in the Amendment Act, merely because a relative was an employee of the company or its holding, subsidiary or associate company in any of the three (3) financial years immediately preceding the financial year in which such director's relative is proposed to be appointed, will not act as a ground for disqualification for appointment as an independent director.

D. Disqualification from appointment as, and vacation of office of director

(a) No disqualification for 6 months for a newly appointed director in defaulting companies

Section 164(2) of the Act disqualifies a director from being appointed as a director if such director is or has been a director of a company which:

- (i) has not filed financial statements or annual returns for any continuous period of three (3) financial years; or
- (ii) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one (1) year or more.

The Amendment Act has proposed that where a person is appointed as a director of a company which is in default as above, such director will not incur the disqualification for a period of six (6) months from the date of his appointment.

(b) Vacation of office as director in all companies but the defaulting company

The Amendment Act has proposed to clarify that if a director incurs disqualification as a result of the grounds mentioned in Section 164(2), then such director will not vacate his office as director in the defaulting company, however, he will stand to have vacated his office in all other companies. This amendment is proposed to handle a situation where the office of all the directors in a Board would become vacant where they are disqualified under Section 164(2), and a new person could not be appointed as a director as they would also attract such a disqualification.

(c) Vacation of offices in cases of orders passed by judicial bodies | Breather given as against immediate vacation | However, no relaxation in cases of disqualifications

As per the Act a director vacates his office as director if:

- (i) he becomes disqualified by an order of a court or the Tribunal;
- (ii) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six (6) months:

whether or not if he has filed an appeal against the order of such court.

The Amendment Act proposes to give breather for immediate vacation of office in such cases, and proposes

that the office will not be vacated by the director:

- (i) for thirty (30) days from the date of conviction or order of disqualification;
- (ii) where an appeal or petition is preferred within thirty (30) days as aforesaid against the conviction resulting in sentence or order, until expiry of seven (7) days from the date on which such appeal or petition is disposed of; or
- (iii) where any further appeal or petition is preferred against order or sentence within seven (7) days, until such further appeal or petition is disposed of.

Interestingly, above breather was available in cases of a director incurring disqualification for similar grounds as mentioned above (including an additional ground of violation of related party transactions), however, such relaxation has been proposed to be removed, and a director will stand disqualified, whether or not appeal or petition has been filed against the order of conviction or disqualification.

E. Resigning Director | DIR-11 made optional

Section 168 required a resigning director to file Form DIR-11 with the Registrar of Companies within thirty (30) days of such resignation, however, this requirement is proposed to be made optional.

F. Existing director in a company cannot act as alternate director

The extant provisions of the Act do not prohibit an existing director in a company to act as an alternate director for any other director in the company. Due to this, the same individual acting as a director and alternate director for some other director of the same company lead to conflict of interest and also ambiguity in the calculation of quorum. Accordingly, the Amendment Act has proposed to remove this conflicting position and has provided that a director holding directorship in the same company cannot act as an alternate director for any other director in the same company.

G. Private companies to have same rights to fill casual vacancy as public companies

As per the extant provisions of the Act, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board. This was available only with public companies. Now the Amendment Act proposes to provide the same ability to even private companies.

18. Deposits: Relaxations and stringent approach at the same time.

H. More funds to be credited to deposit repayment reserve account.

The Amendment Act has proposed that the deposit repayment reserve account is required to be funded with depositing such sum not less than 20% of the amount of its deposits maturing during the following financial year. This account has to be funded with such amounts on or before the 30th day of April each year.

As per the extant provisions, the requirement is to fund the account with 15% of the amount of its deposits maturing during a financial year and the financial year next following.

I. Requirement of deposit insurance removed.

The Amendment Act has proposed to remove the requirement of creating deposit insurance by companies accepting deposits as per the provisions of the Act. Notably, the Ministry of Corporate Affairs had time and again extended the requirement of complying with this provision, the last being 31 March 2018.

J. Acceptance of deposits by defaulting companies.

As per the extant provisions, there is a complete prohibition for acceptance of deposits by companies who had defaulted in repayment of deposits accepted either before or after the commencement of the Act or payment of interest on such deposits.

As per the Amendment Act, such bar has been proposed to be relaxed in favour of those companies which had defaulted but made good the default and a period of five (5) years had lapsed since the date of making good the default.

K. Extension of time for repayment of deposits accepted under the Companies Act, 1956.

The Amendment Act has proposed that the companies which had accepted deposit before 1 April 2014, will be allowed to repay within three (3) years from 1 April 2014 or on or before expiry of the period for which the deposits were accepted, whichever is earlier. As per the extant provisions, the companies have only one (1) year time period for such repayment.

L. Penalty for non-compliance with provisions related to deposit acceptance.

The Amendment Act has proposed lower threshold of monetary penalty against the company, and stricter penalty against officer in default of a company, for accepting or inviting or allowing or causing any other person to accept or invite on its behalf any deposit in contravention of the manner or the conditions prescribed under section 73 or section 76 or rules made thereunder or if a company fails to repay the deposit or part thereof or any interest due thereon within the time specified under section 73 or section 76 or rules made thereunder or such further time as may be allowed by the NCLT under section 73. The proposed revised penalties are as follows:

- (a) *Against company.* As per the extant provisions, a company is punishable with fine which shall not be less than Rs. 1 Crore but which may extend to Rs. 10 Crores, in addition to the payment of the amount of deposit or part thereof and the interest due. As per the Amendment Act, the *minima* of Rs. 1 Crore

has been proposed to be changed to Rs. 1 Crore or twice the amount of deposit accepted by the company, whichever is lower.

- (b) *Against the officers in default.* As per the extant provisions, every officer of the company who is in default is punishable with imprisonment which may extend to seven (7) years or with fine which shall not be less than Rs. 25 Lakhs but which may extend to Rs. 2 Crores, or with both. The Amendment Act has proposed that the option between the aforementioned penalties will no longer be there, and an officer who is in default will be punishable with imprisonment as well as fine.

19. Debentures and charges | Exemption from debentures and registering charges.

A. Exemption from registration of charges.

The Amendment Act has proposed that the requirement of registration of charges with the Registrar of Companies, will be exempted for such charges as may be prescribed in consultation with the Reserve Bank of India.

F. Exemption from debentures.

It is proposed by the Amendment Act that following instruments will not be treated as debentures under the Act, hence compliance with the provisions related to issuance of debenture will not be required to be followed (e.g. section 71) in case of:

- (a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934, that is, derivatives, money market instruments which include call or notice money, term money, repo, reverse repo, certificate of deposit, commercial usance bill, commercial paper such other debt instrument of original or initial maturity up to one (1) year as the Reserve Bank of India may specify from time to time; and
- (b) such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company.

20. SEBI's jurisdiction respected | Provisions dealing with forward dealings and insider trading omitted.

Section 194 of the Act which deals with prohibition on forward dealings in securities of company by director or key managerial personnel, and section 195 of the Act which deals with prohibition on insider trading of securities, have been proposed to be deleted by the Amendment Act. Accordingly, any power given to the Central Government to enforce provisions related to section 194 and 195 is also proposed to be deleted by the Amendment Act.

The above change has been proposed as per the recommendations of the Companies Law Committee in its report in February 2016, wherein the committee was of the opinion that SEBI regulations are comprehensive in

the matter (and also apply to companies intending to get listed), and that in view of the practical difficulties expressed by stakeholders, sections 194 and 195 may be omitted from the Act.

21. Fraud | Punishment linked with quantum of money involved in fraud.

The Amendment Act has proposed to divide the punishment for fraud as per the quantum involved in such fraud. Following is the proposed division:

Where fraud involves	Punishment
An amount <u>less than</u> Rs. 10 Lakhs or 1% of the turnover of the company, whichever is lower, and does not involve public interest	Imprisonment for a term which may extend to 5 years; or fine which may extend to Rs. 20 Lakhs; or both
An amount of <u>at least</u> Rs. 10 Lakhs or 1% of the turnover of the company, whichever is lower, and does not involve public interest	Imprisonment for a term which shall not be less than 6 months but which may extend to 10 years; and fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud
An amount of <u>at least</u> Rs. 10 Lakhs or 1% of the turnover of the company, whichever is lower, and involves public interest	Imprisonment for a term which shall not be less than 3 years but which may extend to 10 years; and fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud

DISCLAIMERS:

1. This Quick Guide is given as of 8 January 2018 and with respect to the specified provisions of the Amendment Act. This Quick Guide is based on our understanding of the law and regulations prevailing as of the date of this Quick Guide and our past experience with the authorities. However, there can be no assurance that the government authorities or regulators may not take a position contrary to our views.
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