

All About Private Companies

[Coverage Cos. Act, 2013
Cos. (Amendment) Act, 2017
MCA Notifications]

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Seminar on Cos. Act, 2013 – Mangalore Branch of
SIRC of ICAI – June 9, 2018.

Private Company

- ✓ All About Private Company – What is ‘ALL’
- ✓ Definition under Sec. 2(68) of the Act,
- ✓ Exemptions in Cos. Act, 2013 vis-à-vis Cos. Act, 1956.

Further classification of Private Co.

3

Small Company

One Person Company

DIPP-registered Start-Up

Private Co. (other than above)

Small Company

- i. Paid-Up share capital (maximum limit) enhanced to Rs. 10 Crore (from Rs. 5 Crore)
AND
- ii. Turnover (maximum limit) enhanced to Rs. 100 Crore (from Rs. 20 Crore).

Cos. (Amendment) Act, 2017 (*effective from Feb. 9, 2018*)

5

OPC

Applicability & Exemptions

MCA Notification dated June 5, 2015 & June 13, 2017

Exceptions, modifications & adaptations shall be applicable to Private Co. which has not committed a default in filing its Financial Statements (u/s 137 of the Act) or Annual Return (u/s 92 of the Act) with the ROC.

Applicability of the exemptions to Private Co.

Loan to directors

Section 185 of Cos. Act, 2013

Companies (Amendment) Act, 2017.

Section completely substituted.

(effective from May 7, 2018)

Amended provision:

Sec. 185 is completely substituted by Cos. (Amendment) Act, 2017

Revised Sec. is divided in 4 sub-Sec., highlights are as follows:

- (1) Complete restriction on loans, guarantees & securities to certain parties,
- (2) Permits granting of loans, guarantees & securities to certain parties, subject to riders,
- (3) Loans, guarantees & securities to certain parties completely exempted from compliance of the Sec.,
- (4) Penal provisions under Sec. 185 of the Act.

Associate Company

Section 2(6) of Cos. Act, 2013

Ref: Cos. (Amendment) Act, 2017(May 7, 2018)

Amended provision:

10

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.

Explanation.—For the purpose of this clause:

*(a) the expression ‘significant influence’ means control of at least 20% of **total voting power**, or control of or participation in business decisions under an agreement;*

(b) the expression ‘Joint Venture’ means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

11

Holding Company

Section 2(46) of Companies Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (Feb. 9, 2018)

Amended provision:

12

Holding Company in relation to one or more other companies, means a company of which such companies are subsidiary companies.

Explanation — For the purposes of this clause, the expression ‘company’ includes any body corporate.

Key Managerial Personnel

Section 2(51) of Cos. Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective from
Feb. 9, 2018)*

Amended provision:

14

Key Managerial Personnel in relation to a company, means—

- i. Chief Executive Officer or Managing Director or Manager;
- ii. Company Secretary;
- iii. Whole-time Director;
- iv. Chief Financial Officer;
- v. **Such other officer, not more than one level below the directors who is in whole-time employment, designated as KMP by Board; and**
- vi. such other officer as may be prescribed;

Related Party

Section 2(76) of Cos. Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective from
Feb. 9, 2018)*

Relevant clause of ‘Related Party’ under Cos. Act, 2013

16

‘Related Party’, with reference to a company, means—

(viii) any **body corporate** which is—

(A) a holding, subsidiary or an associate company of such company;

(B) A Subsidiary of a Holding Co. to which it is also a subsidiary; or

(C) An Investing Co. or the venturer of the Co.

Explanation – For the purpose of this clause, ‘the investing company or the venturer of a company’ means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

Subsidiary Company

Section 2(87) of Cos. Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective from
May 7, 2018)*

Amended provision:

18

- ❑ One of the criteria changed for determining a company as ‘subsidiary company’:
- ❑ Co. in which Holding Co. exercises controls more than $\frac{1}{2}$ of the *total voting rights* (earlier ‘total-share capital’) either at its own or together with one or more of its subsidiary cos.

Section 188 of Cos. Act, 2013

Approval of shareholders for RPTs u/s 188 of Act by ordinary resolution is not applicable to:

A company in which 90% or more members, in number, are relatives of promoters or are related parties.

Ref.: Cos. (Amendment) Act, 2017 (effective from Feb. 9, 2018)

Companies capable of being registered

Section 366 of Cos. Act, 2013

U/s 366 of the Act, any partnership firm, LLP, co-operative society or any other business entity (with 7 or more members, now 2 members or more members) may be converted into company limited by shares, guarantee or unlimited company under the Act.

(Ref.: Cos. (Amendment) Act, 2017 – Not yet notified)

Financial Statement

Section 2 (40) of Companies Act, 2013

Non-applicability of ‘Cash Flow Statement’ to OPC, Small Co., Dormant Co. & Private Co. (DIPP registered ‘start-up’).

MCA Notification June 5, 2015

Kinds of Share Capital

Section 43 – Kinds of Share Capital – Shall not apply where MoA or AoA of the private company so provides.

MCA Notification June 5, 2015

Voting Rights

Section 47 – Voting Rights shall not apply where MoA or AoA of the private company so provides.

MCA Notification June 5, 2015

Further issue of share capital

Section 62 of Companies Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 effective from
Feb. 9, 2018)*

Highlight of the Amendment

25

The notice (*referred to in Sec. 62(1)(a)(i) of the Act*) shall be dispatched through Registered Post or Speed Post or through electronic mode or **courier or any other mode having proof of delivery** to all the existing shareholders at least 3 days before the opening of the issue.

Now 5 options to send the Notice
Earlier, it was 3 options – Registered Post or Speed Post or through electronic mode

Further Issue of Shares u/s 62 of Cos. Act, 2013

In case 90%, of the members of private Co. have given their consent in writing or in electronic mode, the period lesser than those specified (i.e. 15 – 30 days) shall apply – Offer Letter under Rights Issue u/s 62 of the Act.

MCA Notification dated June 5, 2015

Further Issue of Shares

Section 62 of Cos. Act, 2013:

By passing an Ordinary Resolution, a Pvt. Co. can offer shares to employees under ESOP scheme, subject to prescribed conditions.

MCA Notification June 5, 2015

Provisions relating to acceptance of deposit

Section 73(2) of Cos. Act, 2013

Ref.: MCA Notification – June 5, 2015

Conditions prescribed in Sec. 73(2) of the Act

29

Passing of resolution in general meeting, subject to rules prescribed by RBI w.r.t. *acceptance of deposits from its members* with the conditions:

- (i) Issuance of Circular,
- (ii) Filing of copy of circular with ROC,
- (iii) Depositing 30% of maturing amount in separate Bank A/c,
- (iv) Certifying that Co. has not committed any default in the repayment of deposits accepted either before or after the commencement of Cos. Act or payment of interest on.

Said conditions are not applicable to Private Co., subject to following riders:

30

- (A) Such Pvt. Co. accepts from its members monies not exceeding 100% (Paid-up Share Capital + Free Reserves + Securities Premium A/c); or
- (B) Such Pvt. Co. which is a Start-Up, for 5 years from date of its incorporation; or
- (C) Which fulfils all of the foll. conditions, namely:

Members 'Deposits' from Private Company

31

- (i) Which is not Associate or Subsidiary Co. of any other Co.;
- (ii) If borrowings of such a Co. from Banks or Financial Institutions or any body corporate is less than twice of its paid-up share capital or Rs. 50 crores, whichever is lower; and
- (iii) Such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits.

Register of significant beneficial owners in a company

Section 90 of Companies Act, 2013

(complete substitution 'Investigation of beneficial ownership of shares in certain cases')

Ref.: Cos. (Amendment) Act, 2017 (Not yet notified)

Annual Return

Section 92 – In case of OPC, Small Co. & Private Co. (DIPP registered ‘Start-Up’) – the Annual Return shall be signed by CS, or where there is no CS by the director of the company.

Ref.: MCA Notification

Annual Return

Section 92 of Companies Act, 2013

*Ref.: Cos. (Amendment) Act, 2017
(Certain provisions notified w.e.f. May 7, 2018)*

Amended provision:

35

- (i) Indebtedness of Co. is not required to be reported,
- (ii) Details / Particulars of Foreign Institutional Investors is not to be reported,
- (iii) Govt. to prescribe abridged form of Annual Return for OPC, Small Co. and such other class or classes of Cos. as prescribed,
- (iv) Annual Return to be uploaded on website of Co. & web-link to be provided in Board's Report.

Annual Return

36

Earlier provision: An extract of the Annual Return in such form as may be prescribed [i.e. MGT – 9] shall form part of the Board's report.

Amended provision: Every company shall place a copy of the Annual Return on the website of the company, if any, and the web-link of such annual return shall be disclosed in the Board's Report.

Notice of General Meeting

Section 101 of Cos. Act, 2013 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Annual General Meeting

Section 96 of Companies Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (not yet notified)

Amended provisions

39

Every AGM shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the Co. or at some other place within the city, town or village in which the registered office of the Co. is situate:

Provided that AGM of an unlisted Co. may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance:

Provided further that the Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.

Extra-ordinary General Meeting

Section 100 of Companies Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective from
Feb. 9, 2018)*

Amended provision

41

The Board may, whenever it deems fit, call an extraordinary general meeting of the company:

Provided that EGM of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.

Notice of the meeting

Section 101 of Companies Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective from
Feb. 9, 2018)*

Amended provisions

43

Co.'s General meeting may be called by giving not less than clear 21 days' notice either in writing or through electronic mode in such manner as may be prescribed:

In the case of an AGM, by not less than 95% of the members entitled to vote thereat;

In the case of any other general meeting, by members of the Company:

- *Co. has a Share Capital: holding majority in number of members entitled to vote and who represent not less than 95% of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or*
- *Company has no Share Capital: Having not less than 95% of the total voting power exercisable at that meeting:*

Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolution or resolutions and not in respect of the latter.

Right of member to copies of audited financial statement

Section 136 of Companies Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (effective from Feb. 9, 2018)

Explanatory Statement

Section 102 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Quorum for general meetings

Section 103 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Chairman for general meetings

Section 104 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Proxies at General meetings

Section 105 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Restriction on voting rights

Section 106 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Voting by show of hands

Section 107 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Demand for Poll

Section 109 – Shall apply unless otherwise specified in respective sections or AoA of the Co. provide otherwise.

MCA Notification June 5, 2015

Section 141 of Companies Act, 2013

MCA Notification June 5, 2015

Person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 cos. *other than OPCs, Dormant Cos., Small Cos. and Private Cos. having paid-up share capital less than Rs. 100 crore.*

Consolidation

Section 129 of Cos. Act, 2013

Financial Statements of Associate Co. shall also be consolidated with Financial St. of Co.

Ref.: Cos. (Amendment) Act, 2017 (effective from May 7, 2018)

Board's Report

Section 134 of Cos. Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (Not notified)

Amended provision:

56

- (i) CEO shall sign the Boards' Report, whether or not appointed as a director of the company,
- (ii) Provisions relating to extract of Annual Return (in Form MGT-9) omitted, web-link of Annual Return to be provided,
- (iii) Salient points of CSR Policy, Remuneration Policy may be included in the Report and web-link of these Policies to be provided in the Report,
- (iv) Govt. may prescribe an abridged Board's Report, for OPC or Small Company.

Appointment of Auditors

Section 139 of Companies Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (May 7, 2018)

Amended provisions – Sec. 139(1)

58

Subject to the provisions of this Chapter, every company shall, at the first AGM, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth AGM and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed:

~~**Provided that the company shall place the matter relating to such appointment for ratification by members at every annual general meeting:**~~

Powers & Duties of Auditor

Section 143 of Cos. Act, 2013

Statutory Auditor of Holding Co. has a right to access the records of Associate Companies also.

Ref.: Cos. (Amendment) Act, 2017 (effective from Feb. 9, 2018)

Companies to have Board of Directors

Section 149 of Cos. Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective
from May 7, 2018)*

Amended provision:

61

- (i) Provisions relating to ‘resident director’ have been changed. According to the amended provisions, a person who has stayed in India for a minimum period of 182 days in previous FY shall be considered as ‘resident’;
- (ii) In case of newly incorporated companies, the requirement of 182 days (for resident director) shall apply proportionately;
- (iii) Change in eligibility criteria for independent directors.

Right of a person to stand for directorship

Section 160 of Cos. Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective
from Feb. 9, 2018)*

Amended provision:

63

In case of company appointing:

- (i) Independent director,
- (ii) Director recommended by NRC or
- (iii) Director recommended by the board (where NRC constitution is not applicable)

the requirement to deposit amount of Rs. 1 lac shall not apply.

Retiring Directors to stand for Directorship

Section 160 of Companies Act, 2013 – Right of persons other than retiring directors to stand for directorship is not applicable to Private Company.

Not applicable to public company.

MCA Notification June 5, 2015

65

Appointment of Alternate Director

Section 161 of Cos. Act, 2013

(effective from Feb. 9, 2018)

Amended provision:

66

- (i) A person holding directorship in the Co. in any capacity cannot be an alternate director in the same Co.,

- (i) The provisions of appointment of casual vacancy of director are now applicable to private companies.

However, the director appointed by casual vacancy by the board of directors shall be subsequently be approved by the members in the general meeting.

Appointment of directors to be voted individually

Sec. 162 – Appointment of directors to be voted individually.

Not applicable to Private Company
MCA Notification June 5, 2015

Disqualifications for appointment of director

Section 164 of Companies Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (Effective from
May 7, 2018)*

Amended provisions

69

No person who is or has been a director of a company which:

- a) Has not filed Fin. Statements or Annual Returns for any continuous period of 3 FYs; or
- b) Has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for 1 year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years from the date on which the said company fails to do so:

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of 6 months from the date of his appointment.

Vacation of Office of director

Section 167 of Companies Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (effective May 7, 2018)

Amended provisions

71

Sec. 167(1) of Companies Act, 2013:

The office of a director shall become vacant in case:

(a) he incurs any of the disqualifications specified in section 164:

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section;

Resigning director's intimation

Section 168 of Cos. Act, 2013

The director who has resigned *may* forward a copy of his resignation along with detailed reasons for resignation.

*Ref.: Cos. (Amendment) Act, 2017 (effective from
May 7, 2018)*

Board Meetings

Section 173 of Companies Act, 2013

Board Meeting

OPC, Small Co., Dormant Co. & Private Co. (DIPP registered ‘Start-up’) shall be deemed to have complied with Sec. 173 of the Act if:

- (i) At least 1 Board Meeting has been conducted in each half of a calendar year and*
- (ii) Gap between 2 meetings is not less than 90.*

Provisions relating to Board Meetings & Quorum are not applicable OPC in which there is only 1 director.

Section 173 of Cos. Act, 2013

*Ref.: Cos. (Amendment) Act, 2017 (effective
from May 7, 2018)*

Amended provision:

76

Directors may attend the meeting by video conferencing or audio visual means for all business agenda items, subject to presence of quorum in-person: for

- (i) Approval of annual financial statements,
- (ii) Approval of Board's report,
- (iii) Approval of prospectus,
- (iv) Audit Committee Meetings for consideration of Financial Statement including Consolidated Financial Statement and
- (v) Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Quorum for Board Meeting

Section 174 of Companies Act, 2013

MCA Notification June 5, 2015

Quorum for Board Meeting – Pvt. Co.

78

Basic provision: *Where at any time the number of interested directors exceeds or is equal to 2/3rd of the total strength of board of directors, the number of directors who are not interested directors and present at the meeting, being not less than 2, shall be the quorum during such time.*

For Private Co. – Interested Director may also be counted towards quorum in such meeting after disclosure of his interest.

79

Restrictions on Powers of Board of directors

Section 180 of Companies Act, 2013

MCA Notification June 5, 2015

Restrictions on Powers of Board of directors

80

- (i) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of Co.,
- (ii) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation,
- (iii) Restrictions on borrowings,
- (iv) To remit, or give time for the repayment of, any debt due from a director.

Above provisions not applicable to Private Co.

81

Disclosure of interest by director

Section 184 of Companies Act, 2013

MCA Notification June 5, 2015

Disclosure of interest by director – Exemption for Private Co.

82

Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement (or proposed contract or arrangement) entered into or to be entered into shall disclose the nature of his concern or interest at board meeting in which the contract or arrangement is discussed and shall not participate in such meeting.

For Private Co. – It shall apply with the exception that the interested director may participate in such meeting after disclosure of his interest.

Related Party Transactions

No member of the Co. shall vote on the Ordinary Resolution, to approve any contract or arrangement which may be entered into by the Co., if such member is a related party.

MCA Notification June 5, 2015
Not applicable to Private Company.

Appointment of MD, WTD or Manager

Section 196 (1), (2) & (3) - Applicable

Section 196(4) and (5) – Not applicable.

*Certain provisions for appointment of MD, WTD or
Manager – Not applicable to Pvt. Co.*

MCA Notification June 5, 2015

Fee for filing, etc.

Section 403 of Cos. Act, 2013

Ref.: Cos. (Amendment) Act, 2017 (Partly notified)

Amended provision:

86

Annual Filing (Financial Statements / Annual Return) – Where any document / e-Form is required to be submitted, filed, registered within prescribed time period, without prejudice to any other legal action or liability under the Act, it may be submitted, filed, registered, as the case may be, after expiry of the period (as prescribed), on payment of such additional fee, which shall not be less than Rs. 100/- per day. Different amounts may be prescribed for different classes of cos.

Amended provision:

87

Where the document / e-Form (other than annual filing) is not submitted, filed, registered within prescribed period, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered as the case may be, on payment of such additional fee as may be prescribed. Different fees may be prescribed for different classes of companies.

Q & A Session

Thank you ICAI Mangalore Branch for the wonderful opportunity!! 😊

Thank you Members & students for active participation!! 😊

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