

# Overview of Key Provisions of Companies Act 2013

# Overview

- Number of sections reduced from 658 Sections and 15 Schedules in old Act to 470 sections and 7 schedules in new bill.
- A very substantial part of the Bill will be in form of rules, which will be prescribed separately. This paves way for changes to operational provisions of Act without amendment and parliament nod
- The Government of India, has the power to notify different provision of the Act at different point of time
- The Bill prescribes 33 new definitions.
- Language in general has been simple but in some places drafting could have been better.

# Key Concerns - Summary

- **NFRA**
  - This being constituted without the concept paper being discussed and stakeholders comments received may not be appropriate
- ***Too many matters left to the rules and the rules proposed are not yet clear***
- **Penalties**
  - The penalties and the liabilities being substantially increased without looking at the nature of the offence.
  - A firm to be debarred when one partner is found guilty is of a serious consequence, especially with the size of the firms growing significantly.
- ***Increase in partnership number from 20 to 100 without discussion***

# Key Concerns - Summary

- One Person Company
  - Person not defined – so, even companies etc., could form a one person company
  - Foreign nationals / companies / entities forming a one person company
  - ***Concept may be good – but operational issues have not been discussed***
- Interested director
  - Clause 184 (2) now also provides for interested director not participating in such contracts in board meetings
  - ***There is no specific requirement that promoter / director must vote on such interested contracts and record their views to make them primarily liable!***

# Key Concerns – Summary

- Auditors – a firm where majority of partners are chartered accountants – Does this pave way for a firm which has non CAs as members?
  - *This is also against the ethical standards of ICAI*
- **Conflict of interest extended with far reaching consequences**
  - Shareholding is extended to company, holding, associate, co-subsidiary etc., and also extended to relatives also (Relatives can hold up to Rs.1000 or such sum as may be prescribed)
  - Indebtedness and guarantee also extended to group entities as above and also to relatives
  - Not to have business relationships directly or indirectly with any group entity (of such nature as prescribed)

# Key Concerns – Summary

- Conflicting services by auditors (even for OPC and Private Companies)
  - New clause. Specified services cannot be done
  - Covers auditor, firm and also all other entities they are related to – actual coverage needs to be clarified
  - Covers not only the company but its holding coy subsidiary and associate
  - Any non specified services also only with Board approval
- Auditor Rotation
  - Mandatory rotation of auditor for listed / prescribed class of companies
  - Change is only by special resolution
  - Right to terminate (by special resolution and previous CG clearance) / right to resign exists in between also
  - Members can resolve seeking rotation of team / partner each year
  - Also, members can seek conduct of audit by more than one auditor

# Key Concerns – Summary

- At least one Director required to stay in India for 182 days
  - Presently foreign companies could have all foreign directors
- Top 10 shareholders' holding changes
  - All listed entities are required to file changes in shareholding of top ten shareholders and promoters within 15 days of such change!
  - In the market there could be changes happening each day!
- Internal auditor
  - There is a need to clarify that it could be a firm of CAs / CWAs...

# New Concepts

- One person Company
- “Provisions of entrenchment” in AOA
- National Financial Reporting Authority (NFRA) from NACAS
  - More than advisory; Charged with monitoring and enforcement
  - Investigate into professional or other misconduct
- CSR obligations on every company having networth of Rs.500 crore or more or turnover of Rs.1,000 crore or more or net profit of Rs.5 crore or more
  - Company to spend 2% of its average NP for 3 years
- Provision for cross border mergers
- Registered Valuers
- Concept of Dormant Company
- CG empowers to prescribe restrictions on layers of subsidiaries

# Business Friendly

- Speedy incorporation process
- Private limited members limit enhanced to 200
- Simpler and single forum approval for M&A
  - Simple and short process for holding and WOS or small companies
  - Concept of deemed approval in some cases
- Squeeze out provisions – purchase of minority shareholding when 90% holding reached
- Simplified process for voluntary removal of name from register

# E-enable

- Voting through electronic means by members at meeting
- Board meetings can be held by video conferencing / electronic means
  - Such participation will count for quorum too
- Maintenance and allowing inspection of documents by companies in electronics form

# Professionals...

- Rotation of auditors after 5 / 10 years for individual CA / firm
  - Annual rotation of team and partner if the members so resolve
- 5 year tenure for auditors appointed in AGM
  - Automatic reappointment in AGM where no auditor is appointed / reappointed
- CG may prescribe manner and procedure for selection of auditors at AGM
- Tribunal can direct change of auditors if it is satisfied that the auditors have colluded in a fraud...
- LLPs may be appointed as auditors
- Auditing Standards to be made mandatory
- Auditor not to render certain conflicting services

# Professionals...

- Consolidated Financials made mandatory
- Company's financial year made standard – 1<sup>st</sup> April to 31<sup>st</sup> March (except for exceptional cases)
- Internal audit by members of professional body being made mandatory
- Mandatory secretarial audit for bigger companies including listed companies

# Legal Empowerment

- Class Action in case of misleading prospectus
- Personal and unlimited liability on directors, promoters, experts etc., in case of fraudulent purpose
- Class Action suits for oppression / mismanagement / fraudulent acts
- ROC can strike off name – if name reserved using false / incorrect information
- Tribunal can remove name – if incorporated by false / incorrect information or by suppressing material facts
- Re-opening of accounts on Court's or Tribunal's order
- Voluntary revision of financials / board report with Tribunal's consent
- Special court to deal with offences under the Act

# Legal Empowerment

- Criminal case for impersonation / multiple applications
- Disgorgement provisions in such cases
- Resigning directors to also notify ROC with detailed reasons
- Investigation into the affairs by SFIO
- Vigil mechanism (whistle blowing...)
- Mediation and Conciliation Panel
- Change in shareholding of promoters and top 10 shareholders to be filed for listed entities

# Directors and Management

- Duties and liabilities of directors has been prescribed
- At least one woman director mandatory for certain class of companies
- Every company to have at least one director who has stayed in India for over 182 days in the PY
- Independent Directors prescribed for class of companies – also tenure and liability codified
- Statutory recognition to audit committee, remuneration committee and stakeholders relationship committee as well as CEO, CFO and CS as KMP

# Others

- Revival and Rehabilitation Provisions for Sick Companies
- Sickness to be determined not based on negative networth but based on ability to repay debts
- Stringent control over Sec 25 companies
- Relaxation that association / partnerships could have up to 100 persons
  - No ceiling on partners / members in case of associations of persons / partnerships for professionals regulated by special acts
- Companies which can raise public deposits restricted
- Dividend claim not extinguished after 7 years

# What Goes Out...

- Certificate of Incorporation is the conclusive evidence
- Provisions relating to certificate of commencement of business
- Statement in lieu of prospectus
- Statutory meeting and statutory report
- Share warrants
- Public trustee
- Payment of interest out of capital
- Special audit
- Share qualification
- Restrictions on appointment and remuneration of sole selling / sole-purchasing agents
- Employee's Security and PF amounts
- Receivers and Managers

# PROSECUTION OF CHARTERED ACCOUNTANTS

# Tribunal to direct change of Auditor

- Section 140 (5) Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either *suo motu* or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors:
- Provided that if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place:
- Provided further that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447.
- ***Explanation 1.***—It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its director or officers.

# Prosecution of Chartered Accountants

## 1

- **Section 147 (2)** If an auditor of a company contravenes any of the provisions of section 139, section 143, section 144 or section 145, the auditor shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees:
- Provided that if an auditor has contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.
- **Section 147 (3)** Where an auditor has been convicted under sub-section (2), he shall be liable to—
  - (i) refund the remuneration received by him to the company; and
  - (ii) pay for damages to the company, statutory bodies or authorities or to any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.
- (5) Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have **acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company** or its directors or officers, the liability, **whether civil or criminal as provided in this Act or in any other law for the time being in force**, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally.

# Prosecution of Chartered Accountants

## 2

- Class Action suits – Section 245 (1) (g) (ii)
  - the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct;
- Section 337 to 341 penal provisions includes penal action against auditor. Section 342 (5) specifically states that
  - When any prosecution is instituted under this section, it shall be the duty of the liquidator and of every person, who is or has been an officer and agent of the company to give all assistance in connection with the prosecution which he is reasonably able to give.
  - *Explanation.*—For the purposes of this sub-section, the expression “agent”, in relation to a company, shall include any banker or legal adviser of the company and any person employed by the company as auditor.

# Other penal provisions in CHAPTER XXIX

- Section 447 Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud
- Section 450 – Punishment where no specific penalty or punishment is provided. – **Omnibus provision?**