In the past, MCA vide Section 462(1) of the 2013 Act issued two notifications dated 5 June 2015 and 13 June 2017 and provided various exceptions/modifications/adaptations to the provisions of the 2013 Act for private companies.

Overview of the exceptions/modifications/adaptations to the 2013 Act

The relaxations provided to private companies have been categorised under the given heads:

- Sections/sub-sections that are amended for private companies
- Sections/sub-sections that would not apply to any private company
- Sections/sub-sections that would not apply to certain class of private companies.

Sections/sub-sections that are amended for private companies

The following sections/sub-sections of the 2013 Act have been amended for the private companies:

- **Definition of financial statements (Section 2(40)):**
  Financial statements, in relation to a company, include:
  a. A balance sheet as at the end of the FY
  b. A statement of profit and loss, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the FY
  c. Cash flow statement for the FY
  d. A statement of changes in equity, if applicable and e. Any explanatory note annexed to, or forming part of, any document referred to in (a) to (d) above.
However, financial statements of a one person company, small company, dormant company and a private company which is a start-up company are not required to include a cash flow statement.

The exemption became effective from 13 June 2017.

**Further issue of share capital:** Section 62(1)(a)(ii) of the 2013 Act provides a time limit for rights’ offer that is ‘not less than 15 days and not exceeding 30 days’ from the date of offer. It further states that offer not accepted within the specified time period would be deemed to have been declined. Additionally, Section 62(2) requires an entity to dispatch the notice of such an offer at least three days before the opening of the issue.

However, in case a private company wants to reduce the time period for the rights issue to less than the period prescribed in Section 62(1)(a)(ii) and Section 62(2), it can do so provided 90 per cent of its members have given their consent in writing or via an electronic mode.

Section 62(1)(b) deals with a situation when a company proposes to increase its subscribed capital by the issue of further shares, and the shares are offered to employees under a scheme of employees’ stock option. Such an offer is subject to the specified conditions which, *inter alia*, require a special resolution by the company. However, for private companies, passing of an ordinary resolution would be sufficient as per the amendment to the 2013 Act.

These exemptions became effective from 5 June 2015.

It is important to note that in the erstwhile 1956 Act, the above provisions were not applicable to private companies (including a private company which is a subsidiary of a public company) i.e. private companies were allowed to offer its further issue of capital to any person and in any manner as they deemed fit.

**Annual return:** Every company is required to prepare an annual return in the prescribed form and contain the particulars as they stood on the close of the FY. Private companies which are small companies are required to provide details of aggregate amount of remuneration drawn by directors instead of providing details of remuneration of directors and KMP of the company.

Additionally, the annual return of a private company which is a start-up is required to be signed by the company secretary, or where there is no company secretary, by the director of the company. (Section 92)

These amendments became effective from 13 June 2017.

**Mandatory rotation of auditors:** Section 139(2) of the 2013 Act read with Rule 5 of the Companies (Audit and Auditors) Rules, 2014 provides that certain class of companies cannot appoint or reappoint an individual as an auditor for more than one term of five years or an audit firm as an auditor for more than two consecutive terms of five years each. Those class of companies are as follows:

a. Listed companies
b. All unlisted public companies with paid-up share capital of INR10 crore or more
c. All private limited companies with paid-up share capital of INR50 crore (earlier INR20 crore) or more
d. All companies with paid-up share capital of below threshold limit mentioned in (b) and (c) above, but with public borrowings from financial institutions, banks or public deposits of INR50 crore or more.

The mandatory rotation of auditors’ requirement is not applicable to small companies and one person companies.

The MCA issued a notification amending the limit for mandatory auditor rotation for all private companies. Now private companies with paid-up share capital of INR50 crore or more required to follow the mandatory rotation of auditors. This notification became effective from 22 June 2017.

The CLC in its report highlighted that the threshold for private companies for rotation of auditors has been prescribed for the purposes of good corporate governance and larger public interest. Accordingly, the CLC did not propose to increase the threshold of auditor rotation for private companies in its report. However, MCA has still amended the threshold.

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84. Small company means a company, other than a public company which meets both the given conditions:

a. Paid-up share capital does not exceed INR50 lakh or such higher amount as may be prescribed which should not be more than INR100 crore and
b. Turnover as per last statement of profit and loss does not exceed INR2 crore or such higher amount as may be prescribed which should not be more than INR20 crore.

However, these conditions would not be applicable to the following class of companies:

a. A holding company or a subsidiary company
b. A company registered under Section 8 of the 2013 Act or
c. A company or body corporate governed by any special Act.
• **Eligibility/qualifications/disqualifications of auditors:** Section 141(3)(g) specifically prohibits a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as an auditor of more than 20 companies, from being appointed as an auditor.

The MCA provided relaxation while calculating the limit of 20 companies and following companies would be excluded:
- One person company
- Dormant companies
- Small companies and
- Private companies having paid-up share capital less than INR100 crores.

The above relaxation became applicable from 5 June 2015.

The 1956 Act, on the other hand, specifically excluded all private companies from the ceiling of number of audits to be conducted by an auditor i.e. an auditor/audit firm was allowed to conduct audit of any number of private companies under the 1956 Act.

• **Meetings of board:** Every company is required to hold first meeting of its BoD within 30 days of the date of its incorporation and thereafter required to hold a minimum number of four board meetings every year in such a manner that not more than 120 days should intervene between two consecutive board meetings.

However, in case of a one person company, small company, dormant company and a private company which is a start-up, a relaxation has been given. They need to hold at least one board meeting in each half of a calendar year and the gap between two meetings should not be more than 90 days. (Section 173(5))

The provision became applicable from 13 June 2017.

• **Quorum for meetings of board:** The quorum for a board meeting of a company should be higher of the following limits:
- One-third of the total strength of the board or
- Two directors.

However, where at any time the number of interested directors exceeds or becomes equal to two-thirds of the total strength of the board, the number of directors who are not interested directors and present at the meeting, being not less than two, would be the quorum during such time. (Section 174(3))

In case of private companies, interested directors can also be counted towards quorum in such a meeting after disclosure of his/her interest in accordance with Section 184 of the 2013 Act. This relaxation is in line with the recommendation of the CLC and is applicable from 13 June 2017.

Additionally, the interested director of a private company can also participate in the board meeting in which the contract or arrangement (in which he/she has direct/indirect interest) is being discussed after disclosure of his/her interest. These relaxations came into force on 5 June 2015.

**Sections/sub-sections that would not apply to any private company**

• **RPTs:** Section 2(76)(viii) of the 2013 Act provides a definition of a ‘related party’ and Section 188 requires that specified transactions with related parties that are not in the ordinary course of business and which are not at an arm’s length would require consent of the BoD of the company.

**Exemption for private companies**

The Companies (Amendment) Act, 2017 has amended the definition of related party (as given in Section 2(76)(viii)). According to it, any body corporate which is a:

a. Holding, subsidiary or an associate company of such company
b. Subsidiary of a holding company to which it is also a subsidiary or
c. An investing company or the venturer of the company

is a related party.

The Companies (Amendment) Act, 2017 provides relief to private companies. The above defined Section 2(76)(viii) does not apply to private companies. Therefore, in case of private companies, the above mentioned class of body corporates would not be considered as related parties.

Further, second proviso to Section 188(1) requires a related party (who is a member) to abstain from voting on a resolution of a company to approve a contract/arrangement entered into by the company. However, this proviso is not applicable to a private company i.e. in the case of a private company, members who are related parties are also allowed to vote. These amendments are applicable from 5 June 2015.
• Resolutions and agreements to be filed: Section 117 pertains to resolutions and agreements to be filed with the ROC. Section 117(3)(g) states that resolutions passed in pursuance of Section 179(3) (powers of board) should follow the requirements of Section 117.

Private companies are not required to file with the ROC resolutions passed by the board which are covered in Section 179(3) of the 2013 Act. Following are the resolutions that are not required to be filed:

a. To make calls on shareholders in respect of money unpaid on their shares
b. To authorise buy-back of securities under Section 68
c. To issue securities, including debentures, whether in or outside India
d. To borrow monies
e. To invest the funds of the company
f. To grant loans or give guarantee or provide security in respect of loans
g. To approve financial statements and the board’s report
h. To diversify the business of the company
i. To approve amalgamation, merger or reconstruction
j. To take over a company or acquire a controlling or substantial stake in another company,
k. Any other matter which may be prescribed.

The amendment came into effect from 5 June 2015.

• Rights of persons other than retiring directors to stand for directorship: Section 160 relates to right of persons other than retiring directors (i.e. not liable to retire by rotation) to stand for directorship. This Section is not applicable to private companies with effect from 5 June 2015.

The above provision was not applicable to private companies (not being a subsidiary of public company) under the 1956 Act as well.

• Appointment and remuneration of managerial personnel: Section 196(4), inter alia, states that subject to the provisions of Section 197 and Schedule V to the 2013 Act (relating to managerial remuneration), a MD, WTD or manager should be appointed by a company. The terms and conditions of such appointment and remuneration payable should be approved by the BoD at a meeting and would be subject to approval by a resolution at the next general meeting of the company. The CG approval would also be required in case such appointment is at variance to the conditions specified in Part I of Schedule V to the 2013 Act. Additionally, a return in the prescribed form should be filed with the ROC within 60 days of such an appointment.

Section 196(5) states that where an appointment of a MD, WTD or manager is not approved by the company at a general meeting, any act done by him/her before such approval should not be deemed to be invalid.

The provisions of Section 196(4) and 196(5) are not applicable to the private companies with effect from 5 June 2015.

Sections/sub-sections that would not apply to certain class of private companies

• Prohibition on acceptance of deposits from public: Clauses (a) to (e) of the Section 73(2) deal with the conditions to be fulfilled by the companies for accepting deposits from the public or from its members.

The provisions of clauses (a) to (e) of Section 73(2) of the 2013 Act would not be applicable to a private company if it meets any of the given criterion:

a. It accepts monies from its members not exceeding 100 per cent of aggregate of the paid-up share capital, free reserves and securities premium
b. It is a start-up company for five years from the date of its incorporation, or
c. It fulfils all the following conditions:
   i. The private company is not an associate or a subsidiary company of any other company
   ii. 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 INR50 crore, whichever is lower and
   iii. Such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under Section 73.
Additionally, the private company would be required to file the details of monies accepted to the ROC in such a manner as may be specified.

Apart from providing relief to private companies which are start-ups to raise funds without complying with the prescribed conditions, the CLC also recommended to grant relief to the private companies which are engaged in the infrastructure sector to accept deposits from its members without any upper limit. However, no such specific exemption to private companies in the infrastructure sector has been provided under the Companies (Amendment) Act, 2017.

- **IFC:** An auditor of a private company is not required to report on the adequacy and operating effectiveness of IFC in the auditor’s report (as required under Section 143(3)(i) of the 2013 Act) provided such a private company meets either of the given conditions:
  
  a. It is a one person company or a small company, or
  
  b. It has a turnover of less than INR50 crore as per the latest audited financial statements and the borrowings of such a company from banks or financial institutions or any body corporate at any point of time during the FY is less than INR25 crore.

  The exemption from reporting on IFC has been made applicable for auditor’s reports in respect of financial statements pertaining to FYs commencing on or after 1 April 2016 that are made on or after 13 June 2017 (i.e. the date of notification of the amendment) 85.

  An auditor of a specified private company is not required to report on IFC, but it would be advisable that such companies should also internally evaluate their processes/systems as part of better corporate governance.

- **Kinds of share capital:** Section 43 deals with the kinds of share capital namely equity and preference shares. This section will not apply to a private company if memorandum or articles of association of the private company provide that Section 43 would not apply. The amendment came into effect from 5 June 2015.

- **Voting rights:** Section 47 on voting rights attached to shares would not apply to a private company if memorandum or articles of association of the private company provides that Section 47 would not apply. The amendment came into effect from 5 June 2015.

- **Restrictions on purchase by company or giving of loans by it for purchase of its shares:** Section 67 provides certain restrictions on companies for buyback of its shares or to give loans for purchase of its shares.

  These restrictions would not apply to private companies provided following conditions have been met:

  a. No other body corporate has invested in its share capital
  
  b. If the borrowings of such a company from banks or financial institutions or any body corporate is less than twice its paid-up share capital or INR50 crore, whichever is lower, and
  
  c. If such a company is not in default in repayment of such borrowings subsisting at the time of making transactions under this Section.

  The amendment came into effect from 5 June 2015.

- **Management and administration:** Following Sections would apply to private companies unless otherwise specified in respective Sections, or unless articles of the private company otherwise provide:

  - Section 101: Notice of meeting
  
  - Section 102: Statement to be annexed to notice
  
  - Section 103: Quorum for meetings
  
  - Section 104: Chairman of meetings
  
  - Section 105: Proxies
  
  - Section 106: Restriction on voting rights
  
  - Section 107: Voting by show of hands
  
  - Section 109: Demand for poll.

  The amendment came into effect from 5 June 2015.

- **Loans to directors, etc.:** Section 185 of the 2013 deals with loans to directors and companies in which directors are interested. This section does not apply to a private company if it meets all the given conditions:

  a. No other body corporate has invested in its share capital
  
  b. Its borrowings from banks or financial institutions or any bodies corporate is less than twice of their paid-up share capital or INR50 crore, whichever is lower, and
  
  c. It has not defaulted in repayment of such borrowings subsisting at the time of making transactions under this section.

  The amendment came into effect from 5 June 2015.
Consider this

- Private companies form the back bone of the corporate structure prevalent in India. The relaxations from various provisions of the 2013 Act are expected to ease out the hardships faced by the private companies and would reduce the cost of compliances.
- Exemptions to private companies which are start-ups are expected to attract more investments in such companies.
- Additionally, a private company, in general, should take note of the following important points:
  - A private company could prescribe lesser time for rights issue (i.e. less than 15 days) when 90 per cent of its members have given their consent in writing or in electronic mode.
  - It could increase its subscribed share capital by offering the shares to its employees (under a scheme of employees’ stock option) by passing an ordinary resolution.
  - Mandatory auditor rotation norms are applicable to all private companies with paid-up share capital of INR50 crore or more.
  - Interested directors of private companies are allowed to be counted towards quorum in a board meeting and are allowed to participate in the board meeting in which the contract or arrangement (in which he/she has direct/indirect interest) is being discussed subject to disclosure of his/her interest.
  - Members of private companies who are related parties are also allowed to vote on a resolution of a company to approve a contract/arrangement entered into by the company.
  - Auditor of a private company (other than small company, one person company or with turnover and borrowings less than INR50 crore and INR25 crore) are mandatorily required to report on the adequacy and operating effectiveness of IFC.
  - Private companies are allowed to buy-back its own shares or could grant loans for purchase of its own shares without any restrictions. Similarly, no restriction is applicable to them while granting loans to directors and companies in which directors are interested.