www.pwc.in

Refresh

Changing Regulatory Landscape

Newsletter

August 2013

pwc

In this Issue

Sectoral Regulations 04
- *Telecommunication*
- *Broadcasting*
- *Special economic zone*

Corporate Regulations 09

Perspective 12

Annexure 16

Glossary 20

The FIPB meeting

Some interesting cases that were discussed in the meeting held on 5 July, 2013 have been mentioned below:

- An NBFC company's proposal to convert itself into a CIC was approved by the FIPB. The proposal also included additional FDI to be brought into the company as well as post facto approval for not meeting the minimum capitalisation requirement for a brief period in the past.

- A foreign owned NBFC sought an amendment for removal of the condition of registration as a CIC as it is not accessing public funds. The proposal thus approved also includes downstream investment to be made by such an NBFC.

- An Indian company's proposal to make a preferential issue of partly paid shares to another Indian company, owned and controlled by a non-resident entity, was approved by the FIPB.

- A group restructuring proposal that involved placing two Indian subsidiaries of a foreign parent company into a two-step structure by swapping shares was approved by the FIPB.

- A proposal to change the purpose funds provided to an Indian company, from advances against future production to FDI was rejected by the FIPB.

Sectoral regulations

Telecommunication

Telecom Consumer Complaint Redressal Regulations

Effective redressal of consumer complaints is of prime importance to the TRAI. While the measures taken by it so far have been effective, it is important for them to be continuously reviewed for an improved and more efficient complaint redressal. The TRAI had issued the Telecom Consumers Complaint Redressal Regulations, 2012 (1 of 2012) on 5 January, 2012 to make complaints redressal for the telecom consumer by the service provider more effective.

For further enhancement, the TRAI has made the following changes in the regulations:

- Every service provider shall earmark or allot sufficient telephone lines or connections to be called 'Consumer care numbers' and ensure that its complaint centre is accessible to its consumers in person as well as through voice calls, SMS, email and post.
- The service provider should communicate to the consumer through an SMS, email or post, the details of the action taken for the complaint and the procedure for preferring appeal to the Appellate Authority.
- A consumer may prefer an appeal either directly to the Appellate Authority through an email, facsimile, post or in person, or through the consumer care number of the complaint centre established by the service provider.
- On disposal of the appeal, the secretariat of the Appellate Authority shall intimate the decision through an SMS, email or post, to the appellant and the service provider.

Telecommunications Mobile Number Portability (Fifth Amendment) Regulations, 2013 for Corporate Numbers

The TRAI has issued Telecommunication Mobile Number Portability Regulations, laying down the framework for the implementation of mobile number portability in India. The regulation has constantly been amended, based on the feedback received from customers as well as service providers.

In continuation, the TRAI has now introduced changes in relation to mobile number portability for corporate numbers. The salient features proposed in the amendment have been listed below:

- Upto 50 corporate numbers of a service provider can be ported to another service provider. This can be done through a letter of authorisation from the authorised signatory of the corporate mobile numbers, in a single porting request.

- A copy of the no objection certificate from the authorised signatory will be sent by the recipient operator to the donor operator along with other requisite details.

- The porting request must now be forwarded in 48 hours by the recipient operator for corporate mobile numbers whereas, for individual porting requests, the limit continues to be 24 hours.

Broadcasting

Proposal to further liberalise FDI caps

To counter the current account deficit, the Indian Government has been focussing on attracting a greater FDI flow into the country. For this, through an inter-ministerial consultation process, the Ministry of Information and Broadcasting and the TRAI have agreed to further increase FDI limits in the broadcasting sector. The TRAI issued its recommendation paper on 22 August, proposing the FDI limits.

- FDI in carriage services (HITS, DTH, MSOs undertaking digitisation, teleport, mobile TV): 100% FDI (FDI beyond 49% with Government approval)

- Uplinking of news channels from India: Increase in FDI from the current 26 to 49% under the Government approval route

- FM radio: Increase in FDI from 26 to 49%, but under the Government approval route

- Downlinking and uplinking of non-news channels: To maintain status quo; i.e. Maintain 100% FDI under the FIPB approval route

It is important to note that this recommendation will be applicable only once the Government notifies the changes in due course.

Distribution of TV channels from broadcasters to platform operators

The TRAI issued a consultation paper on 6 August, 2013, proposing to amend the current regulatory framework by demarcating the roles and responsibilities which can be assigned by the broadcasters to their authorised agencies for the distribution of TV channels to various platform operators.

These roles and responsibilities can be summarised in the following:

- Broadcasters to publish their RIO and enter into interconnection agreements with distribution platform operators
- The authorised distribution agent (of the broadcaster) cannot:
    - change the composition of the bouquet formed by the broadcaster while providing it to the distributors of TV channels;
    - bundle bouquet or channels of the broadcaster with those of other broadcasters.

Three months is the proposed timeframe for reworking the RIOs, entering into interconnect agreements and filing them with the TRAI.

SEZ

The DoC amends the SEZ Rules

To revive the interest in SEZs, the DoC on 18 April, 2013 announced a series of measures in the annual supplement (2013-14), FTP 2009-14. The key changes proposed included reduction in minimum land area requirements for multi-products and sector-specific SEZs, doing away with the minimum area requirement for IT or ITeS SEZs, a graded scale for the minimum land area criteria, sector broad-banding, land vacancy issues and exit policies for SEZ units.

To bring these changes into effect, the DoC on 12 August 2013, amended the SEZ Rules, 2006.

Definition of 'sector' under the SEZ Rules expanded

The term 'sector' was defined in the earlier SEZ Rules *"as one or more products or one or more services falling under a category such as engineering, textiles and garments, pharmaceuticals and chemicals, handicrafts, gem and jewellery, electronics hardware and software, including information technology enabled services and bio-technology".*

To further explain what constitutes a 'single sector', a new proviso has been inserted in the SEZ Rules . It states that *"provided various categories comprising their* ***products or services that are similar or compatible with each other*** *and including* ***related ancillary services***, ***R&D services*** *of the sector and additional combination of products and services of similar or compatible nature approved by the BoA shall constitute a single sector".*

While the above addition may broaden the definition of a 'single sector', it may be noted that it is subject to further interpretation and any combination of products and services of a similar or compatible nature that constitutes as 'single sector' and is approved by the BoA.

Minimum contiguous land area requirement reduced

Under the revival package announced in April this year, the Government of India had decided to **reduce the minimum land area requirement by half, which is 50%** of the existing requirement for specified SEZs. It was further proposed to do away with the minimum land area requirement for IT/ITeS SEZs **and instead have only a minimum built-up processing area**.

Under the amended SEZ Rules, the minimum contiguous land area requirement for multi-product and sector-specific SEZs has been reduced by half. For IT or ITeS SEZs, there is no minimum land area requirement and the developer will be required to meet only the minimum built-up processing area criteria. While the minimum land area requirement for IT or ITeS SEZs has been done away with, the minimum land area requirement for electronic hardware and software (including ITeS) remains unchanged (10 hectares). In addition, such zones will be required to fulfill the minimum built-up processing area requirement applicable to IT or ITeS SEZs.

Under the amended SEZ Rules, a new sector,. agro based food processing, has been brought under the 10-hectare category with a minimum built-up processing area of 40,000 square meters.

S.no	Type of SEZ	Minimum land area requirement for SEZs		
		Revised* (in hectares)	Old (in hectares)	Built-up area
1	Multi-product SEZ[1]	500	1000	50%
2	Sector-specific SEZ or SEZ with one or more services or in a port or airport (excluding IT or ITeS sector)	50	100	50%
3	IT or ITeS sector SEZ	No minimum land area requirement	10	Required to meet the built-up processing area requirements as prescribed **
4	Electronic hardware and software (including ITeS)	10	10	Yes **
5	Agro-based food processing	10		

Notes

** In case of multi-product SEZs operating in specified states and UTs, the land parcel has been reduced from 200 to 100 hectares. Similarly, with respect to sector-specific SEZs or SEZs with one or more services or in a port or airport (excluding the IT or ITeS sector) operating in specified states and UTs, the minimum land area parcel has been reduced from 50 to 25 hectares.*

** The area requirement prescribed for IT or ITeS sector.

Particulars	Minimum built-up area
Seven major cities (Delhi NCR, Mumbai, Chennai, Hyderabad, Bangalore, Pune, Kolkata)	One lakh square metres
Category ‘B’ cities	50,000 square metres
Category ‘C’ cities	25,000 square metres

[1] *The upper ceiling of the land parcel remains unchanged at 5000 hectares.*

Addition of a sector to a sector-specific SEZ or SEZ for one or more services, ports or airports

Under the amended SEZ Rules, the developer of an SEZ for sector-specific or one or more services or in a port or airport will be allowed to add an additional sector to an existing SEZ for every contiguous 50-hectare land parcel.

Incentives on additions made to pre-existing structures on a land parcel to be used for SEZs

As per the earlier SEZ Scheme, land parcels with pre-existing structures not in commercial use were being considered as vacant land for the purposes of setting-up and notifying an SEZ. However, presently, developers carrying out any addition to such pre-existing structures were not eligible for duty benefits.

Under the amended SEZ Rules, developers or co-developers proposing to use land parcels with existing structures, which are non-operational and thereafter making **additions to such pre-existing structures such as ports, manufacturing units or structures on which no commercial, industrial or economic activity is in progress will now be eligible for duty benefits** akin to any other activity in the SEZ.

Also, the authorised operations carried out on such infrastructure shall be eligible for fiscal incentives the way it is for any new infrastructure in an SEZ.

Transfer of assets by SEZ unit upon exit or sale

Under the earlier SEZ Scheme, Rule 19(2) of the SEZ Rules, 2006 provides that the UAC may approve the proposals for a change of entrepreneur of an approved unit, if the incoming entrepreneur takes over the assets and liabilities of the existing unit.

The new SEZ Rules have amended the above provision and have introduced Rule 74A which deals with the transfer of the SEZ unit assets upon exit or sale.

An SEZ unit may choose to opt out of the SEZ scheme by transferring its assets and liabilities to another person by way of transfer of ownership (including the sale of SEZ unit), provided the following conditions are complied with:

- The unit has a valid LoA and the land's lease is for not less than five years, as on the date of transfer.
- The unit has been operational for a minimum period of two years after the commencement of production, as on the date of transfer.
- The sale or transfer will be subject to approval of the UAC.
- The transferee fulfills all eligibility criteria that is applicable to a unit.
- The applicable duties and liabilities, if any, as applicable under Rule 74 and the export obligations of the transferor unit shall stand transferred to the transferee unit.

Corporate regulations

LRS for resident individuals

Following the recent rupee depreciation, the RBI has initiated a spate of measures, including restricting outbound remittances under the LRS window available to resident individuals.

- The existing limit of 200,000 USD per financial year (April to March) has been reduced to 75,000 USD per financial year with immediate effect

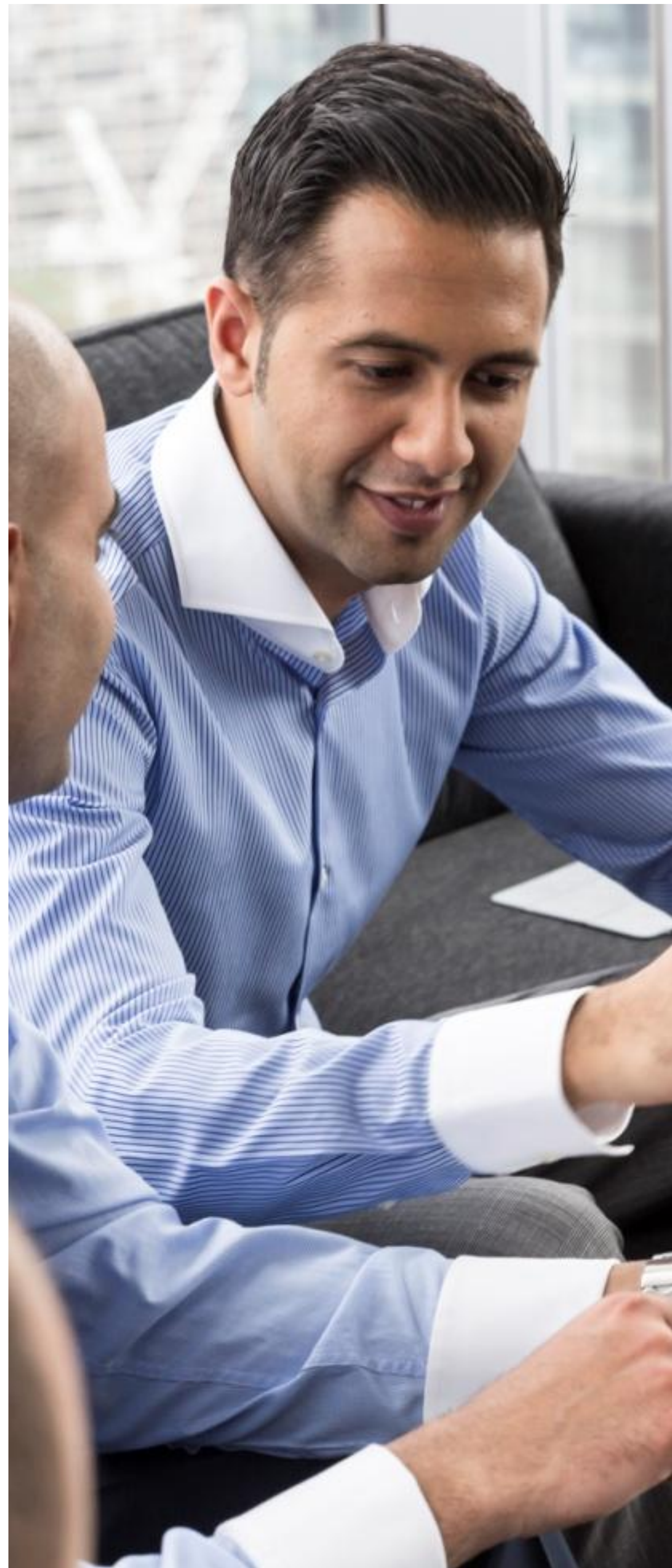
- Acquisition of immovable property outside India (directly or indirectly) under the LRS scheme will not be allowed

In addition to the above points, the RBI has also permitted the eligible resident individuals to access the LRS window to acquire or set up overseas a JV or WOS (which is an operating company) outside India for a *bona fide* business activities by making remittance under the LRS within the 75,000 USD limit with effect from 5th August, 2013. The key aspects of this change are summarized below:

- The overseas JV or WOS should be an operating entity not having any step-down subsidiary and should be engaged in a *bona fide* business activity other than in real estate, banking or financial services.

- The overseas JV or WOS should not be located in countries that have been identified as 'non co-operative countries and territories'.

- Investment should be made through equity shares and **CCPS**. However, any other financial commitment to or on behalf of the JV or WOS is prohibited.



- Investments can be disinvested (partially or fully) after one year has elapsed from the date of making the first remittance by way of transfer/ or sale or by way of liquidation or a merger of the JV or WOS. However, no write-off will be permitted pursuant to the disinvestment.

- Resident individuals need to comply with following requirements as applicable to the Indian parties making ODI:
  - Receiving share certificates or any other document as evidence of investment in the foreign entity within the given time frame;
  - Compliance with valuation norms;
  - Reporting requirements viz. filing of Form ODI, Form APR and reporting any alteration in the share holding pattern within the given time frame;
  - Repatriate to India, all dues receivable from the foreign entity within the given time frame.

Source: A.P. (DIR Series) Circular No. 24 dated 14th August, 2013 and Notification No. FEMA.263/RB-2013 dated 5 March, 2013

ODI

The RBI has notified modifications in the present ceilings for ODIs under the **automatic route.**

Entity	Old limits	Revised limits
Total ODI by an Indian party in all its **JVs** or **WOSs** abroad, engaged in any *bona fide* business activity	400%*	100%*
Total ODI by an Indian company, investing in overseas unincorporated entities in the energy and natural resources sectors	400%*	100%*

*of the net worth of the Indian party or company as on the date of the last audited balance sheet

Henceforth, ODI in the excess of 100% of the net worth will be considered under the **approval route**.

It has been notified that the amended provisions shall apply with immediate effect to all fresh ODI proposals on a prospective basis, but will not apply to the existing JVs or WOSs set up under the extant regulations.

It is unclear at this stage whether the reduced limit of 100% of the net worth would apply to any additional funding into the JV or WOS that was set up before the above amendment. Clarification from the RBI is expected soon.

A.P. (DIR Series) Circular No. 23 dated 14 August, 2013

Compounding of contraventions under FEMA

RBI has notified the following instructions with respect to the compounding procedures under FEMA:

- As per extant directions,[2] compounding applications should be submitted only after the transactions are complete and all the requisite approvals have been obtained from the concerned authorities. Failing this, the applications are returned along with the application fee of 5000 INR.

- In order to expedite the return of fees, the RBI will now directly credit 5000 INR to the applicant's account through NEFT.

  Accordingly, the applicants will be required to furnish their mandate and the details of their bank account in the prescribed format along with the application and other documents.

[2] A.P. (DIR Series) Circular No. 56 dated 28th June, 2010

- Further, the existing format[3] for furnishing additional details to be accompanied with compounding application have been modified to include the details of income-tax PAN and the activity as per NIC codes – 1987.

- Any change in the address or contact details during the pendency of the compounding application should be brought to the notice of the compounding authority.

A.P. (DIR Series) Circular No. 20 dated 12 August, 2013

[3] A.P.(Dir Series) Circular No.57 dated 13th December, 2011

Perspective

Independent director: Guardian of 'corporate governance'

The role of the independent director is considered to be a vital cog in the corporate governance framework. Surprisingly, The Companies Act, 1956 had never discussed the concept of an independent director. In the Indian regulatory arena, the term 'independent director' has only been mentioned in the Equity Listing Agreement[4]. ,

The concept of independent directors in the Companies Act 2013

The Bill was passed by the Rajya Sabha on 8 August, 2013 and obtained President's assent on 30 August, 2013. The Act aims to provide for a self-regulatory process and a stringent compliance regime. The Act has widened the definition of an independent director by prescribing the roles and responsibilities and has also demarcated the liabilities. The objective of having an independent director is to empower him to evaluate the decisions made by the management, protect shareholder value and bolster stringent internal controls.

It is important to determine who can be an independent director and what it will entail. According to The Act "*Every listed public company shall have at least one-third of the total number of directors as independent directors and the central government may prescribe the minimum number of independent directors in case of any class or classes of public companies*"[5].

[4] Section 49.1 (A) (ii) of the Equity Listing Agreement
[5] Section 149 (4) of the Companies Act 2013

Two issues have come to the forefront in relation to the concept independent directors:

- Who is an independent director?
- How long can one occupy this position without vitiating the independence?

The Act addresses both these issues. In addition, it also prescribes a code of conduct for them.

The Act also states that there are rules to be prescribed and that the companies will be given a period of one year to ensure compliance with the Bill as well as the rules that are framed, if any.

Who is an independent director?

An independent director is a director other than the Managing Director or the full-time director or the nominee director. It further clarifies that the nominee director appointed by any institution, or in pursuance of any agreement, or appointed by any government to represent its shareholding shall not be deemed as an independent director.

Section 149 (5) of the Act defines the term 'independent' in relation to a company. It has improved on some of the shortcomings of the definition prescribed in clause 49 of the ELA and has fixed some of the loopholes that listed firms could have exploited to circumvent the existing regulations.

- The Act bars the independent director to have any pecuniary relationship with the company, its holding, subsidiary or associate company, their promoters or directors during the two immediately preceding financial years or during the current financial year.
- The Act has included relatives in the scope of 'pecuniary relationship'.
- An ex-promoter of the company, of its holding, a subsidiary or any associate company cannot be classified as an independent director.
- A person who (or who's relative) is or has been an employee of the company or its holding, subsidiary or associate company cannot be an independent director.
- An independent director should not be a chief executive or a director, of any NPO that receives 25% or more of its donation from the company, any of its promoters, directors or holding, subsidiary or associate company or one that holds 2% or more of the total voting power in the company.
- Auditors, cost auditors and practicing company secretaries of the company or its holding, subsidiary or associate are not allowed to be classified as independent directors. One of the regulatory loopholes that companies frequently exploit is the appointment of a partner in a legal or consulting firm with whom the company has 'non-material' associations as an independent director. The Act has fixed thes loophole by providing a standardised definition of what comprises a 'material association'.

Most importantly, the criteria of independence are a part of the definition and extend to include the board of director's opinion on integrity. According to Section 149, "an independent director is one who, in the opinion of the board, is a person of integrity and possesses relevant expertise and experience and such other qualifications as may be prescribed". This requirement also poses difficulty in terms of the manner in which integrity of an individual can be assessed. The independent director also needs to give a declaration confirming that he meets the given criteria of independence.

Tenure

An independent director shall be in office for a term of up to five consecutive years on the board of a company, but shall be eligible for reappointment after that. However, he cannot be in office for more than two consecutive terms, though he would be eligible for re-appointment after the expiration of a three year cooling off period. During this time, he shall not be appointed in or be associated with the company in any other capacity, directly or indirectly[6].

Liability

The Act makes an attempt to distinguish between the liability of an independent director and a non-executive director from the rest of the board and has accordingly inserted a provision to insulate them from civil or criminal action. The intention to limit liability of independent directors is demonstrated in the below definition which inter-alia provides that the liability for independent directors will be[7] "only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through board processes, and with his consent or connivance or where he had not acted diligently."

Code

Schedule IV of the Act provides the code for independent directors. It is a guide to the professional conduct for independent directors. Both the company and independent directors shall abide by the provisions specified in this schedule. The code states that an independent director shall uphold ethical standards of integrity and probity. However, what constitutes ethical behaviour has not been defined and hence, is open to interpretation.

[6] Section 149(11) of The Companies Act 2013
[7] Section 149(12) of The Companies Act 2013

Stock options

As per The Act, an independent director will not be able to get stock options but may get the payment of fees and profit linked commission, subject to the limits specified or to be specified in the rules. 8

Databank of independent directors

The Act proposes to make the appointment process of the independent directors, independent of the company's management by constituting a panel or a data bank to be maintained by the MCA, out of which companies may choose their independent director. What remains unaddressed is the manner in which the companies need to carry out an assessment of the attributes of the independent director as specified under the 'manner of appointment' in the code from the databank maintained by the MCA.

Requirement of an independent director for a private limited company or a one person company

Though the requirement of an independent director is mandatory only for public listed company, Section 135 of The Act which provides for CSR makes it mandatory for a private limited company or a one person company as well. According to Section 135, "Every company having a net worth of 500 crore INR or more, or a turnover of 1000 crore INR or more or a net profit of five crore INR or more during any financial year shall constitute a CSR Committee of the board consisting of three or more directors, *out of which at least one director shall be an independent director.*

Hence, a private limited company or a one person company having a net worth of 500 crore INR or more or turnover of 1000 crore INR or more **or a net profit of five crore** INR or more (which is the most likely case) during any financial year shall appoint an

[8] Section 149 (9) of The Companies Act, 2013

independent director to form a CSR committee. This would take away the liberty provided in Section 149 where in a private limited company and a one person company, it is not mandatorily required to appoint an independent director. The requirement of an independent director defeats the very purpose of introducing the one person company, as it takes away the operational flexibility hence provided. .

"To address some open issues , rules are yet to be prescribed, we need to wait and watch as to how the rules would be framed to tackle the ambiguity. Having said this, the Act, has made some welcome changes to the existing regulations on board independence and it is a big step towards achieving corporate governance."

- Vanishri S (Manager, Regulatory Services)

Annexure

Key changes proposed to be introduced in the Companies Act 2013 (New Act):

- The new Act provides 33 new definitions such as 'small company', 'dormant company', 'one person company', 'associate company', 'CEO', 'CFO, control, employee stock option, related party, etc.
- **KMP** have been defined to include the CEO, the managing director, the manager, the company secretary, whole-time director and the CFO. KMP is considered an 'officer in default' under the new Act. Accordingly, he or she is expected to carry the desired obligations and hence, shall also be liable for the penal consequences for any default thereon.
- FY in relation to any company or body corporate, has been defined to mean the period ending on 31 March every year, and where it has been incorporated on or after 1 January of a year, the period ending on 31 March, the following year, in respect whereof financial statement of the company or body corporate is made up.

  The Tribunal may, on an application made, allow the Company to have a different financial year.
- **OPC** means a company with only one person as its member.
- The new Act provides for a few exemptions in terms of compliances for small companies, one person companies and dormant companies.
- The definition of a private company has been altered, inter-alia, the new requirement increases the limit of the number of members from 50 to 200.
- **Issue shares at a discount:** Issuing shares at a discount will no longer be permitted. The only shares that can be issued at a discount belong to the class of sweat equity wherein shares are issued to directors or employees in lieu of their services.
- **Issue of bonus shares:** The new Act includes a new clause that provides for the issue of fully paid-up bonus shares from its free reserves or the securities premium account or the capital redemption reserve account, subject to compliance with conditions such as authorisation by the articles, approval in the general meeting, etc.
- **Woman director on board:** Certain prescribed companies need to mandatorily have at least one woman director on their boards.
- **Resident director mandatory:** A new requirement requires at least one director to have stayed in India for at least 182 days in the previous calendar year. This may alter the current board structure of companies without resident directors.
- **Dividends:** The requirement of the existing Act with regard to the transfer of a specified percentage of profits not exceeding 10% of the reserve [i.e. Companies (Transfer of Profits to Reserve) Rules,1975] has not been acknowledged in the new Act and thus companies are free to transfer any or no amount of profits to reserves.
- **Unpaid dividends:** The company is required to disclose details such as names, last known address and unpaid dividend, within 90 days of fund transfers to an unpaid dividend account, on its website, also on any other website approved by the central government for this purpose.

- **Objection to any compromise or arrangement** can now be made only by shareholders who hold not less that 10% of shares or have an outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statements.

- **Cross-border mergers:** The new Act proposes to allow the merger of an Indian company with a foreign company, with a rider that any such mergers can be effected only with respect to companies incorporated in specific countries, as notified by the central government.

- **Minority buy-out:** Purchase of minority shares is permitted on acquisition of 90% or more (either directly or by virtue of any amalgamation, share exchange, conversion of securities or any other reason) of the issued capital of the company by the acquirer or person acting in concert with the acquirer. The offer shall be at a price as determined by a valuer. However, minority shareholders are entitled to a higher price.

- **Multiple buybacks:** Under the existing Act, companies are permitted to more than one buyback in a year. The new Act however does not allow multiple buy-backs in a year.

- **Corporate social responsibility:** The new Act mandates that every company with a net worth of 500 crore INR or more, or a turnover of 1000 crore INR or more, or a net profit of 5 crore INR or more during any FY will be required to spend at least 2% of the average net profits of the immediately preceding three years on CSR activities. If they do not spend, relevant reasons should be provided in the director's report. Further, the company shall prefer local regions for spending the amount earmarked against CSR activities.

- **Registered valuers:** The new Act has introduced a new concept of registered valuers required to provide valuation reports mandated under various clauses:
  - Further issue of share capital
  - Restriction on non-cash transactions involving directors
  - Compromises, arrangements and amalgamations
  - Purchase of minority shareholding
  - Submission of report by the company liquidator
  - Declaration of solvency in case of a voluntary wind up proposal
  - Power of the company liquidator to accept shares, etc, as consideration for the sale of company property

- **First annual general meeting:** The new Act provides that the first annual general meeting should be held within nine months from the date of closing of the first FY of the company.

- **Quorum in shareholders' meeting:** No change for a private company. The slab given below applies to a public company.

No of members	Quorum
Upto 1000	Five members
Between 1000 to 5000	15
Beyond 5000	30

- **Shareholders' meetings:** Secretarial standards issued by the Institute of Company Secretaries of India have been recognised, so long as they are notified by the central government.

- **Auditors:** Unlike an appointment at each annual general meeting under the existing Act, the auditor may now be appointed for a period of five years, with a requirement to ratify such an appointment at each annual general meeting.

- **Mandatory firm rotation:** The new Act has introduced the concept of auditors and audit firms rotation. It propose that in case of listed companies (and other class (es) of companies as may be prescribed) it will be mandatory to rotate auditors every five years in case of the appointment of an individual as an auditor and every 10 years (i.e. two terms of five years each) in case of appointment of an audit firm with a uniform cooling off period of five years in both (individual and audit firm) cases. The related provisions need to be implemented within three years from the date of commencement of the new Act.

- **Loans and investments**
  - Under the new Act, companies can invest only through two layers of investment companies subject to exceptions which includes company incorporated outside India
  - Exemption available under the existing Act to private companies, as well as loans, investment given or made by a holding company to, in its subsidiary company are no longer available under the new Act

- **SFIO** –

  The new Act provides for the establishment of a SFIO to investigate certain offences under the new Act, on the recommendation of the central government. The government may make recommendation for investigation based on (i) an RoC report (ii) intimation of a special resolution passed by a company that its affairs are required to be investigated (iii) public interest (iv) request from any department of the central or the state government.

- **Oppression and mismanagement: The** new Act recognises '**class action suits'** which may be initiated by a specified number of members or depositors for the following:
  - To seek relief for restraining the company from doing certain acts[9]
  - To claim damages or compensation or demand suitable action from or against the following:
    - The company or the directors for fraudulent, unlawful or wrongful acts, etc
    - The auditor for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; and any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct.

- **Independent directors:** Unlike the existing Act which does not recognise independent directors, the new Act provides for a prominent role for independent directors. Some of the important points are as follows:
  - Listed public companies shall have one-third of its board as independent directors.
  - The central government may prescribe a certain class of unlisted public companies also to have independent directors.
  - The new Act defines an independent director.. It is different from the one defined under clause 49 of the listing agreement.
  - Code for independent directors as prescribed in the new Act.
  - The tenure of an independent director restricted to five consecutive years, extendable for another five years by a special resolution.
  - The independent director who has completed two terms shall be eligible

[9] Restraining acts which are ultra vires the articles or memorandum; restraining the breach of articles, memorandum; declare a resolution altering articles, memorandum as void; restrain commission of act which is contrary to Companies Act or any other law; restrain company from taking any action contrary to a resolution passed by members.

for an appointment only after the expiry of three years.
- Independent directors are not to retire by rotation.
- The manner and procedure of selecting an independent director will prescribed by the central government.

- **Related party transaction**
  - The scope and the nature of transactions have been widened to include buy, sell, and lease all kinds of properties, agent appointments, appointments of such related parties to any office or place of profit in the company, its subsidiary or associate company.
  - All related party transactions shall be approved at a meeting of the board and in the case of companies exceeding such an amount of paid up capital or such amount of transactions value, approval through a special resolution is required.
  - A member who is also the related party shall not be entitled to vote on the special resolution
  - The central government approval (as required under the Companies Act, 1956) has been dispensed with.
  - Related party transactions to be reported in the board report.

- **Restriction on non-cash transactions involving directors**
  - No company shall enter into any contract by which the director of the company or its holding, subsidiary or associate company or a person connected with such a director can acquire assets of the company for a consideration otherwise than in cash except with the prior approval of the shareholders. However, the shareholders' approval of the holding company is also required if the director is a director of the holding company.
  - Similarly no company shall acquire assets from such a director or person so connected.
  - The valuation of the asset to be acquired shall be supported by a registered valuer's certificate.

- **Prohibition on forward dealing in securities of company by director or key managerial personnel:** Trading in securities in futures and options market by a director or a key managerial personnel is prohibited. The restriction applies to securities of the company, its holding, subsidiary, and associate company. Contravention of the provisions is a criminal offence.

- **Insider trading of securities have been recognised:**
  - Insider trading by any person is prohibited.
  - Definitions of 'insider trading' and 'price sensitive information' provided.
  - Contravention of the provisions is a criminal offence.

Note: The annexure is prepared with an intention to highlight the important developments under the new Act. The provisions need to be looked in entirety before they can be implemented. It is advisable to obtain professional advice or support before implementing these provisions in practice.

Glossary

BoA	Board of approval
BTP	Biotechnology park
CCPS	Compulsorily Convertible Preference Shares
CEO	Chief executive officer
CFO	Chief financial officer
CSR	Corporate social responsibility
DC	Development commissioner
DIPP	Department of Industrial Policy and Promotion
DoC	Department of Commerce
FAQ	Frequently asked questions
FDI	Foreign direct investment
FEMA	Foreign Exchange Management Act
FIPB	Foreign Investment Promotion Board
FTP	Foreign Trade Policy
FY	Financial year
INR	Indian rupee
IT	Information technology
JV	Joint venture
LoA	Letter of approval
LRS	Liberalised Remittance Scheme
MBRT	Multi-brand retail trading
MCA	Ministry of Corporate Affairs
MIB	Ministry of Information and Broadcasting
MoC	Ministry of Commerce
NBFCs	Non-banking financial companies
NEFT	National Electronic Funds Transfer
ODI	Overseas Direct Investments
OPC	One person company
PIB	Press Information Bureau
RA	Regional authorities
RBI	Reserve Bank of India
RIO	Reference Interconnect Offer
SBRT	Single brand retail trading
SFIO	Serious fraud investigation office
SEBI	Securities Exchange Board of India
SEZ	Special economic zone
STP	Software technology park
KMP	Key managerial personnel
The bill	The Companies Bill
TRAI	Telecom Regulatory Authority of India
UAC	Unit approval committee
USD	United States dollar
USSD	Unstructured supplementary service data
UTs	Union Territories
WOS	Wholly owned subsidiary

Contacts

Ahmedabad
President Plaza, 1st Floor Plot No 36
Opp Muktidham Derasar
Thaltej Cross Road, SG Highway
Ahmedabad, Gujarat 380054
Phone +91-79 3091 7000

Bangalore
6th Floor, Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bangalore 560 008
Phone +91-80 4079 7000

Chennai
8th Floor, Prestige Palladium Bayan
129-140 Greams Road,
Chennai 600 006
Phone +91 44 4228 5000

Hyderabad
#8-2-293/82/A/113A Road no. 36,
Jubilee Hills, Hyderabad 500 034,
Andhra Pradesh
Phone +91-40 6624 6600

Kolkata
56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake.
Kolkata - 700 091, West Bengal, India
Phone +(91) 033 - 2357 9101 / 4400 1111

Mumbai
PwC House, Plot No. 18A,
Guru Nanak Road - (Station Road),
Bandra (West), Mumbai - 400 050
Phone +91-22 6689 1000

Gurgaon
Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City, Gurgaon
Haryana -122002
Phone : +91-124 3306 6000

Pune
GF-02, Tower C,
Panchshil Tech Park,
Don Bosco School Road,
Yerwada, Pune - 411 006
Phone +91-20 4100 4444

www.pwc.in

This report does not constitute professional advice. The information in this report has been obtained or derived from sources believed by PricewaterhouseCoopers Private Limited (PwCPL) to be reliable but PwCPL does not represent that this information is accurate or complete. Any opinions or estimates contained in this report represent the judgment of PwCPL at this time and are subject to change without notice. Readers of this report are advised to seek their own professional advice before taking any course of action or decision, for which they are entirely responsible, based on the contents of this report. PwCPL neither accepts or assumes any responsibility or liability to any reader of this report in respect of the information contained within it or for any decisions readers may take or decide not to or fail to take.

© 2013 PricewaterhouseCoopers Private Limited. All rights reserved. "PwC", a registered trademark, refers to PricewaterhouseCoopers Private Limited (a limited company in India) or, as the context requires, other member firms of PwC International Limited, each of which is a separate and independent legal entity.