

**Provisions in Companies Act, 2013 : Recommendation for consideration by the Ministry of Corporate Affairs**

S. No.	Section	Particulars	Provision	Difficulties in Implementation
1	<b>135</b>	Calculation of net profit for the purpose of Corporate Social Responsibility	Two separate methods are provided for calculation of net profit, one under the Companies Act, 2013 and another under the Companies (Corporate Social Responsibility Policy) Rules, 2014.	The provisions in the Act and Rules for determination of Net Profits are different. Calculation of Net profit is the basic pre-requisite for compliance of these Rules. Considering the above, you will agree that Rule 2(f) cannot extend the contours of the definition of “Net Profits” given in the Act.
2	<b>135 &amp; 149</b>	Appointment of Independent Director on CSR Committee	Section 149(5) allows a time frame of one year from April 1, 2014 for appointment of Independent directors whereas Section 135(1) provides for immediate constitution of CSR committee with one independent director.	Both the provisions should be read harmoniously. It is suggested that a suitable clarification be issued to overcome the anomaly. Further Rule 5 provides that a private company need not have an ID on the CSR Committee. This is contrary to what Section 135 provides. Section 149 provides for requirement of IDs only in listed and certain categories of unlisted public companies. There is a clear disconnect between Section 135, 149 and the CSR Rules. The Rules cannot travel

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				beyond the Act.
3	<b>179 &amp; Rule 14(2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014</b>	Issue of Securities by a Company - Disconnect with the Companies (Prospectus and Allotment of Securities) Rules, 2014	<p>Section 179 of the Act empowers the Board, inter alia, to issue securities including debentures whether in or outside India. The Section has not put any fetter on the Board for exercising this power.</p> <p>On the other hand, Rule 14(2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 provides for special resolution for issue of securities.</p>	<p>When the Act does not contemplate sanction of shareholders for an issue of debentures, the Rules cannot travel beyond the scope of the Act.</p> <p>The Rule cited above has to be suitably modified to overcome the hardships that would be caused to the corporate entities.</p>
4	<b>Rule 18 in The Companies (Share Capital and Debentures) Rules 2014</b>	Creation of Debenture Redemption Reserve and maintenance of Liquid Assets	Certain types of Companies have to create DRR up to 25% of the value of debentures and the said companies will have to maintain liquid assets to the extent of 15% of value of debentures due for	Creation of Debenture Redemption Reserve should not be made mandatory for inter corporate debentures or for issue of debentures by subsidiary company or associate company to holding company for financial accommodation. Further bank guarantee shall

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			redemption next year	also be considered as one of the forms of maintaining liquid assets as it will affect adversely the cash flow of the Company which is already facing a cash crunch.
5	<b>Rule 18(1)(d) of the Companies (Share Capital and Debentures) Rules, 2014</b>	Creation of Security on Specific Movable Properties	The rules require creation of charge for debentures on any specific movable property or any specific immovable property.	<p>It would be impractical to create a security on movable properties such as stock in trade, business receivable if specific property details are required to be provided in the Security documents. These assets represent stock in trade and being ambivalent, the security has to be only by way of a floating charge.</p> <p>MCA needs to clarify that in case of a charge on a pool of assets of a certain class, specific details of each of the moveable property comprising in such pool is not required to be mentioned.</p>
6	<b>107 and Rule 20 in the Companies (Management and</b>	Requirement of E-voting	every listed Company should provide to its members the convenience of	Where members vote electronically or where a poll is demanded, there is no scope for voting by members

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	<b>Administrati on) Rules, 2014</b>		exercising their votes at its General Meetings through e-voting platforms	<p>by show of hands even when the members are physically present at the General Meetings.</p> <p>In e-voting there is no scope for any suggestion for modification in the resolution.</p> <p>It will be unfair to deny the members present at the meeting their legitimate right to vote on a show of hands.</p>
7	<b>Rule 6(2)(c) of the Companies (Share Capital and Debentures) Rules 2014</b>	Issue of Renewed/ duplicate share certificates	The Rule provides that the duplicate share certificates should be issued within 15 days from the date of submission of complete documents by the members with the approval of the Board.	<p>The time frame provided for issue of duplication share certificate is very short considering the formalities that have to be completed before issue. Further the Board cannot meet so frequently to consider the issue of duplicate share certificate. The power should be delegated to Director / Company Secretary to approve issue of duplicate share certificate.</p> <p>Consolidated report may be placed at the next Board Meeting. The penalty for non-complying within the timelines is abnormally heavy.</p>

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8	<b>Section 93 read with Rule 13 of the Companies (Management and Administration) Rules, 2014</b>	Reporting of changes in promoter /top 10 holders stakes	Every listed company has to file a return with the Registrar with respect to changes relating to either an increase or decrease of two percent or more in the shareholding of the promoters and top ten shareholders within 15 days of such change.	There is no clarity about calculation of 2% - whether it is of the total issued capital or of the shares held by the Promoters and / or top 10 shareholders.  Further, similar provisions are operative under the listing agreement and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and SEBI (prohibition of Insider Trading) Regulations, 1992. To avoid duplication and unnecessary costs, companies may be asked to file with the ROC a copy of the returns being filed with the stock exchanges in this connection.
9	<b>Rule 4 in the Companies (Meetings of Board and its Powers) Rules, 2014,</b>	Matters not to be dealt with in a meeting through video conferencing or other audio visual means	Clause (v) in the above Rule 4 does not allow " <i>the Audit Committee meetings for consideration of Accounts</i> " to be dealt with through video	The language used in the clause is confusing and gives the impression that the Audit committee cannot consider the quarterly financial statements of the company through video

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			conferencing.	conferencing. There is need to clarify this issue.
10	<b>Rule 22 in Chapter VII containing Companies (Management &amp; Administration) Rules, 2014</b>	The procedure to be adopted for conducting business through postal ballot.	Rule 20(2), <i>inter alia</i> , directs that where a company is required to pass any resolution through postal ballot, it shall send a notice to all the share holders, along with a draft resolution requesting the members to send their assent or dissent in writing on a postal ballot. The notice has to be sent either by Registered post or speed post or through electronic means or through courier service so that the members can respond within a period of thirty days.	The Rule is silent on the point whether it would be necessary for the company to send to the members postage prepaid envelope so that they can communicate their responses to the postal ballot.  MCA should issue suitable clarification on this issue at the earliest.
11	<b>62</b>	Preferential issue of shares	A Company can make preferential issue of shares if it is authorized by a special resolution, whether or not	Valuation Report of a registered valuer cannot be sole criteria for determining price of shares as it involves several business considerations which cannot

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			<p>those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.</p>	<p>be covered in valuation report.</p> <p>The requirement of valuation report should be removed</p>
12	188	Related Party Transactions	<p>i. As per the Rules specified, every contract with a company with a share capital of Rs 10 crore or more requires prior approval of members by special resolution. However, for companies with share capital of less than Rs 10 crore, the Rules permit related party transactions with certain threshold limit with</p>	<p>i. For companies with share capital of Rs 10 crore or more, contracts of all nature and for any amount, say even one rupee, contracts with such companies require prior approval of members. Strangely, for companies with share capital of less than Rs 10 crore contracts up to certain threshold limit of turnover or net worth is permitted. Companies with share capital of Rs 10 crore or more should also be allowed to enter into such</p>

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			<p>reference to turnover or net worth</p> <p>ii. A member of the company who is a related party to the transaction for which approval of members is sought, cannot vote on the special resolution.</p>	<p>contracts within certain specified limit of turnover or net worth.</p> <p>ii. This provision militates against the very concept of shareholder democracy. While one can appreciate that an interested director should not vote for any business items with which he is interested, one cannot deny the members their right to vote on resolutions. This would make the promoters face the tyranny of other shareholders who have no long term stake in the company.</p>
13	<b>161(4)</b>	Appointment of Director to fill up casual vacancy	Plain reading of Section 161(4) makes it clear that in a public company such appointment can be made at a Meeting of the Board. However a private company cannot do so and has	The law should be simpler for private companies. The above provision makes a private Company comply with a requirement, which does not apply for a public company.



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			to take approval in General Meeting	
14	<b>177(iv)</b>	Approval of Audit Committee	Approval of Audit Committee is required for all related party transactions and modification thereof.	Considering the coverage of related party transactions, the Audit Committee may not be able to meet frequently to approve all related party transactions.
15	<b>Rule 3(c)(vi) Companies Acceptance of Deposit Rules, 2014</b>	Amounts not to be considered as deposits	Any amount received by a company from any other company	Any amount received by a company from any other company should include debentures and the same should be specifically mentioned in the Rules.
16	<b>42</b>	Private Placement	Sub-section 7 states that all offers covered under the section shall be made only to such persons whose names are recorded by the company prior to the invitation for subscription to issue.	It is practically difficult to ascertain the list of investors at the initial stage of the offer. The final list of investors is known to the companies only on closing of the issue.
17	<b>197</b>	Managerial Remuneration by companies not having profits or adequate profits	Sub-section 3 of section 197, states that <b><i>"Notwithstanding anything contained in sub-section 1 and 2 of section 197", a company not having profits or inadequate profits shall pay</i></b>	The statement highlighted in bold tantamount to applicability of the provisions of the said sub-section to private limited companies as well. We submit that private limited companies are generally closely held companies with

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			<i>remuneration to its directors including manager in accordance with provisions of Schedule V of the Act.</i>	minimum public interest involved and accordingly, it would be impractical to impose a cap on the payment of managerial remuneration by private companies. This would also lead to unnecessary hardship and compliance cost for such companies.
18	<b>179 and Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014</b>	Powers of Board of Directors	As per the said Rule, the following matters are also required to be noted / approved by Board of Directors: 1) To take note of appointment(s) or removal(s) of one level below the Key Managerial Personnel 2) To buy, sell investments held by the company (other than trade investments), constituting 5% or more of the paid-up share capital and free reserves of the investee company.	The requirement of approving the appointment / removal of personnel one level below the Key Managerial Personnel seems to be impractical. In case of large companies, there would be many personnel reporting to MD or Manager or CS. Noting of appointment / removal of all such personnel by the Board would be impractical. Also, in case of small companies, there is a possibility that a person reporting to MD is a very junior level person. Reporting of appointment / removal of such a person to Board would be futile. Regarding approval for buying / sale of investments (other than trade

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				<p>investments), constituting 5% or more of the paid-up share capital and free reserves of the investee company, we submit that this would be an additional requirement as the investments made by the company are already required to be approved by the Board or any other committee / person authorized by the Board. Also, it states that 5% should be calculated on the basis of investee company's paid-up capital and free reserves. It is felt that the same would lead to reporting and approval of various transactions which would be immaterial to the Board of large companies investing in very small companies / group companies. Hence, we request you to revisit this provision.</p>

### Additional Points for recommendation

S. No.	Provision in the Act	Constraints
1	Concept of <b>Class Action Suit</b>	The concept while prevalent in other developed countries and is important to provide rights to stakeholders, is new to India, and needs to be well explained to the stakeholders.
2	<b>Criminal liabilities on directors</b> of a company	This provision should be further defined to include on only serious non-compliance or violations including fraudulent conduct in order to avoid victimization.
3	<b>Limiting the levels of subsidiaries</b> for investments purpose <b>to 2</b>	This may curb the flexibility of corporate entities, particularly in Infrastructure, where subsidiaries or SPVs are a norm. Also, M&A activity can get severely affected.
4	<b>Redefining</b> of Securities premium, deemed deposit etc	The new stipulations would require the Industry to revamp and restructure businesses