CHANGES RELATED TO DIRECTORS AND THEIR POWERS

The 2013 Act provides detailed role of the management by incorporating sections enunciating powers, duties and responsibilities of board of directors, KMP, etc. Following are some of the important changes in the 2013 Act vis-à-vis 1956 Act:

Directors

Maximum Number of Directors [Section 149(1)]: The maximum number of directors for a public company has been increased from 12 to 15. In case the company desires to further increase the board size, it may do so by passing a special resolution. The requirement of taking permission of the Central Government as provided in the 1956 Act is done away in the 2013 Act.

Every company shall have atleast one of the directors, who has stayed in India for 182 days or more in the previous calendar year.

Number of Directorships [Section 165]: A person cannot be a director (including alternate director) in more than 20 companies out of which he or she cannot be a director of more than 10 public companies. The 2013 Act now restricts over all directorship of any individual as compared to the 1956 Act which allowed 15 directorships of any person in a public company and any number of directorships in a private company.

Resident Director [Section 149(3)]: At least one director of the company is required to fulfill the residency test i.e. stay for not less than 182 days in India in the previous calendar year.

Woman Director [Section 149(1)]: Certain class of the companies (which will be notified in the Rules) must have at least one woman director on the board. The categories of companies which need to comply with the requirement of having at least of one woman director are as follows: [section 149(1) of the 2013 Act]

(i) Every listed company, within one year from the commencement of second proviso to sub-section (1) of section 149 of the 2013 Act.

(ii) Every other public company that has paid–up share capital of one hundred crore rupees or more, or a turnover of three hundred crore rupees or more within three years from the commencement of second proviso to sub-section (1) of section 149 of the 2013 Act.

While this new requirement will go a long way in encouraging gender diversity, it has already created quite a stir in the manner in which companies will ensure compliance.

Small Shareholder Director: A listed company may have one director elected by small shareholders. Small shareholder means a shareholder holding shares of nominal value of not more than INR 20,000 or such other sum as may be prescribed.

Independent Directors [Section 149(4)]: One of the significant aspects of the 2013 Act is the effort made towards incorporating some of the salient requirements mandated by the SEBI in clause 49 of the listing agreement in the 2013 Act itself. To this effect, the 2013 Act requires every listed public company to have at least one-third of the total number of directors as independent directors. Further, the central government in the draft rules has prescribed the minimum number of independent directors in case of the following classes of public companies [section 149(4) of the 2013 Act]:

- Public companies having paid up share capital of 100 crore INR or more; or
- Public companies having turnover of 300 crore INR or more
- Public companies which have, in aggregate, outstanding loans or borrowings or debentures or deposits, exceeding 200 crore INR.

Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class or classes of companies shall have at least two Directors as Independent Directors:

- Public companies having paid up share capital of 10 crore rupees or more; or
- Public companies having turnover of 100 crore rupees or more; or
- Public companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

In case a company covered under this rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

Any intermittent vacancy of an independent director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

Where a company ceases to fulfill any of the three above conditions for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

The paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

An independent director shall not be entitled to stock options. He shall not be entitled to any remuneration other than sitting fee, reimbursement of expenses for participation in the Board and other meetings and profit-related commission as may be approved by the members.

Duties of the Director [Section 166]:The 2013 Act attempts to codify the duties of directors, including but not limited to the following, they are required to:

- Act in good faith and in the best interest of the company;
- Not to have direct or indirect conflict of interest with the interest of the company;
- Exercise duties with diligence and reasonable care and declares that it would be punishable offence to commit a breach of those duties. The liability of the director in default for contravention, for which no specific penalty is prescribed, has been increased from INR 50,000 to INR 500,000.

Limitation of Liability: Notwithstanding anything contained in the 2013 Act:

- An independent director;
- A non – executive director not being promoter or key managerial personnel,

shall be held liable, 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.

Nominee Director: Section 161 of the 2013 Act provides that subject to the Articles, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or State Government by virtue of its shareholding in a Government company.

Additional Director: Section 161(1) of the 2013 Act provides that the Board of Directors shall not appoint a person who fails to get appointed as a director in a general meeting as an additional director.

Disqualification of Directors [Section 164]

Section 274 of Companies Act, 1956 describes the disqualification of a person for appointment as a director in a company. The above mentioned section is replaced by section 164 of Companies Act, 2013 and it makes required changes and now all such disqualification will cover private company as well.

Disqualifications for appointment as Director [Section 274]

The 2013 Act permanently debars from directorship of a company any person who is convicted of any offence and sentenced to imprisonment of 7 years or more. Section 164 of the 2013 Act contains the following two new grounds for disqualifying a person from directorships of companies which were not there in section 274 of the 1956 Act:

- He has been convicted of an offence dealing with related party transactions at any time during the last preceding five years;
- He has not obtained Director Identification Number.

Vacation of office of Director [Section 167]

Vacation of office of Director if he absents himself at Board meetings

Section 167 of the 2013 Act provides that if a Director absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board, his office shall become vacant.

This section is much more liberal in the sense that it requires director to attend at least one board meeting during a period of 12 months.

However, Section 238 of the 1956 Act authorised the Board to sanction a director’s absence for any period of time which is not possible now under section 167 of the 2013 Act.

Register etc. of Directors [Section 170]

Section 170 of the 2013 Act requires that a return containing such particulars and documents as may be prescribed, of the directors and the key managerial personnel shall be filed with the Registrar within 30 days from the appointment of every director and key managerial personnel, as the case may be, and within 30 days of any change taking place.