



NEW CONCEPTS UNDER COMPANIES ACT, 2013

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OVERVIEW OF COMPANIES ACT, 2013

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Rotation of auditor & auditor not to render certain services

Why there was a need for change? Benefits...

Why there was need for change?

- Big scams like Satyam, Sahara etc. influenced to change the existing law.
- For smooth and seamless application of corporate governance to all companies.
- Old Companies Act was a voluminous document, very procedural in nature and prescribed certain quantitative limits which were irreverent on account of changes in economy.
- Change in any provision requires an amendment of the law through the parliamentary process.

Benefits of re-enacting the new Companies Law:

- Bringing flexibility & adoption of Internationally accepted practices
- Self regulation with more disclosure
- Stringent punishment for violation
- Effective protection for different sections of society
- E-Governance
- Professionals' enhanced roles and accountability
- New Regulator set ups: NFRA, SFIO, NCLT

Silent features of The Companies Act, 2013:

<u>Companies Act, 2013</u>	<u>Companies Act, 1956</u>
29 Chapters	13 Parts
470 Sections	658 Sections
7 Schedules	15 Schedules
<ul style="list-style-type: none"> • Till date total 282 Sections & Rules for 23 chapters are notified • Substantial part of the Act is from Rules (418 places it has prescribed word) 	

<u>New chapters added</u>	<u>Chapter number</u>
Registered Valuers	Chapter 17
Government Companies	Chapter 23
Companies to Furnish Information or Statistics	Chapter 25
Nidhis	Chapter 26
National Company Law Tribunal & Appellate Tribunal	Chapter 27
Special Courts	Chapter 28

Brief on New concepts introduced:

<u>Sl. No.</u>	<u>New concepts</u>
1	Introduction of One Person Company & Small Company
2	Mandatory application of Corporate Social Responsibility (CSR)
3	Mandatory implementation of Internal Audit & Secretarial audit
4	Mandatory rotation of auditor & auditor not to render certain services
5	Mandatory inclusion of at least one woman director on board
6	Concept of resident director introduced
7	Concept of Class Action introduced
8	Prohibition on forward dealings in securities of Company by directors and KMP & Insider Trading of Securities is prohibited
9	Establishment of New Regulators (NFRA, SFIO, NCLT)
10	Formation of Nomination and Remuneration Committee and Stakeholders Relationship Committee, Vigil Mechanism
11	New definition for Associate company, Control, Small company, Key managerial personnel, Related party, etc.

Key definitions:

Associate company - section 2(6):

- Associate company means a company in which that other company has significant influence but which is not a subsidiary AND includes a joint venture company.
- “Significant influence” means control of at least 20% of total share capital, or of business decision under an agreement. However, as per Accounting Standard AS 23 significant influence is defined as “the power to participate in financial and/or operating policy decisions of the investee but not control over those policies”.

Control shall include - Section 2(27):

- To appoint majority of the directors or
- To control the management or policy decisions of the company through shareholding or management rights or shareholder agreements or voting agreements or any other manner.

As per Section 2(87), holding and subsidiary relationship relating to exercises and controls more than half of the total share capital includes equity shares and convertible preference shares.

Key definitions:

Chief Executive Officer - section 2(18):

- “Chief Executive Officer” means an officer of a company, who has been designated as such by it. Normally a person who leads a business enterprise is called as CEO.

Chief Financial Officer - section 2(19):

- “Chief Financial Officer” means an officer of a company, who has been designated as such by it. Normally a person who leads finance and treasure functions of a company is called as CFO.

Expert - Section 2(38):

- “Expert” includes an engineer, a valuer, a chartered accountant, a company secretary, a cost accountant and any other person who has the power or authority to issue a certificate in pursuance of any law.

Accounting and Auditing Standards - Section 2(2) & 2(7):

- Accounting Standards and Auditing Standards means the standards as recommended by ICAI in consultation with and after examination of the recommendations made by NFRA.

Key definitions:

Financial Statements - section 2(40):

- Financial Statements in relation to a company includes:
 - i. A Balance Sheet as at the end of the financial year
 - ii. A profit and loss account
 - iii. Cash flow statement for the financial year
 - iv. A Statement of changes in equity, if applicable and
 - v. Any explanatory note annexed to or forming part of above document.

Financial Year - section 2(41):

- Financial Year, means the period ending on the day 31st March every year
- If a company or body corporate incorporated on or after 1st January of a year, the period ending on the day 31st March of the following year,
- Provided a holding company or subsidiary company which is incorporated outside India and is required to follow different financial year for consolidation outside India, can get exception to this provision after Tribunal's approval.
- Existing companies who have different financial year ending, within 2 years shall be required to align its financial year ending as per new provision.

Key definitions:

Key Managerial Personnel (KMP) - section 2(51):

- Chief Executive Officer or managing director, or the manager
- the Company Secretary, the Chief Financial Officer, the whole time director
- Such other officer as may be prescribed.

Every listed company and every other public company having a paid-up share capital of Rs 10 crore or more shall have whole-time key managerial personnel. (Section - 203)

Turnover - section 2(91):

“Turnover” means the aggregate value of the realization of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year.

Net-worth - section 2(57):

“net worth” means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;

Relative, Related party & Transactions:

Relative section 2(77):

- Categories of relatives reduced to a major extent and includes Father, mother, Son, Son's wife, Daughter, Daughter's husband, Brother, Sister.
- New Relatives added - Step Father, Step mother, Step Brother, Step Sister (Previously step daughter was a relative)

Related party - Section 2(76) New definition: with reference to a company means:

- a director or his relative;
- a key managerial personnel or his relative;
- a firm, in which a director, manager or his relative is a partner;
- a private company in which a director or manager is member or director;
- a public company in which a director or manager is a director or holds along with his relatives more than 2% of its paid up capital;
- any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- any person on whose advice, directions or instructions a director or manager is accustomed to act;
- a holding, subsidiary or an associate company, a fellow subsidiary;
- Such other person as may be prescribed. (Director and KMP of holding company or his relative)

Related party transactions (Section 188)

Board approval required for following RPTs,
provided the transactions are being made on arm
length basis.

Leasing of property

Disposing of, or
buying, property

Sale, purchase or supply
of any goods or material

Appointment of any
agents

Appointment of
any related party
to any office or
place of profit

Contract for underwriting
the subscription of
securities or derivatives

Requires prior approval by Special resolution:

✓ for Companies having paid up share capital of Rs 10 crores or more

OR

✓ Transactions made for

- in the case of sale of goods or services exceeding 25% of the annual turnover,
- in the case sale of property or leasing transaction exceeding 10% of its net worth or availing of services directly or through agent
- Payment of remuneration to related person exceeding limit of Rs. 2.50 lac per month
- Remuneration for underwriting of securities exceeding 1% of net worth

One Person Company:

One person company (OPC) - section 2(62):

- OPC means a company which has only one person as a member.
- Who can incorporate an OPC?
 - i. Natural person
 - ii. an Indian citizen and resident in India. (Resident in India means a person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year.
 - iii. Should not be minor
- Nominee is essential and he or she must qualify the above criteria
- No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- Member of OPC “A” - Nominee of OPC “B” - becomes member in OPC “B” by virtue of nomination - make a choice within 180 days.
- The words “One Person Company” shall be mentioned in brackets below the name of OPC wherever its name is printed or affixed.

One Person Company:

Restrictions:

- OPC can not be incorporated or converted into a company with charitable objects of the Act.
- OPC cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporate.
- OPC can not convert voluntarily into any kind of company unless two years have expired from the date of incorporation of such Company.

Nominations:

- Subscriber to the memorandum shall nominate one person after obtaining prior written consent of such person and his name should be entered in Memorandum.
- Nominee can withdraw his consent by giving a notice in writing and the another person should be nominated within 15 days of receipt of such notice by sole member of OPC.
- Subscriber or member can change nominee at any time by giving notice to the Company and such change not deemed to be an alteration of the Memorandum.

One Person Company:

Exemptions available:

- Holding of AGM is not mandatory.
- OPC has to conduct one Board Meeting in each half of a calendar year provided the gap in 2 Board meetings is not less than 90 days.
- No requirement of quorum for Board meeting if there is only one director of OPC
- Financial Statement shall be approved by one director, if there is only one
- Preparation of Cash flow statement is not mandatory
- Rotation of auditor is not applicable and maximum term of auditor being 5 years in the case of individual and 10 years in the case of firm of auditors is not applicable.
- Meeting of Board of Director is not required if there is only one director.
- Annual return signed by Company secretary (employee) or where there is no company secretary, by director of the company.

One Person Company:

Mandatory conversion to Public or Private Company:

- Where the paid up share capital of an OPC exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, it shall cease to be entitled to continue as a One Person Company.
Relevant period means the period of immediately preceding three consecutive financial years.
- Such mandatory conversion should be happened within 6 months from the date of increase of such paid up capital or the last day of the relevant period during which its average annual turnover exceeds above threshold limit.
- The OPC shall within a period of sixty days from the date of such applicability give a notice to the Registrar.
- In case of default, OPC or officer of OPC shall be punishable with fine up to Rs. 10,000 or may extend to Rs 1,000 for every day.
- Voluntary conversion into Private and Public company also possible after fulfilling the requirements as per the Act applicable to such company.

One Person Company:

Conversion of Private Company into OPC:

- A private company other than a company under section 8 of the Act, having paid up share capital of fifty lakh rupees or less or average annual turnover during the relevant period is two crore rupees or less may convert itself into OPC by passing a special resolution in the general meeting.
- Before passing such resolution, the company shall obtain No objection in writing from members and creditors.
- The OPC shall file copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution.

Small Company:

Small Company - Section 2(85): means a company other than a public company,

- whose paid-up share capital does not exceed 50 Lakh rupees (higher limit may be prescribed, shall not be more than 5 crore rupees) **OR**
- Turnover as per last profit and loss account does not exceed two crore rupees (higher limit may be prescribed, shall not be more than 20 crore rupees)

Provided that this section will not be applicable to:

- Holding company or a subsidiary company
- A company registered under section 8;
- or a company or body corporate governed by any special Act.

Exemptions available:

All exemptions applicable to One Person Company will be applicable to Small Company. Section 129 (3) mandates a company which has one or more subsidiary must prepare consolidated financial statement. Here, for limited purpose subsidiary includes an associate or joint venture. Hence, small company may prepare consolidated financial statements.

Others:

Women director - 149 (1):

- Women director is mandatory for listed company, public limited company having paid up share capital Rs 100 crore or more or turnover of Rs 300 crore or more as on last audited financial statement.
- A transitional period of one year has been provided from April 1, 2014.
- It will ensure gender diversity on the Boards and may improve the quality of decision making.

Resident director - 149 (3):

At least one director must be in India for 182 days or more in previous calendar year of a company. (concept of Resident director introduced).

Registered Valuer (RV) - 247:

- Valuation of any property, stock, shares, net-worth, goodwill etc shall be valued by a RV and who shall have prescribed qualification and experience.
- BOD and audit committee shall appoint an RV.

Corporate Social Responsibility (whether desirable for brand building):

Corporate Social Responsibility (CSR) Obligations have been introduced under section 135 of the Companies Bill, 2013. The companies will have to mandatorily spend 2% of their average net profits during the three immediately preceding financial years for CSR activities.

- **CSR Provisions in Companies Act 2013 applicable to every company including foreign company having;**
 1. Net worth of Rs. 500 Crore or more, or
 2. Turnover of Rs. 1,000 Crore or more or
 3. Net profit of Rs. 5 Crore or more
- CSR committee shall have 3 or more directors and shall have minimum 1 independent director which shall -
 - Formulate and recommend policy and choose activities out of schedule VII
 - Recommend amount of expenditure to be incurred and Monitor such policy
- Board approved policy - content to be disclosed in Board's report and on Company's website.

CSR:

- Net profit should be calculated in accordance with section 198 of Companies Act, 2013
- Net profit should be before tax and shall not include profits from overseas branches
- Net profit shall not include any dividend received from other companies in India, which are covered under and complying with the CSR provisions
- Contribution can be given to a trust formed by the Company provided:
 - It is for specific projects or programmes
 - There is monitoring mechanism in place
- Company can contribute to unrelated trust having track record of at least 3 years in carrying such activities in related areas.
- Company can be out of CSR ambit only if the conditions given are not satisfied for 3 consecutive years.
- CSR activities that benefit only the employees of the company and their families shall not be considered as CSR activities.

CSR:

- Contribution directly and indirectly to any political party shall not be considered as CSR activity.
- CSR Policy shall include the following:
 - A list of CSR projects, specifying modalities of execution of such project or programs and implementation schedules for the same
 - Monitoring process of such programs and projects
 - CSR policy shall specify that the surplus arising out of the CSR projects or programs shall not form part of the business profits of the company.
- Company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.
- If the company fails to spend such amount, the Board shall, in its report specify the reason for not spending the amount.
- Whether provision required in the P&L account?

Internal and Secretarial Audit:

- Internal Audit is mandatory by Law to the following companies: (Section- 138)
 - All listed company or,
 - Public company: Having Paid up share capital Rs. 50 crore or more, Turnover Rs. 200 crores or more, outstanding borrowing from banks or public financial institutions Rs 100 crore or more, outstanding deposits of Rs 25 crore or more at any point of time during preceding financial year or,
 - Private company: Turnover Rs 200 crore or more, outstanding borrowing from banks or public financial institutions Rs 100 crore or more at any point of time during preceding financial year.
- Transitional provision: within 6 months of commencement of such section.
- Internal auditor may or may not be an employee of the Company.

Secretarial audit is mandatory for: (Section - 204)

- All listed company or
- Public company having paid up share capital of Rs 50 crore or more, turnover of Rs 250 crore or more.

Committees of the Board:

Whistle Blowing - Sec. 177 (9):

- Every Listed company and company which accept deposit from public and which have borrowed money from bank and FIs in excess of Rs 50 crore shall establish a vigil mechanism for directors and employees to report genuine concerns.
- Audit Committee shall oversee the vigil mechanism or in the absence of Audit Committee BOD shall nominate a director to play the role.
- Details of such mechanism shall be disclosed on company's website and in the Board's report.

Stakeholders Relationship Committee- Sec. 178 (5):

- A company has more than 1,000 shareholders, debenture holders and any other security holders at any time during a financial year shall constitute such committee consisting of chairperson who must be non-executive director and such other members as may be decided by BOD.
- Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company.

Committees of the Board:

Nomination and Remuneration Committee - Sec. 178 (1):

- Nomination and Remuneration Committee is mandatory for:
 - All listed company
 - Public company: Paid up capital Rs 10 crore or more, Turnover Rs 100 crore or more, outstanding loans and borrowings or debentures or deposits exceeding 50 crore or more as on the last audited financial statements.
- Such committee shall consist of three or more non-executive directors out of which not less than one half shall be independent.
- Chairperson of the company (whether executive or non-executive) may be appointed as a member of such committee but shall not chair such committee
- Said committee will evaluate of every director's performance and shall identify persons who are qualified to become directors and senior management.

Rotation of auditors:

Mandatory rotation of auditors are applicable for

- Listed company or
- Public company having paid up share capital of Rs 10 crore or more or
- Private company having paid up share capital of Rs. 20 crore or more or
- All companies having borrowings from financial institutions, banks or public deposits of Rs. 50 crore or more

Time Frame for Rotation:

- ✓ An individual as auditor shall not be appointed or re-appointed for more than one term of five consecutive years and in the case of an audit firm not more than two terms of five consecutive years. Provided such company shall comply with the provision within 3 years from date of commencement of Act i.e. April 1, 2014.
- ✓ The Auditor appointed in the AGM shall hold office from the conclusion of that AGM till the conclusion of the sixth AGM.
- ✓ Removal of Auditors before expiry of his term shall require special resolution and prior approval of central government.

New Regulator-National Financial Reporting Authority (NFRA): (Section-132)

Formation:

- NFRA shall consist of chairperson having expertise in accountancy, auditing, finance or law and to be appointed by the Central Government.
- Other members not exceeding 15 part time or full time.
- Chairperson and other full time members shall not be associated with any audit or related consultancy firm during their tenure with NFRA and till 2 years after ceasing to hold such appointment.

Function:

- The Central Government may constitute a NFRA to provide for matters relating to accounting and auditing standards which shall:
 - ✓ make recommendation to CG for standard setting,
 - ✓ monitor and enforce compliance of such standard,
 - ✓ overseas the quality of service of professionals associated with ensuring compliance and suggest measures required for improvement in quality of service.

New Regulator-National Financial Reporting Authority (NFRA): (Section-132)

Power and duties:

- NFRA shall have the powers to investigate into matters of professional and other misconduct committed by member or firm of CAs.
- NFRA has the same powers as are vested in a civil court under the code of civil procedure
- Where professional or other misconduct is proved, NFRA has the power to impose penalty as follows:
 - In the case of individual: penalty of not less than Rs. 1 lakh, but which may extend to 5 times of fees received
 - In the case of firm: penalty of not less than Rs. 10 Lakh, but which may extend to 10 times of fees received.
 - Debarring the member or firm from practice for a minimum period of six months or for higher period not exceeding 10 years
- Appeal against NFRA order possible before the Appellate Authority.

New Regulator-Serious Fraud Investigation Office (SFIO): (Section-211 & 212)

Formation:

- The Central Government shall establish SFIO to investigate frauds relating to a company. Until SFIO is established under this Act, the SFIO set-up by the Central Government shall be deemed to be SFIO for this purpose.
- The CG refers matters to SFIO on receipt of report of Registrar, special resolution from the company, in public interest, on request of Central/ State Govt.
- SFIO shall be headed by a Director and consist of experts.

Function & power:

- If the director, Additional or Assistant director of SFIO has on the basis of material in possession reason to believe (to be recorded in writing) that any person has been guilty of an offence, he may arrest such person
- After such arrest, there is a limitation on granting bail.

New Regulator-National Company Law Tribunal (NCLT): (Chapter-27)

- The Central Govt. shall set up a NCLT to be replaced Company Law Board.
- There are two classes of members to the National Company Law Tribunal; Judicial Members and Technical Members. The Tribunal shall be headed by the President.
- The President shall be a person who is or has been a Judge of a high Court for five years.
- Qualification of Judicial Member unless he or she is or has been a judge of high court, or district judge for at least 5 years or having 10 years of experience been an advocate.
- Qualification of Technical Member unless he has been member of Indian Corporate Law service, Indian Legal Service or has been in practice of CA, CS or Cost Accountant for at least 15 years.
- The Central Government shall by notification, constitute an National Company Law Appellate Tribunal, constituting of a Chairperson and not exceeding eleven members for hearing appeals against the orders of the Tribunal.

Class Action Suit (Sec.-245) Yet to be notified

Background:

After Satyam Scam broke out in 2009, concept of Class action came to the spotlight in India. Satyam's ADR were listed in New York Stock Exchange, several class actions were filed against Satyam, MD and auditors. In the absence of any statutory provision under Indian Companies Act, 1956, no similar proceedings could be initiated by the Indian investors.

Who can file Class Action Suits?

Requisite number of Members, Depositors or any class of the above (not less than 100 members or such percentage of total members (10% of total number of members prescribed in draft rule) or such percentage of members having issued share capital of the company (10% of total issued share capital prescribed in draft rule).

Against whom a Class Action Suit can be filed?

- Against company, any of its directors, Auditor including Audit firm, any other expert or advisor.
- In the case of claim against audit firm, the liability shall be of the firm as well as of each partner who is involved.

Class Action Suit (Sec.-245) Yet to be notified

When can a Class Action suit be filed?:

When applicants are of the opinion that the management or conduct of the affairs of the company are being carried in a manner prejudicial to the interest of the company or its member or depositors.

What action will be taken by NCLT?

- NCLT will issue a public notice with in 7 days of admission of the application in regional and English news paper.
- Consolidate all similar applications prevalent in any jurisdiction into a single application. NCLT will not allow two class action applications for the same cause of action.

Penalty:

- Company shall be punishable with fine which shall not be less than Rs 5 lakh but which may extend to Rs 25 lakh, and Every office who is in default shall be punishable with imprisonment up to 3 years and with fine up to Rs. 1 lakh.
- If the application filed is found to be frivolous the applicant shall pay to the opposite party fine up to actual cost up to Rs. 1 lakh.



Thank You