



## Whether there is ‘ease of doing business’ for Private Companies under Company Law?

**T**he Ministry of Corporate Affairs (‘MCA’) has exempted private companies from the compliance of certain provisions of Company Law by its notification dated June 5, 2015 and June 13, 2017. The Companies (Amendment) Act, 2017 has amended certain provisions of the Act which are broadly aimed at addressing difficulties in implementation owing to the stringent compliance requirements, facilitating ease of doing business for promoting growth with

employment, harmonization with Accounting Standards, SEBI Act and RBI Act. This article is a compilation and analysis of certain important exemptions to private companies and ultimately there is discussion on an important question – Whether there is ‘ease of doing business’ for Private Companies under Company Law?

**Certain important exemptions provided by MCA to private companies**

**1. Cash Flow Statement:** Cash Flow Statement is not applicable to One Person Company, Small Company, Dormant Company & Private Company (if such private company is a 'start-up'),

**2. Related Party:** Holding Company, Subsidiary Company, Associate Company, Fellow subsidiary companies are not 'related parties' for private companies under section 188 of the Act,

**3. Kinds of Share Capital & Voting Rights:** If provided in the Memorandum of Association and Articles of Association of the company, the provisions relating to Kinds of Share Capital and Voting Rights are not applicable to private companies,

**4. Offer Letter under Rights Issue:** For further issue of shares, if 90%, of the members of private company have given their consent in writing or in electronic mode, the period lesser than those specified (i.e. 15 – 30 days) shall apply for issuing Offer Letter under Rights Issue,

**5. ESOP:** In case of private companies, shares can be offered to employees under ESOP scheme by passing an

ordinary resolution,

**6. Acceptance of Deposits:** According to the Act for raising money by acceptance deposits, a company shall pass a resolution in general meeting. The company is further 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. The said conditions are not applicable to private company, subject to following riders: (A) Such Private Company accepts from its members monies not exceeding 100% of aggregate of the paid-up share capital, free reserves and securities premium account; or (B) Such Private Company which is a start-up, for 5 years from date of its incorporation; or (C) Private Company which fulfils all of the following conditions: (i) Which is not an Associate or Subsidiary Company of any other company, (ii) If the borrowings of such a company 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;

**7. General Meeting related provisions:** With reference to provisions relating to general meeting (i.e. notice of the meeting, statement annexed to the notice, quorum, Chairman of the meeting, Proxy, Restriction on voting rights, Voting by show of hands, Demand for Poll) shall apply to private companies unless otherwise specified in respective sections or articles of association of the company that may provide otherwise;

**8. Filing of certain resolutions with Registrar:** A private company is exempted from filing of certain resolutions passed by the board of directors u/s 179 (3) of the Act, which includes resolution to authorise buy-back of securities, resolution to issue securities (including debentures, whether in or outside India), resolution to borrow monies, resolution to invest the funds of the company, resolution to grant loans or give guarantee or provide security in respect of loans, resolution to approve financial statement and the Board's report, etc.,

**9. Right of persons to stand for directorship:** The provisions relating to right of persons other than retiring directors to stand for directorship is not applicable to private company,

**10. Board Meetings:** One person company, small company, dormant company & private company (registered as 'start-up') shall be deemed to have complied with the provisions board meetings if at least one meeting of board has been conducted in each half of a calendar year and the gap between the 2 meetings is not less than 90,

**11. Quorum for board meetings:** For quorum at board meeting, 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 company – Interested Director may also be counted towards quorum in such meeting after disclosure of his interest,

**12. Restriction on the powers of the board of directors:** Certain restrictions on the powers of the board of directors are not applicable to private companies. Such restrictions include:

(i) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of company, (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) (d) to remit, or give time for the repayment of, any debt due from a director,

**13. Loans to directors:** The provisions relating to section 185 of the Act (relating to ‘loans to directors’) are not applicable to private company, subject to compliance of certain conditions: (i) Private company in whose share capital no other body corporate has invested any money, (ii) Private company if the borrowings of such a company 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 no default in repayment of such borrowings subsisting at the time of making transactions,

**14. Related Party Transactions:** Pursuant to section 188 of the Act, no member of the company shall vote on the ordinary resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party. Such provi-

sion is no applicable to private company,

### **15. Managerial Appointment:**

Section 196 of the Act consists of 5 sub-sections. The provisions relating to compliance of Schedule V of the Act and approval of the Central Government are not applicable to private companies for appointment of Managing Director, Whole-time director and Manager.

Under the Companies (Amendment) Act, 2017, following exemptions have been granted to private companies or closely held companies:

**1. Related Parties:** As per amendment – Holding company, Subsidiary company, Associate Company incorporated outside India are also ‘related parties’ under the Act. The Investing Company or Venturer Company are also included as ‘related parties’. They mean a body corporate whose investment in the company would result in the company becoming an Associate Company of the body corporate,

**2. Small Company:** The definition of small company is amended, whereby the paid-up share capital (maximum limit) is enhanced to Rs. 10 crore (from Rs. 5 crore) and turnover (maximum

limit) is enhanced to Rs. 100 crore (from Rs. 20 crore). It has also been clarified that for the purpose of computing 'turnover', P&L A/c of immediately preceding FY shall be considered;

**3. Issue of share on private placement basis:** With respect to issue of share on private placement basis, Sec. 42 of the Act has been entirely substituted. Key amendments are: (a) Group of persons whom offer is to be made is to be identified by board of directors, (b) Private Placement offer and application shall not carry right of renunciation, (c) Requirement to file Form GNL-2 has been discontinued, (d) Cos. cannot use funds till return of allotment has been filed with ROC within 15 days from the date of allotment, (e) Separate penalty provided for default in filing of return of allotment,

**4. Sweat equity shares:** Sweat equity shares can now be issued within 1 year from the commencement of business of the company,

**5. Offer letter for Rights Issue:** In addition to registered post, speed post and electronic means, the Letter of Offer can be sent through courier or any other mode having proof of

delivery,

**6. Venue – AGM of unlisted company:** AGM of an unlisted company may be held at any place in India subject to prior consent of all the members of the company in writing or by electronic mode,

**7. Venue – EGM of WOS:** EGM of a Co. shall be held at any place in India, however EGM of Wholly Owned Subsidiary incorporated outside India may be held outside India.

**8. Board's Report:** (a) CEO shall sign the Boards' Report, whether or not appointed as a director of the company, (b) Provisions relating to extract of Annual Return (in Form MGT-9) omitted, web-link of the annual return to be provided, (c) 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, (d) Govt. may prescribe an abridged Board's Report, for OPC or Small Company,

**9. Participation in Board meeting through electronic mode:** Directors may attend the meeting by video conferencing or audio visual means for all business agenda items, subject to presence of quorum in-person (specifically in

relation to the Rule 4 of Companies (Meetings of Board and its Powers) Rules, 2014) i.e. Approval of annual financial statements, Approval of Board's report, Approval of prospectus, Audit Committee Meetings for consideration of Financial Statement including Consolidated Financial Statement and approval of the matter relating to reconstruction companies

**10. Loan to directors:** Section 185 of the Act has been completely substituted by the Companies (Amendment) Act, 2017. The revised section is divided in 4 sub-sections, the highlights are: (i) Complete restriction on loans, guarantees & securities to certain parties, (ii) Permits granting of loans, guarantees & securities to certain parties, subject to riders, (iii) Loans, guarantees & securities to certain parties completely exempted from compliance of the Sec., (iv) Penal provisions under the section 185 of the Act,

**11. Related Party transactions:** The approval of the shareholders for Related Party Transactions under Sec. 188 of the 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.

*Gaurav Pingle is Practising Company Secretary and Commerce Graduate from Pune.*



**Conclusion:** Taking into account the above discussion, I am of the opinion that there are adequate exemptions from the compliances of certain provisions of the Act for a private company. Some of the exemptions were already provided under the Companies Act, 1956. However, for private companies, under Companies Act, 1956, there was no restriction on loans to directors and limit on acceptance of unsecured loans from members of private company. Presently, there is no clarity on the provisions relating to relief for disqualified directors and companies de-registered by the Ministry of Corporate Affairs. The additional fees (i.e. Rs. 100/- per day) for filing of pending annual Returns and Financial Statements within a prescribed time is also very 'punitive' on private companies, especially when such companies are revived (or name is restored) by the order of National Company Law Tribunal. In my view, there is 'ease of doing business' under Company Law for private companies, however the recent developments (i.e. director disqualification and de-registration of companies) has created pandemonium.