

Companies Act, 2013
Fresh thinking for a
new start



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Background

The Companies Act, 2013 (2013 Act) was assented by the President of India on 29 August 2013 and published in the Official Gazette on 30 August 2013.

The 2013 Act will set the tone for a more modern legislation which enables growth and greater regulation of the corporate sector in India. The Companies Act, 1956 (1956 Act) has been under review for some time in view of the rapidly changing economic and commercial environment nationally as well as globally. The 2013 Act is expected to facilitate more business-friendly corporate regulations, improve corporate governance norms, enhance accountability on the part of corporates and auditors, raise levels of transparency and protect interests of investors, particularly small investors.

The 2013 Act has been developed with a view to enhance self-regulation, encourage corporate democracy and reduce the number of required Government approvals.

The 2013 Act delinks the procedural aspects from the substantive law and provides greater flexibility in rule-making to enable adaptation to changing economic and technological environments. There are several procedural aspects that would be prescribed by the Rules to be framed by the CG. In this document we have used the expression "prescribed" or "as prescribed" or "as may be prescribed" to mean that the CG will prescribe the Rules for implementing the substantive provisions of the 2013 Act.

MCA has initiated the process to implement 2013 Act in consultation with concerned regulatory authorities, Ministry of Law & Justice and other stakeholders. In this regard, two sets of draft rules have been placed

for public comments (the Draft Rules) on 9 September 2013 and 20 September 2013. The other draft rules are expected to be announced soon. The Draft Rules suggest that it can be changed by MCA from time to time and are to be reviewed once in 3 years.

The 2013 Act also empowers the CG to bring into force various sections from such date(s) as may be notified in the Official Gazette. The GOI has decided to enforce the provisions of the 2013 Act in phases. The provisions of the 2013 Act which require statutory or regulatory consultation or functioning of new bodies or prescription of relevant rules and forms have been brought in to force after the preparatory action is completed. Keeping this in mind, the GOI has notified those provisions of 2013 Act which do not require such preparations. Accordingly, GOI has notified 98 sections of 2013 Act which will come into force effective 12 September 2013. The details of such provisions form part of the Annexure.

There are several provisions in the 2013 Act which state that the provision of a particular section is to come into effect from the commencement of 2013 Act. Any reference in a section of the 2013 Act, to the commencement of the 2013 Act is to be construed as a reference to the coming into force of that section and not necessarily with reference to the enactment of 2013 Act or 12 September 2013 or so on and so forth.

This paper is prepared keeping the provisions of the 2013 Act and does not capture provisions of the Draft Rules as these are subject to change once the feedback of the stakeholders is received by MCA and incorporated in the final Rules that may be issued in future.

Key highlights

The key highlights of 2013 Act are summarized below.

Limit on number of members

- Maximum number of members in a private company increased from 50 to 200
- Limit of number of members in an association or partnership (without incorporation) to be prescribed (not to exceed 100). In the 1956 Act, this limit was 10 for banking companies and 20 for other than banking companies.
- One Person Company (OPC) - a new vehicle for individuals for carrying on business with limited liability

Share capital

- For defined infrastructural projects, preference shares can be issued for a period exceeding 20 years
- Provisions relating to further issue of capital made applicable to all companies
- The terms for offer of securities, form and manner of 'private placement' to be as prescribed
- Shares cannot be issued at a discount except sweat equity shares
- Time gap between 2 buy-backs shall be minimum 1 year

Deposits

- Stringent norms provided for acceptance of fresh deposits from members and public
- Any deposit accepted before the commencement of 2013 Act or any interest due thereon to be repaid within 1 year from the commencement of 2013 Act or from the date on which such payments are due, whichever is earlier
- Credit rating made mandatory for acceptance of public deposits
- Limits to be prescribed for accepting ICDs

Corporate Social Responsibility (CSR)

- 2% of average net profits of last 3 years to be mandatorily spent on CSR by companies having
 - net worth of ₹ 5 billion or more; or
 - turnover of ₹ 10 billion or more; or
 - net profit of ₹ 50 million or more

Audit and Accounting

- Companies to have a uniform financial year - ending on 31 March each year
- Consolidation of financials for a company having

a subsidiary, associate or a joint venture made mandatory

- National Financial Reporting Authority (NFRA) to be constituted by Central Government to provide for dealing with matters relating to accounting and auditing policies and standards to be followed by companies and their auditors
- Mandatory audit rotation for listed and prescribed classes of companies
- Restriction placed on provision of specified non-audit services by an auditor to ensure independence and accountability of the auditor
- Mandatory internal audit for prescribed classes of companies

Management, administration and corporate governance

- At least 1 director of a company shall be a person who has stayed in India for 182 days or more in the previous calendar year. Existing companies to comply with this provision within 1 year from the date of commencement of 2013 Act.
- Listed and prescribed class of companies to have at least 1 woman director. Existing companies to comply with this provision within 1 year from the date of commencement of 2013 Act.
- Prescribed class of companies to have whole-time Key Managerial Personnel (KMP)
 - Chief Finance Officer to be a whole time KMP for prescribed classes of companies
 - Whole time Director included in definition of KMP
- Electronic voting for Board and shareholders meetings introduced
- Following committees of the Board made mandatory for listed and prescribed classes of companies:
 - Audit committee
 - Stakeholder relationship committee
 - Nomination and Remuneration committee
 - Corporate Social Responsibility committee
- Director to vacate office on remaining absent from all the meetings of the Board of Directors held during 12 months with or without obtaining leave of absence
- Contents of Directors' Report elaborated. Directors of listed companies to annually report on the existence and effective operations of systems on internal financial controls. Directors of all companies to annually report on the compliance with all applicable laws.
- Secretarial audit mandatory for listed and prescribed



classes of companies

- Approval of Central Government required for certain managerial remuneration

Related Party transactions

- Requirement of obtaining Central Government approval for related party transactions not required
- Approval of related party transactions by Audit Committee / Board of Directors at Board meeting made mandatory
- Related party transactions to also require prior shareholder's approval by special resolution for companies having prescribed paid up capital or transactions exceeding prescribed amounts
- Related party transactions to be disclosed in the Director's Report along with justification thereof

Inter corporate loans / investments

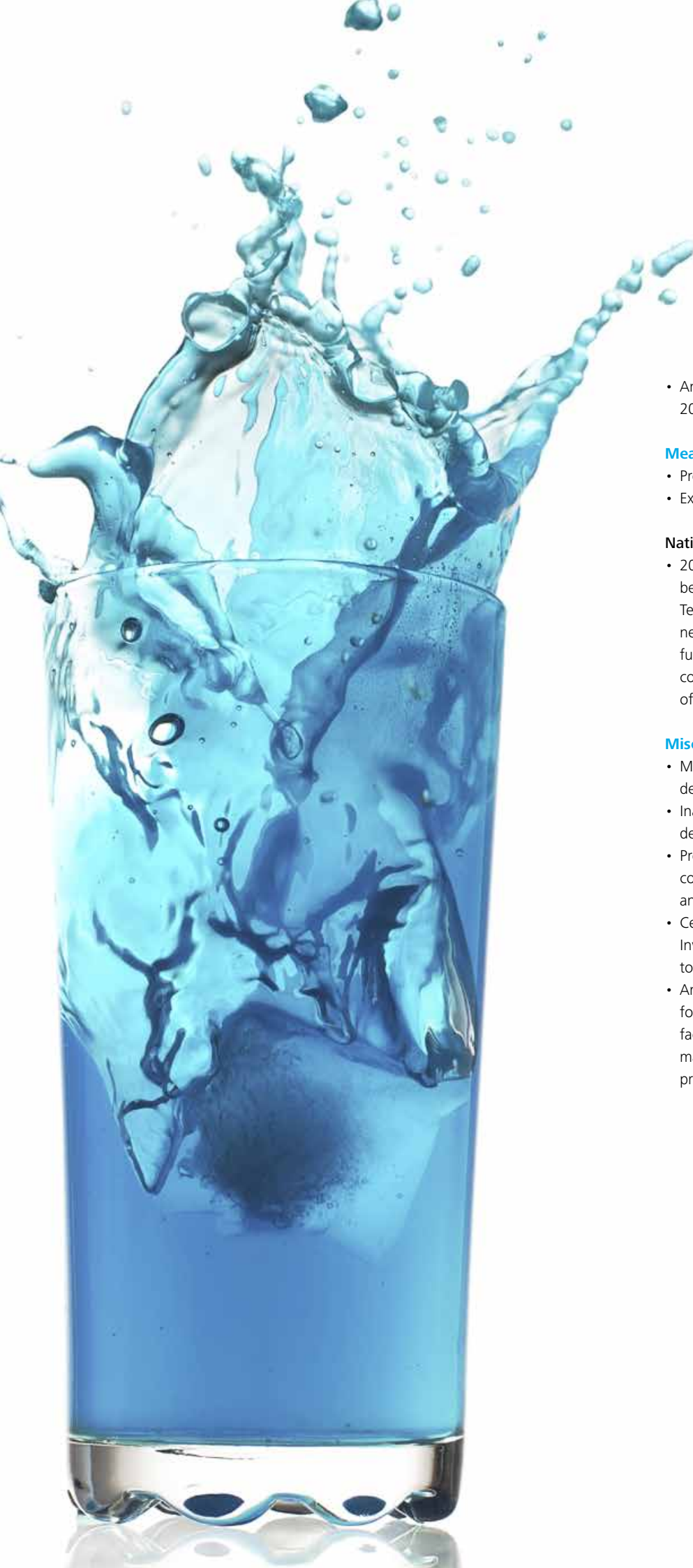
- Loans, guarantee and security made to any person (the 1956 Act dealt only with body corporate) will attract compliance requirements
- Rate of interest on loan granted cannot be lower than the prevailing yield of 1 year, 3 year, 5 year or 10 year Government Security closest to the tenure of the loan
- The list of exemptions has been curtailed

Loan to Directors

- No company shall directly or indirectly advance any loan (including loan represented by a book debt) or give guarantee or provide security in connection with such loan to any director / related persons
 - An exception to the above rule is made for MD or a whole time director (WTD) if such loan is in accordance with the terms of services extended to all employees or is approved by shareholders by special resolution
- Provisions for loan to directors applicable to private companies

Mergers & Acquisitions

- Restriction placed on multi-layer investment subsidiaries
- Merger of Indian company with a foreign company allowed
- Fast track merger for small companies and between holding company and its wholly owned subsidiary introduced
- Person / group of persons holding 90% or more equity shares by virtue of amalgamation etc. can purchase the remaining equity shares of the company from minority shareholders



- Any valuation of shares / assets etc. required under 2013 Act to be performed by a Registered Valuer

Measures for investor protection

- Provisions relating to class action suits introduced
- Exit options for minority holders on reorganization

National Company Law Tribunal (NCLT)

- 2013 Act replaces the High Court with a Tribunal to be known as NCLT, which will consist of Judicial and Technical members, as Central Government may deem necessary, to exercise and discharge the powers and functions conferred including approval of merger, corporate reorganization, capital reduction, extension of financial year etc.

Miscellaneous

- Mandatory transfer of profits to reserves for dividend declaration dispensed with
- Inability to pay debts will be considered as criteria for determining a sick company
- Provisions of revival and rehabilitation of sick companies to apply to all companies and not only to an "industrial company"
- Central Government to establish Serious Fraud Investigation Office for investigation of frauds relating to a company
- Any person representing the company is made liable for punishment for fraudulently obtaining credit facilities from any bank or financial institutions for making any false, deceptive or misleading statement, promise or forecast

Incorporation of companies

Mandatory formation

No association or partnership consisting of more than prescribed number of persons (not more than 100) shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company or is formed under any other law for the time being in force. This rule is not applicable to an HUF carrying on any business and association or partnership formed by professionals who are governed by special acts.

In the 1956 Act, the limit was 10 for entities carrying on banking business and 20 in other cases.

Contents of MOA and AOA

- MOA to contain the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.
- 2013 Act permits AOA of a company to contain provisions relating to 'entrenchment'. An entrenchment clause is a provision which makes further amendments to AOA more difficult. 2013 Act provides that AOA of a company may contain provision for entrenchment whereby specified provisions of AOA may be altered only if conditions or procedures that are more restrictive than those applicable to a special resolution are complied with. Entrenchment provisions can be included in the AOA either on formation of a company or thereafter by an amendment to the AOA which is approved by all the members in case of a private company and by special resolution in case of a public company. Entrenchment clause may assist in protecting the rights of minority members or prevent unilateral amendments to the AOA which may be a joint venture company between 2 or more parties.

Companies with charitable objects

- Scope of companies that may be formed with charitable objects (i.e. Section 25 company under 1956 Act – Section 8 in 2013 Act) increased to include sports, education, research, social welfare,

protection of environment in addition to the promotion of commerce, arts, science, religion and charity

- A Section 8 company can merge only with another Section 8 company

The objects outlined above may not necessarily align with the charitable purposes as defined under the Income Tax Act, 1961. Hence, if registration is sought the provisions under the said Act, would also need to be considered.

Incorporation process

- Nationality and proof of identity of subscribers to MOA and AOA is to be provided
- Promoters may provide a temporary address for correspondence till the company is formed. A new company should have a registered office address within 15 days from its incorporation
- Particulars of interest in other firms and bodies corporate, if any, in relation to the first directors is to be filed with ROC
- A newly formed company cannot commence business or exercise any borrowing power unless it has filed with ROC a prescribed declaration to the effect that:
 - every subscriber has paid-in the value of shares subscribed to MOA;
 - paid-up share capital of the company is not less than the minimum prescribed; and
 - verification of its registered office
- A company may be struck off by the ROC on the following grounds:-
 - subscribers to the memorandum have not paid subscription money within 180 days from the date of incorporation
 - company has failed to commence its business within 1 year from the date of incorporation

- Incorporation process tightened
- Difficult to maintain off the shelf company

Types of companies



Types of companies that can be formed under 2013 Act has remained same as in 1956 Act except one more class of company has been added. The new class of company is OPC. This section deals with some of the significant changes with respect to types of companies.

Private Limited Company

- The maximum number of members in a private company is increased from 50 to 200
- The condition of 1956 Act to have a restriction in the AOA of a private company prohibiting invitation or acceptance of deposits has been removed. However, this deletion may not materially benefit a private company from borrowings by way of deposits as stringent measures have now been provided for acceptance of deposits by a company
- Directorships in private limited companies now counted for the purpose of maximum number of directorships i.e. 20

Small Company

- "Small company" means a company, other than a public company, whose paid-up share capital does not exceed Rs 5 million or such higher amount as may be prescribed (not exceeding ₹ 50 million); or whose turnover as per its last profit & loss account does not exceed ₹ 20 million or such higher amount as may be

prescribed (not exceeding ₹ 200 million)

- Small Company cannot be a holding or subsidiary company

2013 Act provides additional flexibility to small companies and OPC. Some of the relaxations provided to a small company and OPC are as indicated below:

- Cash flow statement is not required
- Annual Return can be signed by CS or one director if there is no CS
- Board meeting is required to be held at least once in each half of a calendar year and the gap between the 2 meetings is not less than 90 days
- Merger process between 2 or more 'small companies' is to be approved on fast track basis. Such merger would require approval of ROC, OL, members holding at least 90% of total number of shares and majority of creditors representing 9/10th in value.

One Person Company (OPC)

- "One Person Company" means a company which has only one individual as a member
- A company may be an OPC having a sole member. The memorandum of such OPC is required to indicate the name of the person who shall become member in the event of death or incapacity of the sole member.
- OPC is required to specifically mention the word "one

person company” below the name wherever it is used

2013 Act provides additional flexibility to OPC. Some of the relaxations provided to OPC are as under:

- OPC should have minimum 1 director
- Where an OPC has only 1 director, the date on which the resolution is signed and dated by such director is considered as the date of the board meeting
- Provisions of board meeting, quorum and interested director shall not apply to OPC
- OPC need not hold an AGM
- Provisions relating to notice, explanatory statement, EGM, quorum, voting, chairman, poll, proxies, postal ballot,

NCLT’s power of calling for EGM does not apply to OPC

- Financial Statements can be signed by only one director
- Financial Statements are to be filed with ROC within 180 days from the end of FY
- OPC can contract with the sole member who is a director

Converting a sole proprietary concern into an OPC will help carrying on the business with limited liability. If the conditions under the tax laws are satisfied, such conversion from sole proprietorship to an OPC may be tax neutral.

Dormant Company

- Where a company is formed and registered under 2013 Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company

may make an application to ROC to obtain status as a “dormant company”

- “inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 FYs, or has not filed financial statements and annual returns during the last 2 FYs;
- “significant accounting transaction” means any transaction other than (a) payment of fees by a company to ROC; (b) payments made by it to fulfill the requirements of 2013 Act or any other law; (c) allotment of shares to fulfill the requirements of 2013 Act; and (d) payments for maintenance of its office and records.

- In case of a company which has not filed financial statements or annual returns for 2 FYs consecutively, ROC shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies
- Cash flow statement is not required for dormant company
- Board meetings required to be held at least in each half of a calendar year and the gap between the 2 meetings is not less than 90 days
- A dormant company shall have the prescribed minimum number of directors, file prescribed documents and pay prescribed annual fee to ROC to retain its dormant status
- The dormant company may become an active company by making necessary application to ROC
- ROC may strike off the name of a dormant company from the register of dormant companies, if the company fails to comply with the requirements

Foreign company

- “Foreign Company” is defined to mean any company or a body corporate incorporated outside India and which -
 - has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - conducts any business activity in India in any other manner.
The expression ‘place of business’ is defined to include a share transfer or registration office.
- As per FEMA, no person resident outside India shall, without prior approval of RBI establish in India, a branch or a liaison office or any other place of business by whatever name called
- A foreign company is required to register with ROC within 30 days from the date of its establishing a place of business in India

Setting up of place of business in India by a foreign company through an agent or electronic mode will require registration under 2013 Act

Share Capital

Types of Share Capital

There is no change in the concept of types of share capital as in 1956 Act. The shares can be of the following types:

1. Equity shares
 - a. With voting rights; or
 - b. With differential rights as to dividend, voting or otherwise
2. Preference shares

Shares with differential rights

The provisions relating to issue of shares with differential rights as to dividend, voting or otherwise have been retained in 2013 Act. The conditions for issuance for such shares will be specified through the prescribed Rules

Issue and redemption of preference shares

- Tenure of preference shares has been kept at 20 years. However, companies having "infrastructural projects" (as defined) can issue preference shares for tenure beyond 20 years, subject to the redemption of specified percentage of shares as per Rules to be prescribed, on an annual basis at the option of the preference shareholders
- Where a company is unable to redeem any preference shares or to pay dividend thereon in accordance with the terms of issue, it may redeem such preference shares by further issue of redeemable preference shares equal to the amount due and dividend due thereon. This is subject to –
 - a) consent of the holders of 3/4th in value of such preference shares; and
 - b) approval of NCLT
- On issue of such further redeemable preference shares, the preference shares not redeemed earlier shall be deemed to have been redeemed

Voting rights on preference shares

- 2013 Act provides that where a dividend in respect of a class of preference shares has not been paid for a period of 2 years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before a general meeting of the company. This is irrespective of whether the preference shares are cumulative or non-cumulative. Thus, unlike 1956 Act, 2013 Act makes no distinction between cumulative preference shares and non-cumulative preference shares in the matter

of the voting rights in the event of non-payment of dividend.

Further issue of capital

- Provisions relating to further issue of capital are made applicable to all types of companies i.e. even private companies have to comply with these provisions for any further issue of capital. This extension to private companies is to ensure that the shareholders are consulted and their opinion considered for issue of shares by special resolution.
- Pricing of a preferential issue of shares by a company shall be determined by a RV. Conditions will be prescribed in the Rules for preferential issue by companies
- Amounts received as share application money by private companies also will not be available for use until allotment of shares
- Shelf prospectus (i.e. prospectus in respect of which securities are issued for subscription in one or more issues without the issue of a further prospectus) can be issued by classes of companies to be prescribed by Regulations of SEBI

Issue of Bonus shares

- Unlike 1956 Act, conditions are specified for issue of Bonus shares under 2013 Act which are made applicable to all companies. Accordingly, issue of fully paid-up bonus shares can be made out of its free reserves or the securities premium account or capital redemption reserve account. However, company cannot issue bonus shares by capitalizing revaluation reserves.
- A company is required to comply with the following conditions in addition to the conditions to be prescribed under the Rules before issuance of bonus shares:
 - a. authorization by AOA
 - b. shareholders' approval in a general meeting
 - c. not defaulted in payment of interest or principal in respect of fixed deposit or debt securities issued by it;
 - d. not defaulted in payment of statutory dues of the employees like provident fund, gratuity and bonus;
 - e. partly paid shares outstanding on the date of allotment should be fully paid-up prior to issue of bonus shares and
- 2013 Act further provides that bonus shares cannot be issued in lieu of dividend

Allotment, transfer and transmission of securities

- Securities or any interest of any member in a public company shall be freely transferable. However, any contract or arrangement between 2 or more persons in respect of transfer of securities shall be enforceable as a contract.
- 2013 Act lays down new timelines for issuance of certificates in respect of allotment, transfer and transmission of securities. The revised timelines are as under:

Certificates for	Stipulated time for issuance of certificates
Shares – on subscription to the MOA and AOA i.e. on incorporation of a company	<ul style="list-style-type: none">• within 2 months from the date of incorporation
Shares – allotted subsequent to incorporation	<ul style="list-style-type: none">• within 2 months from the date of allotment if shares are issued in physical form; or• immediately on allotment to the depository where shares are issued in demat form
Shares – on transfer	<ul style="list-style-type: none">• within 1 month from the date of receipt of the instrument of transfer
Debentures	<ul style="list-style-type: none">• within 6 months from the date of allotment of debentures

Issue of shares at a discount

- 1956 Act permitted issue of shares at a discount to its par value subject to conditions. 2013 Act prohibits issue of shares at a discount except in case of "sweat equity shares" issued to the employees of the Company
 - "sweat equity shares" means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called

Utilization of securities premium

Securities premium may be applied for permitted purposes. Utilization of securities premium for any other purpose would entail compliance with provisions relating to reduction of capital.

For classes of companies to be prescribed in the Rules, utilization of securities premium for the following purposes will require such a company to ensure that the Accounting Standards prescribed have been complied:

- Issue of bonus equity shares
- Writing off the expenses of or the commission paid on any issue of equity shares
- Buy-back of shares or other securities

Prospectus and allotment of securities

- Specific provisions have been inserted in 2013 Act for private placement of securities by public and private companies
- Allotment in respect of private placement of securities must be completed within 60 days from the date of receipt of application money and in the event of such non-allotment, the application money is to be refunded to the subscribers within 15 days from the date of completion of 60 days. If the company fails to refund, interest is payable @ 12% from the end of the 60th day.
- All other provisions relating to public issue, rights issue and preferential issue are similar to those contained in 1956 Act
- An offer or invitation to subscribe securities on private placement can be made to persons not exceeding 50 or such higher number as may be prescribed by Rules (excluding QIBs and employees being offered securities under a scheme) in a FY
 - An offer of securities by a company to more than 50 or such higher number of persons as may be prescribed shall be deemed to be an offer to the public
- A person who has been convicted for personation for acquisition etc. of securities is also liable for suffering disgorgement of gains, seizure and disposal of such securities and such amount received through disgorgement or disposal of securities is to be transferred to IEPF

Debentures

- A Company may issue debentures either with an option to convert such debentures into shares wholly or partly at the time of redemption. The issue of such debentures shall be approved by a special resolution passed at a general meeting.
- Debentures cannot carry any voting rights
- Secured debentures may be issued by a company subject to prescribed terms and conditions
- Compulsory creation of Debenture Redemption Reserve (DRR): Where the debentures are issued by a company, the company is required to create a DRR out of profits of the company available for payment of dividend and the amount credited to such account is to be utilized only for the redemption of debentures
- Appointment of Debenture Trustees: Before issuing a prospectus or making an offer or invitation to the public or to its members exceeding 500, for the subscription of its debentures, a company is required to appoint one or more debenture trustees
- Responsibility of Debenture Trustees: In cases where the debenture trustee comes to a conclusion that the assets of the company are insufficient to pay principal amount as and when it becomes due, debenture trustee may file a petition before NCLT to impose restrictions on the company from incurring any further liabilities

Acceptance of deposits

- The term "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in the Rules in consultation with RBI
- On and from commencement of 2013 Act, other than the following classes of companies, companies in general are not permitted to invite, accept or renew 'deposits' from public:
 - Banking company;
 - NBFC; and
 - such other company as CG may specify;

Repayment of deposits accepted before commencement of 2013 Act:

Any deposit accepted before the commencement of 2013 Act or any interest due thereon is to be repaid within 1 year from the commencement of 2013 Act or from the date on which such payments are due, whichever is earlier.

- NCLT may, after considering the financial condition

of a company etc., allow further time as considered reasonable to the company to repay the deposit.

- Stringent penalty and / or imprisonment provisions have been made for failure to comply with the repayment of deposit conditions.

Acceptance of deposit from members:

A company may accept deposit from its members by passing a resolution in general meeting and subject to conditions as may be prescribed in the Rules.

Such companies are also required to comply with the following additional conditions:

- a) Issuance of circular to its members showing financial position, credit rating etc. The circular must be filed with ROC 30 days before its issue;
- b) Providing deposit insurance;
- c) Depositing in a scheduled bank 15% of amount of its deposits maturing during the current and next FY;
- d) Providing security, if any, for the due repayment of the amount of deposit or the interest thereon including the creation of charge on the property of assets of the company etc.

Acceptance of deposit from public:

Public companies having such net worth or turnover as may be prescribed will be eligible to accept deposits from persons other than its members subject to conditions including:

- (i) obtaining rating from a recognized Credit Rating Agency which ensures adequate safety
- (ii) creation of charge on the assets of the company etc.

- No dividend on equity shares can be declared during the period of non-compliance, if the Company fails to comply with provisions of acceptance and repayment of deposits

One would have to examine the Rules and identify the amounts which will not be regarded as a deposit. If a non-exempted company has accepted a deposit, it will have to organize for its repayment within 1 year from the date of commencement of 2013 Act. The penalties for non-compliance are severe for the KMPs and such personnel should take adequate steps to ensure adequate compliance.

Dividend



- Dividend to be paid out of
 - profits of the company for the year after providing for depreciation; or
 - profits of the previous years arrived at after providing for depreciation and remaining undistributed; or
 - both of the above
 - Mandatory transfer of profits to reserves before declaration of dividend done away with. Companies may voluntarily transfer a portion of its profits to reserves
 - Interim dividend may be declared only out of surplus in Profit & Loss Account and out of profits of the FY in which dividend is sought to be declared. In case a company has incurred losses up to the preceding quarter of the current FY then interim dividend shall not be declared at a rate higher than the average dividend declared by the company during the immediately preceding 3 FYs.
 - Failure to comply with provisions relating to acceptance and repayment of deposits will prevent a company to declare any dividend during the period of such non-compliances
 - Dividend to be distributed within 30 days of its declaration in cash only. Dividend cannot be distributed in kind.
 - Where unpaid / unclaimed dividend has been transferred to IEPF, the corresponding shares on which such dividend was unpaid / unclaimed shall also be transferred by the company to IEPF
 - Amounts that can be credited to IEPF widened to include
 - amount received on disgorgement;
 - redemption amount of preference shares remaining unpaid / unclaimed for 7 years or more;
 - sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for 7 years or more.
- The provisions for declaration and payment of dividend are simplified
 - Subject to Rules to be prescribed, dividend can be paid out of accumulated reserves without restrictions as to rate of dividend

Accounts and Audit

Financial Year

- “Financial year”, in relation to any company or body corporate, means the period ending on the 31st day of March every year.
 - This requirement in case of a company or body corporate, existing on the commencement of 2013 Act, is to be complied within a period of 2 years from commencement of 2013 Act.
 - Where a company has been 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.
- A company or body corporate, which is a holding company or a subsidiary of a company incorporated outside India and is required to follow a different FY for consolidation of its accounts outside India, the NCLT may allow any period as its FY, whether or not that period is a year.

- A subsidiary in India of a foreign company may, with the approval of NCLT follow a different period as its FY. The question for consideration is whether an application will be entertained by NCLT for following a different period as FY by company in India which is an associate company or joint venture company of a foreign entity.
- 1956 Act allowed companies to have financial period of upto 15 months and 18 months with special permission of ROC. This flexibility is removed
- The definition of FY of 2013 Act has been aligned with the Tax laws

Financial statements

- 1956 Act does not define the term “Financial Statement”. 2013 Act defines the term “financial statement” in relation to a company to include:
 - i. a balance sheet as at the end of the FY;
 - 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 FY;
 - iii. cash flow statement for the FY;
 - iv. a statement of changes in equity, if applicable; and
 - v. any explanatory note annexed to, or forming part of, any document referred to above.

The financial statement, with respect to OPC, small company and dormant company, may not include the cash flow statement

- The books of account and other relevant papers are

to be kept at the registered office or such other place in India as BOD may decide and such books can also be kept in electronic mode in the manner to be prescribed

- As per 1956 Act, balance sheet and statement of profit and loss are required to be signed by manager or secretary and by 2 Directors including MD where there is one. 2013 Act requires Financial Statements to be signed at least by
 - chairperson of the company, if authorized by BOD or
 - 2 directors including MD, where there is one and
 - CEO if he is a Director,
 - CFO and CS, wherever they are appointed.In case of OPC balance sheet and statement of profit and loss are required to be signed by one director only.
- Consolidation of financial statements is made mandatory for all companies where a company has one or more subsidiaries whether Indian or foreign
- The mandatory consolidation applies to all companies whether such company is:
 - listed or unlisted;
 - private or public.
- For the purposes of consolidation of financial statements, the expression subsidiary includes associate company and joint venture
 - ‘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.
 - ‘Significant influence’ means control of at least twenty per cent of total share capital, or of business decisions under an agreement.
 - ‘Control’, shall include 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

- Under 2013 Act, the Company will be required to attach statement containing the salient features of the financial statement of its subsidiary(s) in form to be prescribed by Rules
- CG may direct maintaining of books of accounts of a company for a period more than 8 years where any

investigation has been ordered

- CFO made responsible and liable for penalty and / or prosecution for non-compliance with various provisions such as maintenance of books of accounts, preparation & filing of annual accounts, disclosure of financial information in offer document, risk management, internal control etc.

- Consolidation of financial statements of subsidiaries (whether in India or abroad) is applicable to all the companies

Re-Opening of accounts and voluntary revision to Financial Statements or Board Report

- Under 2013 Act, on an application made by CG, IT authorities, SEBI or any other statutory regulatory body or authority or any person concerned and on an order being made by a Court or NCLT, a company can re-open its books of accounts or re-cast its financial statements on the below grounds:
 - that the relevant earlier accounts were prepared in a fraudulent manner; or
 - affairs of the company were mismanaged during the relevant period casting a doubt on the reliability of the financial statements
- The company may voluntarily revise the financial statement or Directors' report in respect of any of the 3 preceding FYs after obtaining approval of NCLT, if the BOD believes that the financial statements or Directors' report do not comply with the relevant provisions of 2013 Act. A detailed explanation would be required to be given in Director's report for the relevant FY for which such revision is made

National Financial Reporting Authority

- NFRA to be constituted by Central Government to provide for dealing with matters relating to accounting and auditing policies and standards to be

followed by companies and their auditors

- 2013 Act provides functions of NFRA, which shall include:
 - Make recommendations to CG on the formulation of accounting and auditing policies and standards;
 - Monitor and enforce compliance with accounting and auditing standards;
 - Oversee the quality of service of the professions and suggest measures required for improvement in quality of services and such other related matters as may be prescribed;
 - Perform other prescribed functions in relation to above as may be prescribed.
- CG may prescribe standards of accounting or any addendum thereto, as recommended by the ICAI in consultation with and after examination of the recommendations made by NFRA
- NFRA to consist of Chairperson and other part time and the full time members not exceeding 15
- The Chairperson and full time members of NFRA shall not be associated with any audit firm (including related consultancy firms) during the course of their appointment and 2 years thereafter
- 2013 Act provides powers to NFRA, which includes:
 - Investigate into the matters of professional or other misconduct committed by member or firm of CA.
 - Powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit.
 - Where professional or other misconduct is proved, NFRA have the power to make order for imposing monetary penalty or debarring the member or the firm from engaging himself or itself from practice as member of the institute for a minimum period of 6 months or for such higher period not exceeding 10 years.
- Any person aggrieved by the order of NFRA can prefer an appeal to NFRAA.

Holding-Subsidiary Company

Subsidiary – meaning

- Under 1956 Act, a company shall be deemed to be subsidiary of other company, if other company exercise or controls the composition of Board of directors or controls more than 50% of total equity share capital or total voting capital
- 2013 Act defines a subsidiary company, in relation to any other company (that is to say the holding company), means a company in which:
 - the holding company controls the composition of the Board of Directors i.e. if that other company by exercise of some power exercisable by it at its

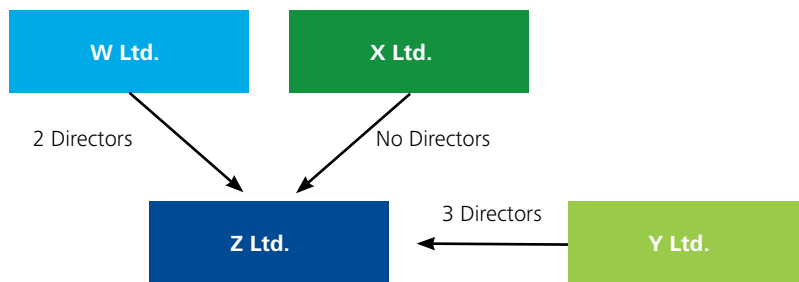
discretion can appoint or remove all or a majority of the directors; or

- the holding company exercise or control more than half of the total share capital either at its own or together with one or more of its subsidiary companies.

A company shall be deemed to be a subsidiary company of the holding company even if the control referred above is of another subsidiary company of the holding company.

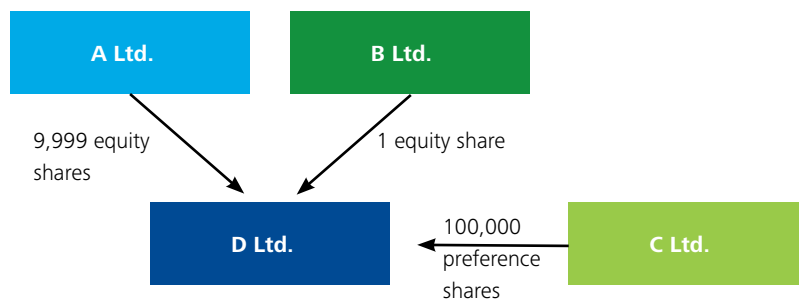
The position is as depicted below:

1. Control – Board of Directors



Z Ltd. is a subsidiary of Y Ltd., since Y Ltd. controls the composition of the BOD of Z Ltd. In this scenario, there is no change between the position under 1956 Act and 2013 Act.

2. Share Capital – ownership



Equity / Preference shares of ₹ 10 each

In this scenario, D Ltd. is a subsidiary of A Ltd. under the 1956 Act. However, under 2013 Act, D Ltd. will be subsidiary of C Ltd.

- Under 2013 Act, the concept of holding-subsidary company relationship, as far as it relates to exercise or control of more than half share capital is concerned, requires one to consider the investor company's shareholding in the total paid up share capital (i.e. equity and preference) of the investee company for which the relationship is to be examined. Under the 1956 Act, the investor company's shareholding in the total equity paid up share capital needed to be considered.
- Class or classes of holding companies to be prescribed cannot have layers of subsidiaries beyond such numbers as may be prescribed

Holding-subsidary relationship will have to be re-examined especially where company is funded with lower equity share capital base and higher preference share capital. This is likely to trigger unintended consolidation.

Audit and auditors

The provisions relating to appointment of auditor, period of appointment, disqualifications of auditors and services that an auditor cannot provide have been substantially modified in 2013 Act.

Appointment of first auditor – on incorporation

The first auditor is to be appointed by the BOD within 30 days of incorporation of a company. If the first auditor is not appointed by the BOD within 30 days from the date of incorporation, then the members shall appoint the first auditor within 90 days at the EGM. The tenure of the first auditor shall be upto the conclusion of first AGM.

Appointment of auditor other than the first auditor:

The manner and procedure for selection of an auditor shall be as per the Rules to be prescribed. The basic provisions are as summarized under:

Appointment of auditor in listed and prescribed class or classes of companies:

Appointment	Maximum period of appointment
Of an individual as an auditor	1 term of 5 consecutive years
Of an audit firm as an auditor	2 terms of 5 consecutive years
Cooling off period of 5 years before next appointment	

Common conditions for appointment of auditor in listed and classes of companies to be prescribed:

- Incoming audit firm should not have any common partners who were the partners of the outgoing audit firm i.e. the audit firm whose tenure expired in the immediately preceding FY by virtue of mandatory rotation requirement
- Rules to be prescribed to state the manner in which the companies shall rotate their auditors
- Audit committee of listed and other classes of companies to be prescribed to recommend appointment of an auditor
- Transition period of 3 years provided to the companies to comply with the mandatory rotation of auditor requirement

Appointment of auditor in other companies i.e. other than listed and prescribed class or classes of companies:

Appointment	Period of appointment
At first AGM	to hold office till conclusion of 6th AGM subject to ratification by members at every AGM
Subsequent	to hold office till conclusion of 6th meeting, subject to ratification by members at every AGM

Following provisions relating to auditors are applicable to all companies:

- The members at every subsequent AGM will be required to ratify the appointment of auditor, in case a fresh appointment is not made
- The company may resolve:
 - If Audit firm is appointed, the audit partner and his team shall rotate at such intervals as may be resolved by members.
 - Audit shall be conducted by more than 1 auditor (i.e. joint auditor).
- The 1956 Act requires all the partners of the firm to be a qualified CA and practicing in India. 2013 Act provides that:
 - Majority of partners practicing in India should be qualified CA;
 - If LLP is appointed as auditor, only partners who are CA shall be authorized to sign
- Procedure and manner of selection of auditor to be prescribed by the Rules
- Additional grounds for disqualifications for appointment as auditor provided
- Auditor cannot provide following services "directly or indirectly" to the company or its holding company or subsidiary company, namely:-
 - 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
 - other services to be prescribed under the Rules.

An auditor or audit firm who or which has been performing any non-audit services on or before the

commencement of 2013 Act shall comply with the above before the closure of the 1st FY after the date of such commencement.

"Directly or indirectly" shall include rendering of services by the auditor,—

- Where auditor is an individual - Either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual
- Where auditor is a firm – Either itself or through

any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

Internal audit

- Classes of companies to be prescribed to appoint an internal auditor who shall be CA or cost accountant or such other professional as may be decided by the BOD.

Loan to Directors



- 2013 Act provides that a company cannot, directly or indirectly,
 - advance any loan, including any loan represented by a book debt to any director or any other person in whom the director is interested (as specified); or
 - give any guarantee or provide any security in connection with any loan taken by its director or such other person
- The above restriction is not applicable to
 - Loan to a MD / WTD which is as a part of contract of services extended to all its employees or pursuant to any scheme approved by members by special resolution
 - A company which in the ordinary course of its business provides loan, guarantee or security (for due repayment of any loan) and charges interest which is not less than Bank Rate declared by RBI.
- The 1956 Act exempted private companies and allowed public companies to give loans etc. with prior approval of CG
- Restrictions on giving loans etc. to directors have been extended in 2013 Act even to private companies
- Ability of a company, whether public or private, to give loan etc. to directors is substantially curtailed
- Even if a loan etc. obtained in contravention of the above provisions is repaid, the contravener would still be exposed to punishment by way of imprisonment
- These provisions should be considered applicable prospectively and should not affect existing loans etc. which are given in compliance with the 1956 Act but which are not in conformity with 2013 Act. After the enactment of 2013 Act, any renewal of loan etc. needs to be in conformity with 2013 Act.

Investment, loan, guarantee, security by company

- Company may give a loan to any person or other body corporate or give any guarantee or provide security in connection with a loan to any other body corporate or person or acquire by way of subscription, purchase or otherwise, securities of any other body corporate not exceeding the higher of:
 - 60% of paid up share capital, free reserves and securities premium; or
 - 100% of free reserves and securities premiumWhere the amount of investment, loan, guarantee or security, as the case may be, exceeds the above limits, prior approval by special resolution is to be obtained.
- Free reserves are reserves which are available for distribution as dividend as per latest audited balance sheet but exclude unrealized / notional gains, revaluation reserve, 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.
- 2013 Act covers within its ambit giving loans, guarantee and security not only to a body corporate but also to any other person.
- Rate of interest on the loan granted shall not be lower than the prevailing yield of 1 year, 3 year, 5 year or 10 year Government Security closest to the tenure of the loan. 1956 Act benchmarked the minimum interest to the Bank Rate as made public by RBI.
- Company will have to disclose in the financial statements the full particulars of loans, investments, guarantee or security and the purpose for which loans, guarantee or security are proposed to be utilized by the recipient of it
- 2013 Act contains following exemptions:
 - Loan given or guarantee or security provided by
 - banking company or insurance company or housing finance company in ordinary course of business;
 - company engaged in the business of financing of companies or of providing infrastructural

facilities as specified.

- Investment and lending by NBFC, registered with RBI, whose principal business is acquisition of securities
 - Acquisition by companies having principal business of acquisition of securities
 - Acquisition of shares pursuant to a 'rights issue'
- Classes of companies to be prescribed and companies registered with SEBI cannot take inter-corporate loan or deposit exceeding the limit to be prescribed under the Rules

1. Companies will have to ensure that their exposure is within the ceiling in view of the provisions having been expanded to include investment / loan / guarantee / security made to 'any other person' – e.g. if a loan is given to a partnership firm, it would require compliance of the above provisions
2. The following exemptions available under the 1956 Act are no longer available:
 - Investment by banking company or insurance company or housing finance company in the ordinary course of its business, or a company engaged in the business of providing infrastructural facilities
 - Loan / investment / guarantee / security by a private company
 - Loan / investment / guarantee / security by a holding company to its WOS
 - Loan / guarantee / security by a company whose principal business is acquisition of securities
3. After the enactment of 2013 Act, any renewal of loan etc. needs to be in conformity with 2013 Act
4. These provisions should be considered applicable prospectively and should not affect existing investments, loans etc. which are given in compliance with the 1956 Act but which are not in conformity with 2013 Act.
5. One would have to examine the Rules to be notified in this regard.

Related party transactions

- Related Party with reference to a company means:
 - director or his relative;
 - KMP or his relative;
 - firm, in which a director, manager or his relative is a partner;
 - private company in which a director or manager is a member or director ;
 - 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 BOD, MD, or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager (except where provided in professional capacity);
 - any person under whose advice, directions or instructions (except where provided in professional capacity) a director or manager is accustomed to act;
 - 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 persons as may be prescribed by the Rules
 - Relative, with reference to any person, means anyone who is related to another, if
 - they are members of a HUF; or
 - they are husband and wife; or
 - one person is related to the other in such manner as may be prescribed by the Rules.
 - Any transaction can be entered into by a company in the ordinary course of its business with a related party on an arm's length basis. 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.
 - Where a transaction with a related party is (i) not in the ordinary course of business or (ii) is in the ordinary course of business but not on an arm's length basis, the consent of the BOD by a resolution at a board meeting and compliance with the conditions to be prescribed is necessary before a company can enter into a transaction with a related party i.e. any contract or arrangement with a related party with respect to:
 - a) sale, purchase or supply of any goods or material;
 - b) buying, selling or disposing of property of any kind;
 - c) leasing of any kind of property;
 - d) availing or rendering of any services;
 - e) appointment of agent for purchase or sale of goods, material, services or property;
 - f) related party's appointment to any office or place of profit in the company, its subsidiary company associate company; or
 - g) underwriting the subscription of any shares in or derivatives thereof;
- 1956 Act, subject to certain exemptions, regulated related party transactions relating to a), d) and g) only. The concept of arm's length transaction was not enacted in the 1956 Act
- Related party transactions by a company having paid-up capital or exceeding value of transaction, to be prescribed, will require prior approval of members by special resolution if such transaction (i) is not in the ordinary course of business or (ii) is in the ordinary course of business but not on an arm's length basis. Related party who is a member of such a company cannot vote on such a special resolution.
 - Requirement of obtaining CG approval for related party transactions, as provided in 1956 Act, done away with
 - Transaction with a director of the company or its holding, subsidiary or associate company or a person connected for acquisition or sale of assets for consideration other than cash to require prior approval of the members in a general meeting and supported by values determined by RV. If the director or connected person is a director of the holding company, approval of shareholders is required to be obtained by passing a resolution in general meeting of the holding company.
 - If OPC enters into a contract with the sole member of the company who is also its director, the company shall, unless the contract is in writing:
 - ensure that the terms of the contract or offer are contained in the memorandum or are recorded in the minutes of the first Board meeting held after entering into the contract
 - inform ROC about such contract within 15 days of entering into the contract.
 - Related party transactions to be disclosed in Director's report along with the justification for entering in to such transactions
- Removal of taking CG approval for related party will remove the uncertainty in timeline and execution of the related party transactions
 - Related party transactions at arms' length price will call for aligning the benchmarking under transfer pricing norms as per Income Tax Act for both domestic and international transactions

Management and administration

2013 Act has simplified the process of holding general meeting and has recognized voting by electronic means. Some significant features relating to general meetings of members are summarized as under:

Annual General Meeting

- The provisions relating to holding of AGM in 2013 Act are similar to 1956 Act
- OPC is not required to hold AGM. This is for the reason that there is only one member in case of an OPC.

Extra Ordinary General Meeting

BOD of the company or on requisition of prescribed number of members may call EGM whenever it deems fit. The provisions relating to holding of EGM in 2013 Act are similar to 1956 Act.

Notice of General Meeting and Voting

- A notice of general meeting (at least 21 clear days' notice) can be given either in writing or by electronic mode.
- For calling a general meeting at a shorter notice, consent of at least 95% of the members entitled to vote is required for both AGM and EGM
- 2013 Act provides that the explanatory statement to be annexed to the notice of a general meeting to also provide such information and facts that may enable members to understand the meaning, scope and implications of the items of business to be transacted
- A member may exercise his vote at a meeting by electronic means as prescribed. A notice of general meeting can be given either in writing or by electronic mode. This measure is expected to enhance participation of members in proceedings of general meeting and enable them to exercise their rights without being present at the meeting.

Poll

The conditions for demanding a Poll at a general meeting on any resolution is made uniform for all companies having share capital.

Postal Ballot

CG may declare by notification such items of business which must be transacted by means of postal ballot. All items other than ordinary business and any business in respect of which directors or auditors have a right to be

heard at any meeting, may be transacted by means of postal ballot.

Quorum for general meeting

- Presence of members in person only will be counted for the purpose of determining quorum
 - Quorum for a private company shall be 2 members personally present.
 - Quorum for a public company is depended on the number of members in the Company as shown below:

Total number of members in a public company as on the date of meeting	Quorum (Members personally present)
Upto 1,000 members	5
Between 1,000 to 5,000 members	15
More than 5,000 members	30

Proxy

- Any member of a company entitled to attend and vote at a meeting of the company is entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf
- A person can be appointed as a proxy for a member or such number of members not exceeding 50 and for such number of shares as may be prescribed. There was no similar provision in 1956 Act. The provision will have to be kept in mind for shareholders who are not likely to be present personally for the meeting.

Secretarial Standards

Every company shall observe Secretarial Standards with respect to General and Board Meetings specified by ICSI and approved by the CG. Duty is cast on the CS to ensure that the company complies with the applicable Secretarial Standards.

Reporting by listed company with ROC

With a view to provide greater transparency and disclosure by listed companies, 2013 Act provides that:

- Listed company to file with ROC a report in respect of change in number of shares held by promoters or top 10 shareholders within 15 days of such change. This is an additional disclosure requirement which is independent of disclosures to be made under the

SEBI Regulations relating to Takeovers and Prohibition of Insider Trading.

- Listed companies are required to file a report with ROC within 30 days of the conclusion of the AGM including a confirmation that AGM meeting was convened, held and conducted.

Annual Return

- In order to have uniformity between all companies, 2013 Act, provides that Annual Return to contain details as on the end of the FY instead of as on the date of AGM as is required under the 1956 Act.
- The disclosures in the Annual Return are enhanced. Information relating to remuneration of directors and KMP, details of meetings of members, BOD and its various committees, matters relating to certification of compliances, disclosures, shares held by or on behalf of FII etc. are also to be provided.

Appointment and qualifications of directors

Directors of the Company:

- Every company to have a BOD consisting of individuals as directors. The minimum number of directors for different classes of companies is as under:
 - private company - 2
 - public company - 3
 - OPC - 1
- A director of a company can be resident or non-resident
- Where no provision is made in the AOA of the company for the appointment of the first director, the subscribers to the MOA who are individuals are deemed to be the first directors of the company and in case of OPC an individual being member is deemed to be its first director
- No person shall be appointed as a director of a company unless he has been allotted DIN

Maximum number of Directors:

The limit on maximum number of directors in a company is increased to 15 which can be further increased by passing a special resolution in the general meeting. This is to provide greater flexibility to a company to attract and retain talent and benefit from experience and expertise of a larger strength of the board.

Resident Director:

2013 Act provides a new requirement for a company to have at least 1 of the directors who is resident in India i.e. a person who has stayed in India for at least 182 days or more in the previous calendar year. This requirement is to be complied within 1 year from the commencement of 2013 Act or notification of rules by CG in this regards.

Women Director:

Prescribed class of companies to have at least 1 woman director. This requirement is to be complied within 1 year from 2013 Act coming into force.

Independent Directors:

An ID in relation to a company, means a director other than a MD or a WTD or a nominee director,-

- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
- (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;
- (ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding FYs or during the current FY;
- (d) none of whose 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 5 million or such higher amount as may be prescribed, whichever is lower, during the 2 immediately preceding FYs or during the current FY;
- (e) who, neither himself nor any of his relatives-
 - (i) holds or has held the position of a KMP or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 FYs immediately preceding the FY in which he is proposed to be appointed;
 - (ii) is or has been an employee or proprietor or a partner, in any of the 3 FYs immediately preceding the FY in which he is proposed to be appointed, of-
 - (A) a firm of auditors or CS in practice or cost auditors of the company or its holding,

- subsidary or associate company; or
- (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 10% or more of the gross turnover of such firm;
- (iii) holds together with his relatives 2% or more of the total voting power of the company; or
- (iv) is a Chief Executive or director, by whatever name called, of any non-profit organization that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or
- (f) who possesses such other qualifications as may be prescribed

Presently, clause 49 of the Listing Agreement provides for appointment of IDs by listed companies. In order to facilitate greater independence in decision making by BOD, 2013 Act provides the following requirements for IDs:

- Listed companies to have at least 1/3rd of its total number of directors as IDs
- CG may prescribe minimum number of IDs in case of any class of public companies. It may be noted that SEBI has put in place a proposed road map to align its requirement relating to ID as provided under clause 49 of the Listing Agreement (Corporate Governance) with 2013 Act requirement;
- Alternate director of an ID can be appointed if such an alternate director is also an ID
- ID is not liable to retire by rotation and is not to be included in the 'total number of directors' liable to retire by rotation
- An ID may be selected from data bank maintained by notified institute or association having expertise in creation and maintenance of such data bank
- ID shall be appointed at a general meeting for a term upto 5 consecutive years. Justification for choosing the appointee as ID to be included in the explanatory statement to the notice
- ID is eligible for re-appointment for another term of upto 5 years subject to compliance with conditions including performance evaluation by the entire BOD and approval by members through special resolution
- Once the 2 consecutive terms of ID are completed, the ID will be eligible for appointment after a cooling period of 3 years, provided he is not associated with the company in any other capacity during this 3 years period, either directly or indirectly

- IDs are not entitled to any stock option but may receive remuneration by way of sitting fee, re-imbusement of expenses for participation in meetings, profit related commission as approved by the members of the company.
- ID and NED (not being promoter or KMP), shall be held liable, only for such acts by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently
- Detailed code of conduct to be followed by companies and their IDs have been included in 2013 Act

Director elected by small shareholders:

Presently, 1956 Act gives an option for appointment of a small shareholder's director for a public company having paid up capital of ₹ 50 million or more and having 1000 or more small shareholders. Under 2013 Act, only listed companies may appoint a small shareholder's director. Accordingly, shareholders holding shares of nominal value of not more than ₹ 20,000 or such other sum as may be prescribed in a listed company, may appoint 1 director from amongst them.

Maximum number of directorships:

- Maximum number of directorships a person can hold in a company is increased from 15 to 20. The limit of 20 will include any alternate directorship. However, the maximum number of public companies (including private companies that are either holding or subsidiary of a public company) in which a person can be appointed as a director cannot exceed 10. This requirement is to be complied within 1 year from the commencement of 2013 Act.
- The members of a company are authorized by special resolution to specify any lesser number of companies in which a director of the company may act as a director. This may restrict ability of professional managers to accept directorship in other companies.

Duties of directors:

Keeping in view the fiduciary capacity of the directors, 2013 Act defines the duties of the directors which inter alia include

- to act in accordance with the AOA
- to act in good faith to promote the objects of the company and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment

- exercise of duties with due and reasonable care, skill and diligence and exercise of independent judgment
- not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company etc.

Disqualification of a director:

In order to restrict corporate delinquency committed by directors of a company, 2013 Act entails greater responsibility on the BOD and shareholders for selection and appointment of director in a company and provides for additional grounds for disqualification of a director in a company as under:

- A person who has been convicted of an offence dealing with related party transactions at any time during the preceding 5 years
- Directors in a company (including a private company) are disqualified if such company fails to file its financial statements or annual return for any continuous 3 years with ROC or fails to repay deposits accepted by it or redeem debentures on due date or pay interest due thereon or fails to pay any dividend declared and such failure continues for 1 year or more. Unlike 1956 Act, these disqualifications would get attracted even if the default is made by a private company.

Vacation of office of director

2013 Act provides for additional grounds for vacation of a director in a company as under:

- Director to vacate office as director if he remains absent from all the meetings of the BOD held during 12 months whether with or without seeking leave of absence of the BOD. This measure will ensure that the directors participate in the meetings and are accountable for decisions made therein.

Resignation of directors:

- 2013 Act, provides that the resigning director to file his resignation letter with the ROC within 30 days, in prescribed manner, giving detailed reasons for resignation and the resignation will take effect from the date on which notice of resignation is received by the company, or the date, if any, specified by director in the notice, whichever is later
- Where all directors of a company resign or vacate office, the promoter or in his absence, the CG will have to appoint the required number of directors till new directors are appointed in a general meeting

Meetings of BOD

Time for holding board meetings:

- The first meeting of the BOD of a company is to be held within 30 days of its incorporation.
- Minimum 4 meetings of BOD are to be held every year and the time gap between 2 board meetings cannot exceed 120 days.
CG may provide different requirement or modify the requirement for specific class or description of companies
- OPC, small companies and dormant companies shall be deemed to have complied with the holding of board meeting requirement if minimum 1 board meeting is held in each half of the calendar year and the gap between 2 meetings is at least 90 days

Participation in board meeting through electronic mode:

2013 Act recognizes participation of directors in the board meeting through VC or other audio visual means as may be prescribed. CG may provide a list of businesses where meeting by means of VC will not be recognized.

Notice of board meeting:

At least 7 days' notice for board meeting is to be given in writing to every director by hand delivery or by post or by electronic means. A board meeting may be called at a shorter notice to transact urgent business, if at least 1 ID, if any, is present at such meeting. Decision taken at such meeting in absence of an ID is final only on ratification thereof by at least 1 ID, if any.

Quorum for board meeting:

- The quorum for BOD meeting is 1/3rd of its total strength or 2 directors, whichever is higher, and the participation of the directors by VC or by other audio visual means is also to be counted for the purposes of quorum
- Where at any time the number of interested directors is 2/3rd or more of the total strength of the BOD, the number of directors who are not interested directors and present at the meeting, being not less than 2, shall be the quorum

Resolution by circulation:

- A resolution of the BOD or its committee can also be passed by circulation, provided the resolution has been circulated in draft, together with the necessary

papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India, by hand delivery or by post or by courier, or through such electronic means as may be prescribed and has been approved by a majority of the directors or members, who are entitled to vote on the resolution

- 2013 Act, provides that where at least 1/3rd of the total number of directors of the company require that any resolution under circulation must be decided at meeting of BOD, the chairperson shall put the resolution to be decided at a meeting of BOD
- A circular resolution is required to be noted at a subsequent meeting of the BOD or the committee

thereof, as the case may be, and made part of the minutes of such meeting

Committees of BOD

2013 Act provides for mandatory setting up of the following committees of the BOD for certain companies:

- Audit committee
- Stakeholder relationship committee
- Nomination and Remuneration committee
- Corporate Social Responsibility committee

The below summarizes the key requirements of the various committees:

Particulars	Audit committee	Stakeholder relationship committee (SRC)	Nomination and Remuneration committee (NRC)	Corporate Social Responsibility committee (CSRC)
Applicability	Listed and prescribed classes of companies	Companies whose total number of shareholders, deposit holders, debenture holders and other security holders exceed 1,000 at any time during a FY	Listed and prescribed classes of companies	Company having: <ul style="list-style-type: none"> • net worth of ₹ 5 billion or more; or • turnover of ₹10 billion or more; or • net profit of ₹ 50 million or more during any FY
Constitution	Minimum 3 directors. Majority being IDs	To be decided by BOD	Minimum 3 or more NED of which at least ½ shall be IDs	Minimum 3 directors of which at least 1 shall be ID
Chairperson	Chairperson and majority of directors on this committee should be able to read and understand the financial statements	Chairperson should be NED	Chairperson of the company can be a member of the NRC but cannot be a chairperson of the NRC	--
Role & Responsibility	<ul style="list-style-type: none"> • To recommend appointment and remuneration of auditors • To review and monitor the auditor's independence and performance and effectiveness of audit process • To examine financial statement and the auditors' report • To approve or modify any related party transactions • To scrutinize inter-corporate loans and investments • To value undertakings or assets of the company • To evaluate internal financial controls and risk management systems • To monitor the end use of funds through public offers, etc. 	<ul style="list-style-type: none"> • To consider and resolve grievances of the security holders of the company 	<ul style="list-style-type: none"> • To identify persons who are qualified to be directors of the company and who can be appointed in senior management • To recommend to BOD a policy relating to remuneration of directors, KMP and other employees keeping in mind appropriate performance bench marks striking a balance between fixed and incentive pay etc. • To evaluate performance of every director of BOD 	<ul style="list-style-type: none"> • To formulate and recommend to BOD, a CSR policy for undertaking permissible activities • To recommend the amount of expenditure to be incurred on CSR activities • To monitor the CSR Policy

Powers of BOD

- In addition to the existing powers (i.e. borrowing, investment, loan etc.) to be exercisable by BOD under 1956 Act at the Board meeting, the following powers are to be mandatorily exercised by the BOD at its meeting:
 - to approve financial statement and the Board's report;
 - to diversify the business of the company;
 - to approve amalgamation, merger or reconstruction;
 - to take over a company or acquire a controlling or substantial stake in another company;
 - to approve related party transactions;
 - to fill-up the casual vacancy of KMP;
 - any other matter which may be prescribed.

This is for ensuring that matters which are considered important for the business of the company are approved after due deliberation between board members and consideration of all relevant factors. This measure will enable board members especially ID and NED to seek necessary information, documents and clarification from KMP before taking individual and collective decision at the Board meeting.

- 2013 Act provides that the rule applicable to public companies that requires obtaining prior approval of its members by way of special resolution for exercise of certain powers by BOD is extended to private companies also. In all below cases approval of shareholders is to be obtained by a special resolution:
 - to sell, lease or otherwise disposal of one or more undertaking or the whole or substantially the whole of undertaking. Quantitative tests are provided for determination of what constitute 'undertaking' and 'substantially the whole of the undertaking'
 - to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation
 - to borrow money in excess of aggregate of the paid-up share capital and free reserves of company, apart from temporary loans obtained from the company's bankers in the ordinary course of business
 - to remit, or give time for the repayment of, any debt due from a director

Appointment and remuneration of Managerial Personnel

Key Managerial Personnel (KMP):

In relation to a company, KMP means-

- (i) CEO or MD or Manager;
- (ii) Company Secretary;
- (iii) WTD;
- (iv) CFO; and
- (v) such other officer as may be prescribed

Appointment of KMP

2013 Act provides that prescribed class of companies to have following whole-time KMP

- (i) MD, or CEO or Manager and in their absence, the WTD;
- (ii) CS; and
- (iii) CFO.

Key requirements in relation to KMP

- Every whole-time KMP is to be appointed by a resolution of the BOD containing the terms and conditions of the appointment including the remuneration.
- A Chairperson can be an MD or CEO at the same time, if the AOA of the company permits or if the company does not have multiple businesses or where the company has multiple businesses and has appointed 1 or more CEOs for each such business as may be notified by CG.
- A whole-time KMP cannot hold office in more than 1 company except in its subsidiary company at the same time and can be appointed as director in other companies with the permission of BOD
- If the office of any whole-time KMP is vacated, the same shall be filled up at the Board Meeting within 6 months
- KMP of a company shall not buy in the company, its holding, subsidiary or associate company -
 - a right to call for delivery or a right to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures; or
 - a right, as he may elect, to call for delivery or to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures.
- Insurance premium paid by company for indemnifying specified KMPs against the liabilities for negligence,

breach of duty etc. of such specified KMPs shall not be treated as part of remuneration of such KMPs.

- MD or WTD of the company who is in receipt of any commission from the company will not be disqualified from receiving any remuneration / commission from its holding company or subsidiary company subject to necessary disclosures in the Director's report.
- KMP is considered as part of 'officer' and 'officer who is in default' for the purpose of 2013 Act and shall along with the Company be held liable for any penalty or punishment by way of imprisonment, fine or otherwise imposed for the non-compliance or default of the provisions of 2013 Act.

Role of CFO:

2013 Act has enhanced the role of CFO which would entail greater responsibilities on the CFO of a company.

- CFO made responsible and liable for penalty and / or prosecution for compliance with various provisions such as maintenance of books of accounts, preparation & filing of annual accounts, disclosure of financial information in offer document, risk management, internal control etc.
- CFO mandatorily required to sign audited accounts.

Managerial Remuneration:

- The provisions relating to limits on managerial remuneration provided in the 1956 Act are retained. The maximum managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any FY cannot exceed 11% of the net profits of that company for that FY computed in the manner prescribed.
- In case of companies with no profits or inadequate profits, managerial remuneration can be paid as per Schedule V (Schedule V is similar to existing Schedule XIII to 1956 Act) and if the conditions of such Schedule V are not complied with, payment of managerial remuneration will require approval of CG.
- CG may prescribe different sitting fees for different classes of companies and fees in respect of IDs for attending meeting of BOD or committee thereof.
- NRC to recommend BOD policy relating to

remuneration of directors, KMP and other employees keeping in mind appropriate performance benchmarks striking a balance between fixed and incentive pay etc.

Director's Report

One of the measures adopted in 2013 Act is self-regulation, corporate democracy and enhance disclosure requirements which provides for greater transparency. Accordingly, 2013 Act has made the Director's Report more informative and includes disclosures amongst others:

- extract of the Annual Return, number of meetings of BOD, development and implementation of a risk management policy and CSR, related party contracts, certain loan / guarantees / investments and in case of listed and prescribed public companies to also provide for policy on directors appointment, remuneration and annual evaluation of the performance of the BOD.
- the Directors' Responsibility Statement shall also include the statement that the directors
 - had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.
 - had laid down internal financial controls to be followed and that such internal financial controls are adequate and were operating effectively – applicable to listed companies

E-Governance

In order to protect the interest of investors and other stakeholders in a transparent manner and facilitate easy and timely availability of information to the stakeholders for taking informed decision, 2013 Act provides for adopting various e-governance measures like maintenance and inspection of documents in electronic form, option of keeping of books of accounts in electronic form, financial statements to be placed on company's website, holding of board meetings through video conferencing/other electronic mode and voting by shareholders through electronic means.

Prohibition on insider trading of securities

No person including any director or KMP of a company should enter into act which amounts to insider trading (as defined in 2013 Act). As an exception, if any communication is required to be made in the ordinary course of business or profession or employment or under any law, the same will not fall under the ambit of insider trading.

Company secretary, its functions and secretarial audit

Appointment of CS:

CS being a whole-time KMP is to be appointed by a resolution of the BOD which will also contain the

terms and conditions of appointment including the remuneration. The functions of CS will include:

- report to BOD about compliance with the provisions of 2013 Act, the rules made thereunder and other laws applicable to the company;
- ensure compliance with the applicable secretarial standards as may be approved by CG; and
- discharge such other prescribed duties.

Secretarial audit:

2013 Act has made mandatory Secretarial Audit by CS in practice for listed and prescribed class of companies. The report of such Secretarial Audit has to be annexed to the Director's report.

Corporate Social Responsibility

With a view to have greater responsibility towards society by the corporates, 2013 Act, provides for CSR:

- Provisions applicable to every company having:
 - net worth of ₹ 5 billion or more; or
 - turnover of ₹ 10 billion or more; or
 - net profit of ₹ 50 million or more during any FY
- BOD of such companies is mandated to spend, in every FY, minimum 2% of the average net profits of the company made during the 3 immediately preceding FYs, in pursuance of its the CSR Policy.
- Such companies are required to constitute CSR committee of its BOD which is responsible for formulating and recommending to the BOD the CSR Policy of the company.
- BOD is required to approve the CSR policy and disclose its content in the Director's Report and also place the same on the company's website.
- The company is required to give preference to local area and areas where it operates for spending the amount earmarked for CSR.
- If the company fails to spend such amount, BOD is required to specify the reasons for not spending the amount in the Director's report.

- In view of the mandatory requirement under the 2013 Act, expenditure on CSR may be allowed as deduction under the Income Tax Act depending on the facts



M & A landscape



Buy-back of securities

Multiple buy-back in financial year: Buy-back of security has often been used to provide to shareholder in a joint venture an exit in a tax efficient manner or to reward shareholders etc. Under 1956 Act, it is possible to carry out more than 1 buy-back in a financial year as long as conditions were complied with. 2013 Act has restricted the ability of a company to do multiple buy-back of securities. Accordingly, no offer for buy-back can be made within a period of 1 year from the date of closure of the preceding offer for buy-back.

Longer waiting period for buy-back by defaulter

companies: If company has defaulted in repayment of deposits or interest payment or redemption of debentures or preference shares or payment of dividend, or repayment of any term loan or interest thereon to any financial institution or banking company then until the default is remedied and period of 3 years is completed after remedying, company will not be eligible to buy-back its securities.

Buy-back under scheme of arrangement or

compromise: Buy-back of securities cannot be made under a scheme of compromise or arrangement unless it is in accordance for buy-back provisions. In other words, buy-back under scheme of compromise or arrangement cannot exceed 25% of aggregate of paid-up share capital and free reserves and further buy-back in a financial year cannot exceed 25% of paid-up equity capital.

Utilisation of securities premium for prescribed class of companies: Prescribed class of companies will not be entitled to utilize securities premium for buy-back unless their financial statements comply with Accounting Standards prescribed for such class of companies.

Multilayer investment subsidiaries

One of the measures adopted in 2013 Act to prevent money laundering and to ensure transparency is to restrict one's ability to set up multiple investment companies.

A company unless permitted under the Rules can make investment through not more than 2 layers of investment companies. Exceptions to this basic law are:

- acquisition of a foreign company which has investment subsidiary beyond 2 layers as per the relevant foreign law; and
- a subsidiary company making investment to comply with any relevant law.

"Investment Company" has been defined to mean a company whose principal business is the acquisition of shares, debentures or other securities.

Simplified M&A process

2013 Act has simplified the process of merger, de-merger, restructuring etc. that requires approval of NCLT. Broadly, this can be seen under:

- Process
- Transparency
- Time line

Highlights of the revised process are as under:

- **Fast track merger:** 2013 Act contains provisions that would expedite merger process between 2 or more 'small companies' and between a holding company and its WOS. This process can be extended, under the Rules, to class of companies. Such a fast track merger would require approval of ROC, OL, members holding at least 90% of total number of shares and majority of creditors representing 9/10th in value. This will considerably reduce the time that takes in the High Court (NCLT under 2013 Act) process and will facilitate smooth and swift completion of the process.
"Small company" has been defined to mean a company, other than a public company, whose paid-up share capital does not exceed Rs 5 million or such higher amount as may be prescribed which shall not exceed Rs 50 million; or whose Turnover as per its last profit & loss account does not exceed Rs 20 million or such higher amount as may be prescribed which shall not exceed Rs 200 million.
- **Outbound merger:** Presently, while foreign company is allowed to merge with Indian company, vice versa is not allowed. 2013 Act permits an Indian company to be merged with a foreign company and vice versa. This will require prior approval of RBI under FEMA to be issued separately. The consideration for such a merger, subject to conditions, can be paid in cash and / or depository receipts. The Cross border merger will pave way for more interest amongst Indian and global players to operate under a single integrated entity. Necessary amendments may be required under the tax laws, to consider the same as a tax neutral merger.
- **Exit by minority shareholders:** Acquirer and / or PAC or person or group of persons who holds 90% or more of the issued equity capital of the company by virtue of amalgamation, share exchange, conversion of securities or for any other reason, can notify the company of his intention to purchase the remaining equity shares of the company from minority shareholders. In such case, the exit price is to be determined by RV. The minority shareholders of the company may also offer to sell their equity shares to the majority shareholders at a price determined under the Rules.
- **Approval threshold:** Compromise or arrangement would require approval by a majority representing 3/4th in value of the creditors and members. Presently, it also requires simple majority in terms

of number for both creditors and members.

Creditors meeting may be dispensed with if at least 90% in value thereof, agree and confirm, by way of an affidavit, to the scheme of compromise or arrangement.

- **Accounting treatment:** Accounting treatment in the scheme of compromise and arrangement need to be compliant with the Accounting Standards and Auditor's Certificate to that effect needs to be filed with NCLT. Listed companies were required to follow this in terms of the Listing Agreement, now even unlisted companies are brought at par with this requirement.
- **Valuation report** to be given to shareholders / creditors along with notice convening meeting for a compromise or arrangement.
- **Let the Regulators beware!** The notice for compromise or arrangement would need to be given to CG, Income tax, RBI, SEBI, Stock exchanges, ROC, OL, CCI, if necessary, and other sectoral regulators / authorities, to enable them to make representations.
- **Wider participation through Postal Ballot voting:** Resolution for compromise or arrangement can also be passed through Postal ballot.
- **Treasury stock:** Holding of shares in its own name or in the name of trust whether through subsidiary or associate companies by the transferee company as a result of the compromise or arrangement will not be allowed and any such shares shall be cancelled / extinguished.
- **Objection by minority:** Objection to the compromise or arrangement can be made only by persons holding not less than 10% of the shareholding or having outstanding debt of not less than 5% of total outstanding debt as per the latest audited balance sheet. This will save the companies from being dragged in long drawn court (NCLT under 2013 Act) process by minority holders who is holding even single share. Threshold will ensure that merger / demerger etc. process moves smoothly and swiftly in accordance with the law.
- **Takeover offer under scheme:** Takeover Offer may be included as a part of the scheme of compromise and arrangement in the manner as may be prescribed in Rules. In case of listed companies such takeover offer shall be as per the guidelines issued by SEBI.
- **Merger of listed into unlisted company:** In case of compromise / arrangement between a listed transferor company and an unlisted transferee company, NCLT may provide that the transferee

company shall remain unlisted company until it becomes listed and those shareholders of the transferor company who opts to exit be given an exit at a price which should not be less than the price under SEBI Regulations.

- **Dispensation of meeting of creditors:** Meeting of creditors can be dispensed only if 90% of the creditors in value agree to the scheme by way of affidavit.
- **Combining authorized capital on amalgamation:** Normally on amalgamation, based on judicial decisions, the authorised capital of the transferor company is added to the authorized capital of the transferee company. Now it is expressly provided that fees, if any, paid by the transferor company on its authorized capital shall be allowed to be set-off against fees, if any, payable by the transferee company on its authorized capital subsequent to the amalgamation.
- **Corporate debt restructuring:** Scheme of Corporate Debt Restructuring shall be approved by at least 75% of the value of the secured creditors.
- The proposal of amalgamation, merger or reconstruction can be considered and approved by Board of directors only by passing resolutions at board meeting and not by circular resolution
- The scheme of compromise or arrangement shall clearly indicate only one appointed date from which date the scheme shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date

Capital Reduction

- Capital reduction will require approval of NCLT
- Company will not be allowed to carry out capital reduction if it is in arrears in the repayment of any deposits accepted by it or interest thereon
- Capital reduction can be sanctioned by NCLT

only if the accounting treatment proposed by the company for such reduction is in conformity with the accounting standards and auditors certificate to that effect is obtained

Postal Ballot

Voting by Postal ballot through post / electronic mode is made applicable to all companies.

Registered Valuers

Where any valuation is required to be made in respect of any property, stocks, shares, debentures, securities, goodwill or other assets or of net-worth or liabilities under 2013 Act, such valuation shall be done by a person registered with the Government as a valuer. Registered valuer shall be appointed by the audit committee or in its absence by the BOD.

- Fast track mechanism for merger between wholly owned subsidiaries and holding company (or) merger between small companies will facilitate quicker internal reorganization
- Doing away with approval of shareholders and creditors of 3/4th majority (in numbers) and raising the threshold limit for raising objection by shareholders (10% holding) and creditors (5% of outstanding debt) in a scheme of arrangement will obviate the entire process being jeopardized by small stakeholders
- Parent / promoter will get opportunity to increase their stake in unlisted companies where they hold substantial holding by purchasing stake of minority shareholders at fair value determined by the RV.
- The process of giving notice to various regulators like IT, SEBI etc. could delay the process of amalgamation, merger, demerger etc. if there are any pending matters with these regulators.

National Company Law Tribunal

- 2013 Act envisages establishment of Tribunal to be known as NCLT with principal bench at New Delhi. NCLT will consist of Judicial and Technical members, as CG may deem necessary, to exercise and discharge the powers and functions conferred on it under 2013 Act or any other law
- NCLT to have such number of other benches as may be notified by CG
- NCLT to endeavor to dispose of the proceedings within 3 months
- On the date of the constitution of NCLT
 - All matters, proceedings or cases pending before CLB will stand transferred to NCLT;
 - All proceedings under 1956 Act, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending before any District Court or High Court, will stand transferred to NCLT. NCLT may proceed to deal with such proceedings from the stage before their transfer.
- Appeals against the order of NCLT is to be preferred to NCLAT
- An appeal arising out of order of NCLAT on any question of law is to be preferred to the Supreme Court
- A party to any proceeding or appeal before NCLT or NCLAT may either appear in person or authorize CA or CS or CWA or legal practitioners or any other person to present his case

Instances where approval of NCLT is required

2013 Act lays down various instances where approval of NCLT is required to be obtained. Some of these include:

- Seeking exemption for having FY of a company which ends on a day other than 31 March
- Issue of further redeemable preference shares in lieu of arrears of dividend or failure to redeem existing preference shares as per the terms of issue
- Preparation of revised financial statement or board report for past 3 FYs, where BOD believes that they do not comply with the relevant provisions
- Conversion of a public limited company to private limited company
- Capital reduction
- Filing Class action suits
- Scheme of compromise, arrangements and reconstruction
- Winding up of companies
- To declare a company as a sick company etc.

- Even CA's in practice are permitted to appear before NCLT / NCLAT. This is expected to broaden selection of service providers by the companies.

Revival and rehabilitation of financially distressed companies



- The provisions of revival and rehabilitation of financially distressed companies has been made applicable to all companies and not only to "industrial company" as defined under SICA
- The criteria of erosion of 50% of networth for filing application with BIFR has been done away with. Test for determining stress necessitating regulatory intervention is made uniform i.e. inability of a company to pay debts. Accordingly,
 - If a company fails to pay debts due to its secured creditor representing 50% or more of outstanding amount of debt within 30 days of demand, any secured creditor may file an application to NCLT to declare such company as a "sick company"
 - The company may also file an application to NCLT to declare it as a sick company on above ground

Protection of minority shareholders interest

2013 Act provides for some measures to protect the interest of minority shareholders. It includes the following:

- Where a company, which has raised money from public through prospectus and still has any unutilized amount out of the money so raised and which proposes to change its objects, then the promoter and shareholders having control of a company are required to provide an exit to the dissenting shareholders in accordance with regulations to be specified by SEBI
- Where any benefit accrues to promoter, director, manager, KMP, or their relatives, either directly or indirectly as a result of non-disclosure or insufficient disclosure in the explanatory statement annexed to the notice of general meeting then such persons shall hold such benefit in trust for the company and shall be liable to compensate the company to the extent of the benefit received by him
- **Class Action Suit:** New concept of Class Action Suit has been introduced. In case of oppression / mismanagement, specified number of members or depositors are entitled to file Class Action Suit before NCLT for seeking prescribed reliefs. They may also claim damages / compensation for fraudulent / unlawful / wrongful acts from or against the company / directors / auditors / experts / advisors etc. Some of the actions that can be taken are as under:
 - Restrain company from any act which is ultra vires the AOA / MOA
 - Restrain company for breach of provisions of MOA / AOA, Act or any other law
 - Declare a resolution void if material facts are not provided
 - Restrain company/ directors from acting on such resolutions
 - Restrain company from taking action contrary to any resolution passed by shareholders
 - Claim damages or compensation or demand any other suitable action.
 - Seek other remedies as Tribunal may deem fit
- **Serious Fraud Investigation Office (SFIO):** CG to establish SFIO for investigation of frauds relating to a company. Till the time SFIO is not established, SFIO already set up by CG in terms of directions of GOI to be used. CG may under the specified situations including in public interest refer affairs of a company to be investigated by SFIO.
- Where CG is of the opinion, that it is necessary to investigate into the affairs of a company by the SFIO -
 - on receipt of a report from the ROC or inspector appointed under 2013 Act;
 - on intimation of a special resolution passed by a company that its affairs are required to be investigated;
 - in the public interest; or
 - on request from any Department of the Central Government or a State Governmentthe CG may, by order, assign the investigation into the affairs of the said company to the SFIO.
- The company and its officers and employees, who are or have been in employment of the company, are responsible to provide all information, explanation, documents and assistance in connection with SFIO inquiry.

Conclusion

The 2013 Act has ushered in a new era of corporate democracy making a titanic shift from "government control" to "self-governance". The 2013 Act has a number of measures for protection of minority holders like tighter norms on companies from raising public deposits, filing class action suit etc. The introduction of concepts of KMP, independent director and woman director are aimed at ushering quality professionals at management/board level. The provisions relating to transactions with related parties have been simplified; at the same time scope of it being misused to the detriment of minority shareholders have been prevented.

The 2013 Act contains several welcome measures to boost M&A activities by allowing merger of Indian companies with foreign companies, putting in place a fast track mechanism for merger between wholly owned subsidiaries and holding company/merger between small companies and exit to minority shareholders at price determined by the valuer. All eyes are on the final Rules to be issued by MCA after considering suggestions received from stakeholders on the draft Rules. The Rules, once finalized, will provide far more clarity on the operational modalities of the 2013 Act.



Annexure

Provisions of 2013 Act (other than definitions) which are made effective as on 12 September 2013 are as under:

Sr. no.	Section	Particulars
Chapter II – Incorporation of company and matters incidental thereto		
1.	19	Subsidiary company not to hold shares in its holding company
2.	21	Authentication of documents, proceedings and contracts
3.	22	Execution of bills of exchange etc.
Chapter III – Prospectus And Allotment Of Securities		
4.	23	Public offer and private placement Except the provision relating to issue of securities by private and public companies through private placement
5.	24	Power of SEBI to regulate issue and transfer of securities
6.	25	Document containing offer of securities for sale to be deemed prospectus Except for matters to be stated in the prospectus
7.	29	Public offer of securities to be in dematerialised form
8.	30	Advertisement of prospectus
9.	31	Shelf prospectus
10.	32	Red herring prospectus
11.	33	Issue of application forms for securities Except penalty provision
12.	34	Criminal liability for misstatements in prospectus
13.	35	Civil liability for misstatements in prospectus Except the liability of an expert
14.	36	Punishment for fraudulently inducing persons to invest money
15.	37	Action by affected persons
16.	38	Punishment for personation for acquisition, etc., of securities
17.	39	Allotment of securities by company Except filing of return of allotment
18.	40	Securities to be dealt with in stock exchanges Except the payment of commission
Chapter IV – Share capital and debentures		
19.	44	Nature of shares or debentures
20.	45	Numbering of shares
21.	49	Calls on shares of same class to be made on uniform basis
22.	50	Company to accept unpaid share capital, although not called up
23.	51	Payment of dividend in proportion to amount paid-up
24.	57	Punishment for personation of shareholder
25.	58	Refusal of registration and appeal against refusal
26.	59	Rectification of register of members
27.	60	Publication of authorised, subscribed and paid-up capital
28.	65	Unlimited company to provide for reserve share capital on conversion into limited company
29.	69	Transfer of certain sums to capital redemption reserve account
30.	70	Prohibition for buy-back in certain circumstances Except for prohibition to companies which have not complied with the requirement of accounts, annual return and dividend

Sr. no.	Section	Particulars
Chapter VI – Registration Of charges		
31.	86	Punishment for contravention
Chapter VII – Management And Administration		
32.	91	Power to close register of members or debenture holders or other security holders
33.	100	Calling of extraordinary general meeting Except manner of reimbursement of expenses incurred by the requisitions
34.	102	Statement to be annexed to notice
35.	103	Quorum for meetings
36.	104	Chairman of meetings
37.	105	Proxies Except a)prescribed class of companies whose members cannot appoint proxy b)acting as proxy for more than 50 members c)validity of proxy form
38.	106	Restriction on voting rights
39.	107	Voting by show of hands
40.	111	Circulation of Members’ resolution
41.	112	Representation of President and Governors in meetings
42.	113	Representation of corporation at meeting of companies and of creditors Except representation by creditors and debenture holders in creditors meeting
43.	114	Ordinary and special resolution
44.	116	Resolutions passed at adjourned meeting
Chapter VIII – Declaration and payment of dividend		
45.	127	Punishment for failure to distribute dividends
Chapter IX – Accounts of companies		
46.	133	Central Government to prescribe accounting standards
Chapter XI – Appointment And Qualifications Of Directors		
47.	161	Appointment of additional director, alternate director and nominee director Except provision relating to alternate director
48.	162	Appointment of directors to be voted individually
49.	163	Option to adopt principle of proportional representation for appointment of directors
Chapter XII – Meetings Of Board And Its Powers		
50.	176	Defects in appointment of directors not to invalidate actions taken
51.	180	Restrictions on powers of Board
52.	181	Company to contribute to bonafide and charitable funds, etc
53.	182	Prohibitions and restrictions regarding political contribution
54.	183	Power of Board and other persons to make contributions to National Defence Fund etc.
55.	185	Loan to directors
56.	192	Restriction on non-cash transactions involving directors
57.	194	Prohibition on forward dealings in securities of company by director or key managerial personnel
58.	195	Prohibition on insider trading of securities

Sr. no.	Section	Particulars
Chapter XIII – Appointment and remuneration of managerial personnel		
59.	202	Compensation for loss of office of managing or whole-time director or manager
Chapter XXII – Companies incorporated outside India		
60.	379	Application of Act to foreign companies
61.	382	Display of name, etc. of foreign company
62.	383	Service on foreign company
63.	386	Interpretation Except the expression "certified"
Chapter XXIII – Government Companies		
64.	394	Annual report of Government Companies
Chapter XXV – Companies to furnish information or statistics		
65.	405	Power of Central Government to direct companies to furnish information or statistics
Chapter XXVI – National company law tribunal and appellate tribunal		
66.	407	Definition
67.	408	Constitution of National Company Law Tribunal
68.	409	Qualification of President and Members of Tribunal
69.	410	Constitution of Appellate Tribunal
70.	411	Qualification of Chairperson and Members of Appellate Tribunal
71.	412	Selection of Members of Tribunal and Appellate Tribunal
72.	413	Term of office of President, Chairperson and other Members
73.	414	Salary, allowance and other terms and conditions of service of Members
Chapter XXVIII – Special Courts		
74.	439	Offences to be non-cognizable
75.	443	Power of Central Government to appoint company prosecutors
76.	444	Appeal against acquittal
77.	445	Compensation for accusation without reasonable cause
78.	446	Application of fines
Chapter XXIX – Miscellaneous		
79.	447	Punishment for fraud
80.	448	Punishment for false statements
81.	449	Punishment for false evidence
82.	450	Punishment where no specific penalty or punishment is provided
83.	451	Punishment in case of repeated default
84.	452	Punishment for wrongful withholding of property
85.	453	Punishment for improper use of "Limited" or "Private Limited"
86.	456	Protection of actions taken in good faith
87.	457	Non-disclosure of information in certain cases
88.	458	Delegation by Central Government of its powers and functions
89.	459	Powers of Central Government or Tribunal to accord approval, etc., subject to conditions and to prescribe fees on applications
90.	460	Condonation of delay in certain cases

Sr. no.	Section	Particulars
91.	461	Annual report by Central Government
92.	462	Power to exempt class or classes of companies from provisions of this Act
93.	463	Power of court to grant relief in certain cases
94.	467	Power of Central Government to amend Schedules
95.	468	Powers of Central Government to make rules relating to winding up
96.	469	Power of Central Government to make rules
97.	470	Power to remove difficulties

Glossary

1956 Act: Companies Act, 1956	2013 Act: Companies Act, 2013
AGM: Annual General Meeting	AOA: Articles of Association
BOD: Board of Directors	CA: Chartered Accountant
CCI: Competition Commission of India	CEO: Chief Executive Officer
CFO: Chief Finance Officer	CG: Central Government
CMA: Cost and Management Accountant	CRA: Credit Rating Agency
CS: Company Secretary	CSR: Corporate Social Responsibility
DRR: Debenture Redemption Reserve	EGM: Extra-Ordinary General Meeting
FY: Financial Year	GOI: Government of India
HUF: Hindu Undivided Family	ID: Independent Director
IEPF: Investor Education and Protection Fund	KMP: Key Managerial Personnel
LLP: Limited Liability Partnership	MCA: Ministry of Corporate Affairs
MD: Managing Director	MOA: Memorandum of Association
NBFC: Non-Banking Finance Companies	NCLT: National Company Law Tribunal
NCLAT: National Company Law Appellate Tribunal	NED: Non-Executive Director
NFRA: National Financial Reporting Authority	OL: Official Liquidator
OPC: One Person Company	PAC: Persons Acting in Concert
RIF: Rehabilitation and Insolvency Fund	RBI: Reserve Bank of India
RSE: Recognised Stock Exchange	ROC: Registrar of Companies
SEBI: Securities and Exchange Board of India	RV: Registered Valuer
SRC: Stakeholders Relationship Committee	SFIO: Serious Fraud Investigation Office
VC: Video Conferencing	WTD: Whole Time Director
WOS: Wholly Owned Subsidiary	

Contacts

Ahmedabad

"Heritage", 3rd Floor, Near Gujarat
Vidhyapith, Ahmedabad 380 014
Phone: +91 (079) 6607 3100

Bangalore

Deloitte Centre, Anchorage II,
100/2, Richmond Road,
Bangalore 560 025
Phone: +91 (080) 6627 6000

Baroda

31, Nutan Bharat Society,
Alkapuri, Baroda 390 007
Phone : +91 (0265) 2333 776

Chennai

No. 37th, New No: 52, 7th Floor,
ASVN Ramana Towers,
Venkatnarayana Road,
T N nagar, Chennai 600 017
Phone: +91 (044) 66885000

Coimbatore

Shanmuga Mandaram, 41 Race Course
Coimbatore 641 018
Phone: +91 (0422) 24392801

Delhi/NCR

7th Floor, Building 10 Tower B,
DLF Cyber City Complex,
DLF City Phase II,
Gurgaon 122 002
Phone: +91 (0124) 679-2000

Goa

5th floor, Suyash Complex,
Panaji, Goa 403 001
Phone: +91 (0832) 2431821

Jamshedpur

8-B ,Circuit House Area, North-East
Road No.11,
Jamshedpur 831 001
Phone : +91 (0657) 2225883

Kochi

First Floor, Wilmont Park,
Business Centre, Warriam Road,
Kochi 682 016
Phone: +91 (0484) 2354305

Kolkata

1st floor, Block-EP & GP, Sector-V,
Salt Lake Electronics Complex
Kolkata 700 091
Phone : +91 (033) 6612 1000

Mumbai

Indiabulls Finance Centre
Tower 3, 27th-32nd Floor,
Senapati Bapat Marg, Elphinstone Road (W),
Mumbai 400 013
Phone: + 91 (022) 6185 4100

Pune

706, B - Wing, 7th floor,
ICC Trade Tower
Senapati Bapat Marg,
Pune 411 016
Phone : +91 (020) 6624 4600

Hyderabad

1-8-384 & 385,
3rd Floor, Gora Grand,
S.P. Road, Begumpet,
Hyderabad 500 003
Phone : +91 (040) 40312600



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