

THE COMPANIES AMENDMENT ACT, 2017

The parliament has passed the Companies Amendment Act, 2017 (hereinafter referred to as the “**2017 Amendment Act**”). It has received President of India’s assent and the same has been published in Official Gazette on 3rd January 2018.

The amendments made under the 2017 Amendment Act shall come into force on dates as notified by Central Government. As of now only section 1, section 2 {except clause (i) and clause (xiii)}, section 3, section 4, section 7, section 9, section 11, section 12, section 14, section 17, section 27-29, section 32, section 34-35, section 38, section 41-45, section 47-48, section 50-51, section 53, section 59-60, section 63-65, section 72-74, section 77-79, section 82, section 84-85, section 90-93 of the 2017 Amendment Act have been notified.

(i) Definition of Associate Company:

- As per Section 2(6) of the existing Companies Act, 2013 (hereinafter referred to as the “**2013 Act**”), an associate company with respect to another company means a company in which the other company has a significant influence and includes a joint venture company.
- Explanation to the said section addresses the meaning of ‘significant influence’ to say control of minimum twenty percent of total share capital, or of business decision under an agreement.
- The 2017 Amendment Act substitutes the explanation to the said section so as to change the meaning of term ‘significant influence’. Now the term means control of at least twenty percent of total voting power (instead of share capital) or control of or participation in business decision (instead of only control) under an agreement.
- This would mean that preference share capital would not amount to significant influence unless the same has control or participation in the business decision of the company. The change has been made in order to align the provision with Accounting Standard 28.
- The term Joint Venture has also been explained in the definition of ‘associate company’ which was earlier missing from the Act. The new definition would mean a joint arrangement, where parties have joint control of the arrangement and have rights to the net assets of the arrangement.

(ii) Liability of members in case of fall in minimum number of members:

- Under the 2017 Amendment Act, a new section 3A, has been introduced whereby the existing members of the company shall be severally liable for the company’s whole debt, if the members are aware of the fact that the number of members of the company are below the minimum number as prescribed under the law i.e. 7 (seven) in case of public company and 2 (two) in case of a private company and the company still carries on business for more than 6 (six) months while the number of its members is so reduced.
- This has reiterated the position of erstwhile Companies Act, 1956 which was missing in current 2013 Act.

(iii) Reservation of the name of the company by the Registrar:

- Under the 2013 Act, the promoters could make application to registrar for reservation for the name of the proposed company or change in the name of an existing company for sixty days from the date of application.
- The 2017 Amendment Act substitutes the period for reservation of name for the proposed company from ‘60 (sixty) days from the date of the application’ to ‘20 (twenty) days from the date of approval’.
- However, in case of change in name or reservation of name of an existing company, the reservation of name by the Registrar may be made for 60 (sixty) days from the date of approval.

(iv) Private Placement:

- The 2017 Amendment Act has replaced and revamped the entire Section 42 of the 2013 Act - Issue of shares on a private placement basis.
- A private placement may only be made only to select group of persons to whom the offer is to be made is to be identified by the board of the company.
- Private placement offer cannot carry right with respect to renunciation in favour of a third party.
- A company may issue simultaneous offer at the same time subject to maximum number of identified persons which shall be not more than 50 (fifty) or such other higher number as may be prescribed and on such conditions as may be prescribed.
- The company raising monies through private placement cannot utilize the money unless it has made allotment of securities and filed return of allotment with the Registrar in form PAS- 3.
- The period of filing the return of allotment has been reduced to 15 (fifteen) days from the date of allotment as compared to current 30 (thirty) days requirement.
- If the return of allotment is not filled within the above-mentioned time period, the company, its promoters and directors are liable to pay penalty i.e. Rs. 1,000/- (Rupees one thousand) for each day of default during which the default continues but not exceeding Rs. 25,00,000/- (Rupees twenty five lakh).
- However, if the company makes an offer or accepts monies the penalty for contravening the section may extend to the entire amount raised through the private placement or Rs. 2,00,00,000/- (Rupees two crore), whichever is lower and the company shall also refund all the monies received along with interest within 30 (thirty) days of the order imposing penalty.

(v) Issue of shares at discount:

- Section 53 of the 2013 Act prohibits issuance of shares at a discount entirely except for the issuance of sweat equity shares under certain prescribed conditions.

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- ≡ The 2017 Amendment Act allows companies to issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme as per the guidelines/ directions of the Reserve Bank of India or Banking (Regulation) Act, 1949.

(vi) Issue of sweat equity shares:

- ≡ As per the Section 54 (1)(c) of the 2013 Act, a company cannot issue sweat equity shares for a period of one year since its date of commencement of business.
- ≡ The said condition has been done away with in the 2017 Amendment Act.
- ≡ This might help the newly incorporated companies, specifically start-up(s) to retain its employees by issuing sweat equity shares.

(vii) Acceptance of deposits by the companies:

- ≡ Under the 2013 Act, company is required to deposit in separate bank account, minimum 15% (fifteen percent) of the amount of deposit maturing during the financial year and next financial year.
- ≡ The 2017 Amendment act increases the minimum requirement of deposit from 15% (fifteen percent) to 20% (twenty percent) to be deposited before 30th day of April of financial year. The allotment money collected shall be kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account.
- ≡ No more mandatory requirement of creating deposit insurance by the companies.
- ≡ Under the 2013 Act, the companies which have defaulted in the repayment of deposits at any time are prohibited from accepting any further deposits from public.
- ≡ The 2017 Amendment Act relaxes the stringency by providing that companies which have rectified the default can accept deposits from public, if a period of 5 (five) years has lapsed since rectifying the default.

(viii) Annual General Meeting

- ≡ The 2017 Amendment Act provides that annual general meeting of an unlisted company may be held at any place in India only if all the members of the company give their consent to it either in writing or by electronic mode.

(ix) Convening of general meeting at shorter consent:

- ≡ Under the 2013 Act a general meeting may be called by giving a shorter notice if consent is given by not less than ninety-five percent of the members entitled to vote at such meeting.
- ≡ The 2017 Amendment Act aims to bifurcate the shorter consent requirement for annual general meeting and other general meeting. It provides that meeting at a shorter notice can be called in case of an annual general meeting with the consent of atleast ninety five percent of the members entitled to vote thereat. In case of any other general meeting by the members of the company, (i) where the company has share capital then the majority in number of members entitled to vote and who represent not less than ninety- five percent of such part of the paid-up share capital of the company as gives a right to vote at the meeting, (ii) where the company

has no share capital then not less than ninety- five percent of the total voting power exercisable at that meeting.

(x) Financial Statement:

- ≡ The 2013 Act mandates for preparation of consolidated financial statement of the company and all of its subsidiaries.
- ≡ The 2017 Amendment Act also makes it mandatory to consolidate the financial statement of associate companies of the company along with its subsidiaries. Also a separate statement shall be attached along with the financial statement of the company containing the salient features of its subsidiaries and associate company.
- ≡ Section 134 of the 2013 Act provided that Chief Executive Officer (CEO) of a company shall sign the financial statement if he is also appointed as director of the company.
- ≡ The 2017 Amendment provides that CEO shall sign the financial statement irrespective of the fact whether he is a director or not.
- ≡ Section 134 of the 2013 Act further provided that a statement, indicating the manner in which annual evaluation made by the Board of its own performance, its committees and individual director, shall be attached to report by the board of director of the company.
- ≡ The 2017 Amendment Act provides that if details pertaining to the company's policies on corporate social responsibility, director's appointment and remuneration, qualifications, independence and such other matters as provided in section 178 are made available on the website of the company, then only salient features with respect to the above mentioned policies and any change therein along with the web link of such policy is required to be mentioned in the board's report and the same shall constitute the compliance with respect to the said requirement under the law.
- ≡ The 2017 Amendment Act inserts a new proviso to Section 139 (1) to provide that in case of foreign subsidiary of an Indian holding company which does not get its financial statement audited, the holding Indian company is required to file such English translated unaudited financial statement with the Registrar as per Section 137 of the 2013 Act.

(xi) Resident Director:

- ≡ The 2013 Act required every company to have atleast 1 (one) director who stays in India for not less than 182 days in the previous calendar year (resident director).
- ≡ The 2017 Amendment Act changes the resident requirement such that the director is required to stay in India for minimum 182 days during the financial year. But in case of a newly incorporated company the requirement shall apply proportionately at the end of the financial year in which it is incorporated.

(xii) Independent Director:

- ≡ The 2013 Act prohibits the appointment of a person as an independent director who had any pecuniary relationship with the company, its holding, subsidiary, associate

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company or their promoters or directors during current or immediately preceding two financial years.

- ≡ The 2017 Amendment Act seeks to relax this disqualifactory norm by providing that if any such pecuniary relationship, excluding remuneration as such director, is not exceeding ten percent of his total income or such income as may be during 2 (two) preceding financial year or during the current financial year, then such person is not disqualified from being appointed as an Independent Director.
- ≡ Independent directors relatives should not hold any security/ interest in the company, its holding or subsidiary company during the 2 (two) preceding financial years or during the current financial year.
- ≡ Is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year.
- ≡ Has provided guarantee/ security to the company with regard to any third person.
- ≡ Has pecuniary transaction/ relationship with the company amounting to 2% (two percent) or more of its gross turnover/ total income held singly or in combination of the above.
- ≡ A relative who is merely an employee during the preceding three financial year will not impact independence.

(xiii) Filling of casual vacancy of director

- ≡ Under the 2013 Act in case where the office of a director is vacated before his term of office expires in the normal course, the casual vacancy may be filled by the Board of Directors at a meeting of the Board.
- ≡ This provision was only available to public company. The 2017 Amendment Act has made this provision applicable to all companies. Further it has also been provided that such casual vacancy filled by the board of directors shall be subsequently approved in the next general meeting of the company. It also puts a restriction on a person from being appointed as an alternate director if he is holding directorship in the same company.

(xiv) Resignation of Director

- ≡ Under the 2013 Act provided that a resigning director shall file Form DIR-11 along with reason of his resignation with the registrar of companies within thirty days of such resignation
- ≡ This mandatory requirement has been made optional under the 2017 Amendment Act.

(xv) Loan to directors:

- ≡ Under the 2013 Act, a company cannot either directly or indirectly provides any loan, guarantee or security to any director or any other person in which such director is interested. However, certain exceptions to the above rules have been carved out in the section.
- ≡ A new Section has been substituted by the 2017 Amendment Act to provide that a company cannot advance loan or give any guarantee or security in connection with a loan taken by

director or his partner or relative or a firm in which such director or relative is a partner or to holding company of the company.

- ≡ However, company is allowed to advance loan, give guarantee or provide security to a person in whom a director of a company is interested subject to the conditions that
 - Special resolution is passed in general meeting.
 - Loan is utilized by borrowing company for its principal business activity.
- ≡ Further, penalties with respect to contravention of the said provision for every officer of the company who is in default has also been added, which was missing in the 2013 Act.

(xvi) Advancement of loan to employees of the company:

- ≡ Section 186 of the 2013 Act restricted, inter alia advancement of loan to any person or other body corporate exceeding such threshold as prescribed thereunder.
- ≡ The 2017 Amendment Act defines the word 'person' for this section to exclude employees of the company meaning thereby that loans given as a part of the condition of service or pursuant to a scheme of the company are not covered in this Section.
- ≡ Section 186 of the 2013 Act further provided that in case the aggregate of loans and investment exceeds the threshold limit, a special resolution with that respect is required to be passed in a general meeting.
- ≡ The 2017 Amendment Act relaxes such norm of passing the special resolution in such cases if loan or guarantee or security has been provided by a company to its wholly owned subsidiary or a joint venture company or acquisition by subscription or otherwise shares of the subsidiary company by the holding subject to the additional condition that the holding company shall disclose such details of such acquisition or purchase or of loan, security or guarantee in its financial statement.

(xvii) Voting in related party transactions:

- ≡ The 2013 Act provided that member of the company who is a related party shall not vote for a resolution required to be passed for approval of the related party transaction, shall be abstain from voting.
- ≡ The 2017 Amendment Act has exempted the applicability of this clause on companies in which 90% (ninety percent) or more members, in number, are relatives of promoters or are themselves related parties.

(xviii) Punishment and penalties:

- ≡ The 2017 Amendment Act inserts new Section 446A to provide the factors that the court should keep in mind while deciding the amount of fine or imprisonment. Such factors are as follows:
 - Size of the company
 - Nature of business carried on by the company
 - Injury to public interest
 - Nature of the default
 - Repetition of the default.

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- Also new section 446B has been introduced which provides for lesser penalties for one person companies and small companies with respect to default in filing annual returns, resolutions and agreements in pursuance of section 117 of the Act and failure of filing of financial statements to the registrar of the companies within the stipulated time period, the penalty for such default shall not be more than one-half of the fine or imprisonment specified in the respective sections.

(xix) Penalty for failure to file resolution with registrar:

- Section 117 of the 2013 Act provided that in case company fails to file the resolution or agreement as required under the section with the registrar, it shall be punishable with fine of minimum five lakh rupees but which may extend to twenty-five lakh rupees and also every officer of the company who is in default shall be punishable with fine of at least one lakh rupees but which may extend to five lakh rupees.
- The 2017 Amendment Act aims to reduce the penalty provided in the section. As per the amendment, minimum penalty for such failure shall be one lakh rupees in case of company and fifty thousand rupees in case of officer in default.

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