Trial for an Ease of Business

as per

The Companies (Amendment) Act, 2017

(Updated till 13th June 2018)

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Objective of Companies (Amendment) Act, 2017

- Facilitate Ease of Doing Business
- Simplification of Compliances
- Harmonisation with Accounting Standards, SEBI and RBI Act and other Regulations
- Rectifies Inconsistencies in the CA 2013
- Strengthen Corporate Governance
- Strict action against defaulting companies.

Journey of Companies (Amendment) Act 2017

- January 03, 2018: President Assent
- December 19, 2017: Rajyasabha Passed
- July 27, 2017: Lok Sabha Passed
- March 16, 2016: Introduced in Lok Sabha
- 98 Sections are Amended
- Amendment Dates: January 26 2018, February 09 2018, May 07 2018 and June 13 2018.
- Total 98 Sections are amended:--
- January 26, 2018:
    - Section 1: Different dates for notification of Sections of CAA 2017
    - Section 4: Duration for Reservation of Name reduced from 60 to 20 days.
- February 9, 2018:- 43 Sections are enforced
- May 7, 2018:- 28 Sections are enforced
- June 13, 2018:- 5 Sections are Enforced

Amendments under CAA 2017

- Sections Amended : 82
- Sections Deleted : 3 (Section 93, 194 and 195)
- Change in promoters holdings, forward dealing and insider trading
- Sections Inserted : 3 (3A, 446A and 446B)
- Members liability in certain cases, Factors determining level of punishment
- Sections Substituted : 5 (Section 42, 90, 185, 406 and 435)
- Private Placement, register of Significant Beneficial Owner, Loans to Directors, Nidhi Company and Special Court

Complete list of Notified Sections of Companies (Amendment) Act, 2017 till date:-

Sr. No.	Companies (Amendment) Act, 2017	Companies Act, 2013	Heading	Effective Date
1	Section 2	Section 2	Definitions	09-02-2018 and 07-05-2018
2	Section 3A	New Insert of Section 3A	Members Severally liable in certain cases	09-02-2018
3	Section 4	Section4	Memorandum	26-01-2018
4	Section 5	Section 7	Incorporation of Company	Not yet enforced
5	Section 6	Section 12	Registered office of Company	Not yet enforced
6	Section 7	Section 21	Authentication of documents, proceedings and contracts	09-02-2018
7	Section 8	Section 26	Matters to be stated in Prospectus	07-05-2018
8	Section 9	Section 35	Civil liability for mis-statements in prospectus	09-02-2018
9	Section 10	Section 42	Issue of Shares on Private	Not yet enforced

			Placement Basis	
10	Section 11	Section 47	Voting Rights	09-02-2018
11	Section 12	Section 53	Prohibition on issue of shares at discount	09-02-2018
12	Section 13	Section 54	Issue of Sweat equity shares	07-05-2018
13	Section 14	Section 62	Further Issue of Share Capital	09-02-2018
14	Section 15	Section 73	Prohibition on acceptance of deposits from public	Not yet enforced
15	Section 16	Section 74	Repayment of Deposits, etc., Accepted Before Commencement of this Act	Not yet enforced
16	Section 17	Section 76A	Punishment for Contravention of Section 73 or Section 76.	09-02-2018
17	Section 18	Section 77	Duty to Register Charges, etc.	07-05-2018
18	Section 19	Section 78	Application for Registration of Charge	07-05-2018
19	Section 20	Section 82	Company to report Satisfaction of Charge	Not yet enforced
20	Clauses (i) and (ii) of Section 21	Section 89 (6) and (7)	Declaration in Respect of Beneficial Interest in any Share	07-05-2018
21	Section 22	Section 90	Register of significant beneficial owners in a company	09-02-2018
22	Clauses (iii) and (iv) of Section 23	Section 92 (4) and (5)	Annual Report	07-05-2018
23	Section 24	Section 93	Return to be Filed with Registrar in Case Promoters' Stake Changes	Not yet enforced
24	Section 25	Section 94	Place of keeping and Inspection of Registers, Returns, etc.	Not yet enforced
25	Section 26	Section 96	Annual General Meeting	Not yet enforced
26	Section 27	Section 100	Calling of Extraordinary General Meeting	09-02-2018
27	Section 28	Section 101	Notice of Meeting	09-02-2018
28	Section 29	Section 110	Postal Ballot	09-02-2018
29	Section 30	Section 117	Resolutions and Agreements to be Filed	07-05-2018
30	Section 31	Section 121	Report on Annual General Meeting	07-05-2018
31	Section 32	Section 123	Declaration of Dividend	09-02-2018
32	Section 33	Section 129	Financial Statements	07-05-2018
33	Section 34	Section 130	Re-opening of accounts on court's or Tribunal's order	09-02-2018
34	Section 35	Section 132	Constitution of National Financial Reporting Authority	09-02-2018
35	Section 36	Section 134	Financial Statement, Board's Report, etc.	Not yet enforced
36	Section 37	Section 135	Corporate Social Responsibility	Not yet enforced
37	Section 38	Section 136	Right of Member to Copies of	09-02-2018

			Audited Financial Statement	
38	Section 39	Section 137	Copy of Financial Statement to be Filed with Registrar	07-05-2018
39	Section 40	Section 139	Appointment of Auditors	07-05-2018
40	Section 41	Section 140	Removal, Resignation of Auditor and Giving of Special Notice	09-02-2018
41	Section 42	Section 141	Eligibility, Qualifications and Disqualifications of Auditors	09-02-2018
42	Section 43	Section 143	Powers and Duties of Auditors and Auditing Standards	09-02-2018
43	Section 44	Section 147	Punishment for Contravention	09-02-2018
44	Section 45	Section 148	Central Government to Specify Audit of Items of Cost in Respect of Certain Companies	09-02-2018
45	Section 46	Section 149	Company to have Board of Directors	07-05-2018
46	Section 47	Section 152	Appointment of Directors	09-02-2018
47	Section 48	Section 153	Application for Allotment of Director Identification Number	09-02-2018
48	Section 49	Section 157	Company to Inform Director Identification Number to Registrar	07-05-2018
49	Section 50	Section 160	Right of Persons Other than Retiring Directors to Stand for Directorship	09-02-2018
50	Section 51	Section 161	Appointment of Additional director, Alternate director and Nominee director	09-02-2018
51	Section 52	Section 164	Disqualifications for Appointment of Director	07-05-2018
52	Section 53	Section 165	Number of Directorships	09-02-2018
53	Section 54	Section 167	Vacation of Office of Director	07-05-2018
54	Section 55	Section 168	Resignation of Director	07-05-2018
55	Section 56	Section 173	Meetings of Board	07-05-2018
56	Section 57	Section 177	Audit Committee	07-05-2018
57	Section 58	Section 178	Nomination and Remuneration Committee and Stakeholders Relationship Committee	07-05-2018
58	Section 59	Section 180	Restrictions on powers of Board	09-02-2018
59	Section 60	Section 184	Disclosure of Interest by Director	09-02-2018
60	Section 61	Section 185	Loan to directors, etc.	07-05-2018
61	Section 62	Section 186	Loan and Investment by Company	07-05-2018
62	Section 63	Section 188	Related party Transactions	09-02-2018
63	Section 64	Section 194	Prohibition on Forward	09-02-2018

			Dealings in Securities of Company by Director or Key Managerial person	
64	Section 65	Section 195	Prohibition on Insider Trading of Securities	09-02-2018
65	Section 66	Section 196	Appointment of Managing Director, Whole-time Director or Manager	Not yet enforced
66	Section 67	Section 197	Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of profits	Not yet enforced
67	Section 68	Section 198	Calculation of profits	Not yet enforced
68	Section 69	Section 200	Central Government or Company to Fix Limit with Regard to Remuneration	Not yet enforced
69	Section 70	Section 201	Forms of, and Procedure in relation to, certain applications	Not yet enforced
70	Section 71	Section 216	Investigation of Ownership of Company	Not yet enforced
71	Section 72	Section 223	Inspector's Report	09-02-2018
72	Section 73	Section 236	Purchase of minority shareholding	09-02-2018
73	Section 74	Section 247	Valuation by Registered Valuers	09-02-2018
74	Section 75	Section 366	Companies Capable of Being Registered	Not yet enforced
75	Section 76	Section 374	Obligations of Companies Registering Under this Part	Not yet enforced
76	Section 77	Section 379	Application of Act to foreign Companies	09-02-2018
77	Section 78	Section 384	Debentures, Annual Return, Registration of Charges, Books of Account and Their Inspection	09-02-2018
78	Section 79	Section 391	Application of Sections 34 to 36 and Chapter XX	09-02-2018
79	First Proviso to clause (i) of Section 80 and clause (ii) of Section 80	Section 403	Fee for filing, etc.	07-05-2018
80	Section 81	Section 406	Provisions relating to Nidhis and its application, etc.	Not yet enforced
81	Section 82	Section 409	Qualification of President and Members of Tribunal	09-02-2018
82	Section 83	Section 410	Constitution of Appellate Tribunal	07-05-2018
83	Section 84	Section 411	Qualifications of Chairperson and Members of Appellate Tribunal	09-02-2018
84	Section 85	Section 412	Selection of Members of	09-02-2018

			Tribunal and Appellate Tribunal	
85	Section 86	Section 435	Establishment of Special Courts	07-05-2018
86	Section 87	Section 438	Application of Code to Proceedings Before Special Court	07-05-2018
87	Section 88	Section 439	Offences to be Non-cognizable	07-05-2018
88	Section 89	Section 440	Transitional provisions	07-05-2018
89	Section 90	Section 441	Compounding of certain offences	09-02-2018
90	Section 91	New Insert of Section 446A	Factors for determining level of punishment	09-02-2018
91	Section 92	Section 447	Punishment for fraud	09-02-2018
92	Section 93	Section 458	Delegation by Central Government of its powers and functions	09-02-2018

The notification of Companies (Registered Office and Fees) Second Amendment Rules, 2018 by the Ministry of Corporate Affairs along with providing relaxation for the Additional Fees payable in the event of delay wherein the due date of filing of Forms falls prior to 30th June, 2018.

The table below depicts the additional fees applicable in different scenarios for the corporates pertaining to the annual filing of forms:

Particulars	**Additional Fees**	
	Due date after 30th June, 2018	**Due date prior to 30th June, 2018**
Forms MGT-7, AoC-4, AoC-4 XBRL, and AoC-4 CFS under Section 92 (Annual Return) or 137 (Annual Financial Statement) of the Companies Act, 2013	**Rs. 100 per day**	Additional fee as per **applicable slab** for the period of delay up to 30th June, 2018 **plus** Additional fee **@ Rs. 100 per day** with effect from 1st July, 2018
23AC, 23ACA, 23AC XBRL, 23ACA XBRL, 20B, 21A under Companies Act, 1956	Not Applicable	Additional fee as per **applicable slab** for the period of delay up to 30th June, 2018 **plus** Additional fee **@ Rs. 100 per day** with effect from 1st July, 2018

Analysis of Amendments made effective under the Companies Amendment Act, 2017 (CAA 2017) from 26 Jan 2018, 09 Feb 2018 and 07 May 2018

Section 2(6) – Associate Company (07 May 18)

The Following section has been amended by substitution of Explanation:

For the purpose of this Clause:

a) The expression "significant influence" means control of atleast 20% of total voting power, or control of or participation in business decisions under an agreement.
b) The expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

Analysis:

- In order to be consistent with the AS, 'total share capital' has been replaced with 'total voting power' and
- The definition of joint ventures is included in Act. JV providing for participation in business decisions rather than control thereof and inclusion of term joint venture is made to bring definition in line with Accounting Standards, particularly AS 28.

Section 2(28) – Cost Accountant (09 Feb 18)

Definition has been substituted:

"Cost Accountant means a cost accountant as defined in section 2(1)(b) of the Cost and Work Accountants Act, 1959 and who holds a valid certificate of practice Section 6 (1) of that Act.

Analysis:

- Now Cost Accountant means Cost Accountant in practice holding valid certificate of practice u/s 6(1) of Cost and Works Accountants Act, 1959 and as defined in section 2 (1)(b) of the Cost and Works Accountants Act, 1959.

Section 2(30) – Debenture (09 Feb 18)

In Definition, Proviso has been inserted-

Provided that---

a) The instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934;
b) Such other instruments as may be prescribed by the CG in consultation with the RBI, issued by a company,

Shall not be treated as debenture

Analysis:

After the amendment, instruments referred to in Chapter III-D of the RBI Act and such other instruments as notified by CG in consultation with the RBI shall be excluded from the definition of Debentures.

Rationale of Section 2(30)

- In CA 2013, the phrase 'Any other instrument of a company evidencing a debt' made it a broad definition to include commercial papers, derivatives, REPO, reverse REPO and other money market instruments which were often used as short term fund raising source by eligible companies were regulated by RBI regulations.

Section 2(41) – Financial Year (09 Feb 18)

The words "or associate company" has been inserted:

Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year:

Analysis:

- Associate company of a company incorporated outside India can also apply to the Tribunal for a different financial year for consolidation of its accounts outside India.

Rationale of Section 2(41)

- A need was felt to include Associate Companies and Joint Ventures in the definition of 'financial year' since the financial statements of the associates and joint venture were also taken into consideration in the preparation of **'consolidated financial statements'**
  Hence Associate and JV companies are now allowed to approach the NCLT for a different financial year.

Section 2(46) – Holding Company (09 Feb 18)

Explanation has been inserted:

Holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies.

Explanation:—For the purposes of this clause, the expression **"company" includes any body corporate.**

Analysis:

- Similar provision was there in the definition of subsidiary company, so as to remove the anomaly, definition of holding company has been amended.

Rationale of Section 2(46)

- The term 'includes a body corporate' was required to be included in Section 2(46) so that a company incorporated outside India could be considered to be the holding company of another company, which would not cause uncertainty in ascertaining the status of a company in case of foreign holding company and also determining the applicability of the Act to such a company.

Section 2(49) – Interested Director- Omitted (09 Feb 18)

Analysis:

- The term Interested Director is not used in other sections of the Companies Act, 2013, the only reference is given in Section 174(3) read with section 184(2).
- In explanation of Section 174(3) it is provided that the term Interested Director means a director within the meaning of section 184(2).
- Section 184(2) provides that if any Director is interested in any contract or arrangement, directly or indirectly
- Considering the redundancy, definition is omitted.

Section 2(51) – Key Managerial Personnel (09 Feb 18)

The following Clause has been inserted:

(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and

(vi) such other officer as may be prescribed

Analysis:

- In the definition of KMP, an officer one level below the Board of Directors, who is whole-time employee of the company, is also included.

Rationale of Section 2(51)

- A Flexibility was required to be given to the companies for designating whole-time officers as KMP of the company since a plain reading of Section 2(51) of CA 2013 suggest that there is a limit on officers who can be designated as KMP and make HOD responsible.

Section 2(57) – Net Worth- Substituted (09 Feb 18)

"Net worth" means the aggregate value of the paid-up share capital and all reserves created out of the profits ,securities premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.

Analysis:

- For Calculation of Net worth debit and credit balance of profit and loss account shall also be included.

Rationale of Section 2(57)

- The Networth of a company reflects its intrinsic value.
- Hence, the phrase debit or credit balance of profit and loss account is added to the definition.

Section 2(71) – Public Company- Substituted (09 Feb 18)

"Public company" means a company which—

(a) is not a private company and;

(b) has a minimum paid-up share capital, as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

Analysis:

- The word 'and' is being inserted to provide more clarity to the definition of public company, now both the conditions should be satisfied to determine Public Company.

Section 2(72) – Public Financial Institution (09 Feb 18)

The following proviso has been substituted:

Provided that no institution shall be so notified unless—

(A) it has been established or constituted by or under any Central or State Act other than this Act or the previous company law.

Analysis:

- It is clarified that a company incorporated under Companies Act, 2013 or previous company law cannot be notified as Public Financial Institution.

Section 2(76) – Related party (09 Feb 18)

The Following sub-clause (viii) has been substituted namely:-

(viii) any body corporate which is—

(A) a holding, subsidiary or an associate company of such company;

(B) a subsidiary of a holding company to which it is also a subsidiary; or

(C) an investing company or the venturer of the company.

Explanation.—For the purpose of this clause, "the investing company or the venturer of a company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

Analysis:

- The substitution of the word 'company' with 'body corporate' would remove any ambiguity or interpretational difficulties that may arise in determining the status of a foreign company as a related party to a Company.
- Also a new sub-clause has been inserted in the definition of related party to include any Body corporate which is an investing company or the venture of the company.

Section 2(85) – Small Company (09 Feb 18)

The Following sub-clause (i) and (ii) has been substituted:-

"Small company" means a company, other than a public company,—

(i) paid-up share capital of which does not exceed Rs. 50 lac or such higher amount as may be prescribed which shall not be more than Rs.10 Crore rupees (earlier 5 Cr.)

(ii) turnover of which as per profit and loss account for the immediately preceding financial year (earlier it was last PL account) does not exceed Rs. 2 crore or such higher amount as may be prescribed which shall not be more than Rs. 100 crore (earlier 20 Cr.)

Section 2(87) – Subsidiary Company (07 May 18)

Sub-clause (ii) of Section 2(87) has been amended,

- Sub-clause (ii) of Section 2(87) for the words "total share capital" the words "total voting power" has been substituted

- Now the sub-clause (ii) shall be read as exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

Analysis:

- The word "total share capital" with the "total voting power" has been substituted which reads now that the subsidiary company in relation to any company means a company in which the holding company exercise more than one-half of the total voting power and not the total share capital.
- This amendment would be in line with the amendment proposed for the definition of "associate company".

Section 2(91) – Turnover- substituted

"Turnover" means the gross amount of revenue recognized (earlier it was aggregate value of the realization of amount made) in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a FY.--- Reason- In line with AS

Section 3A – Members severally liable in certain cases

The Following new section has been inserted:

"3A If at any time the number of members of a company is reduced, in the case of a public company, below 7, in the case of a private company, below 2, and the company carries on business for more than 6 months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor".

Analysis:

- Benefit of the limited liability of members cannot be aviled
- Similar provisions was there in Companies act, 1956 u/s 45, but the Companies Act, 2013only provided for minimum numbers of members so a need arose to introduce members liability in acse number of members fall below minimum number of members required in case of public and private company.

Section 4 – Memorandum

Section 4 (5) (i) has been substituted:

(i)"Upon receipt of an application under sub-section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 20 days from the date of approval or such other period as may be prescribed:

Provided that in case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of 60 days from the date of approval.

Analysis:

- Now, the proposed name will be reserved for a period of only 20 days from the date of approval instead of 60 days from the date of application.
- Also Registrar may reserve the name for a period of 60 days in case of application by an existing company.

Rationale of Section 4(5)

- Since a Centralised processing of name reservation/approval has already been implemented, and that only One resubmission is allowed, period of reservation of name is reduced to 20 days for any person and for 60 days for existing company in order to reduce misuse and inefficiency.

Section 21 - Authentication of Documents, Proceedings and Contracts

Save as otherwise provided in this Act,—

(a) a document or proceeding requiring authentication by a company; or

(b) contracts made by or on behalf of a company,

may be signed by any key managerial personnel or an officer or employee of the company duly authorized by the Board in this behalf.

Analysis:
Now, if authorized by Board any employee of the company can also sign any documents on behalf of the Board or documents requiring authentication.

Rationale of Section 21

- It is practically difficult for top level management to sign all the documents since Section 2 (59) includes top level management persons.
- Hence, authority is given to employees to sign the documents backed by board resolution expecting that the board shall exercise due care while authorizing any such employee.

Section 26- Matters to be Stated in Prospectus (07 May 2018)
Section 26(1) has been amended:
Every prospectus issued by or on behalf of a public company…… after the words "signed and shall", the following shall be inserted, namely:-
" state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government:
Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply."
(ii) Clauses (a), (b) and (d) shall be omitted.
Analysis:

- Every prospectus issued by any public company shall state such information as may be specified by SEBI in consultation with the Central Government.
- Sub clause (a), (b) and (d) are deleted as same are specified under SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2009

Section 35 – Civil Liability for Mis-statements in Prospectus (09 Feb 18)
After clause 2 (b), the following clause shall be inserted, namely:
(c) that, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent required by sub-section (5) of section 26 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder.
Analysis:
Section 35 (2) (C) is inserted to provide that a person will not be liable for mis-statement if he establishes that he had reasonable ground to believe that the person making the statement was competent to make it and that the said person had given the consent before delivery of prospectus.

Rationale of Section 35

- The stakeholders suggested that directors could not rely on statements made by experts in a prospectus as a defence for civil liability, although such a defence was available in CA 1956 under Section 62 (2)(d)(ii)
- Also, United State's Securities Exchange Act named experts (including accountants, engineers & appraisers) who prepare or certify a portion of the prospectus to be held liable for the portion they prepare.
- The English Companies Act 2006 provides that the director is only liable to compensate the company for loss suffered by the company in reimbursing an investor if the director knew, or was reckless in not checking whether the statement was untrue or misleading or knew the omission to be dishonest concealment of a material fact.

- Thus, the CLC felt the need to hold experts liable for the statements prepared by them, as long asthey were identified in the prospectus.

<u>Section 47 – Voting Rights (09 Feb 18)</u>

Section 47 (1) has been substituted:
(1) Subject to the 4[provisions of section 43, sub-section
(2) of section 50 and sub-section (1) of section 188,—
(a) every member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and
(b) his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

Analysis:

As provided in second proviso of Section 188 (1), a member whose is related party cannot vote in the resolution to be passed u/s 188, so it is clarified here also that right of every member holding equity share to vote shall be subject to Section 188(1), it means member cannot vote on resolution to approve any contract or arrangement if he is a related party.
However for the purpose of voting at general meeting if members who are relatives of Promoters/ related party and are 90% or more in numbers, then vote will be counted on resolution to approve such contract/ arrangement.

<u>Section 53 – Prohibition on Issue of Shares at Discount (09 Feb 18)</u>

Section 53(2) has been substituted and (2A) has been inserted:
(2) Any share issued by a company at a discount (earlier discounted price) shall be void.
(2A) Notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

Rationale of Section 53

- It was noted that 'discounted price' could be interpreted to mean a price lower than the market value of the shres, and not lower than its nominal value.
- To remove this ambiguity the word 'discounted' has replaced 'discounted price'
- To enable restructuring of a distressed company, Section 53(2A) was inserted so that the debt of a company can be converted into shares issued at a discount to a creditor with any restructuring guidelines specified by RBI as there was a similar provision in CA 1956 that allowed companies to issue shares at discount with prior approval of CLB.

<u>Section 54 – Issue of Sweat Equity Shares (07 May 18)</u>

In section 54, in sub-section (1), clause (c) has been omitted, read as
(c) not less than one year has, at the date of such issue, elapsed since the date on which the company had commenced

Analysis:

- To widen the scope of sweat equity and ease of doing the business the restriction of minimum 1 year of business commencement by the Company for issue of Sweat Equity.

Section 62 – Further Issue of Share Capital (09 Feb 18)

Section 62 (1)(c) has been substituted:
(c)" to any persons, if it is authorized by a special resolution, whether or not 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 the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed."

Analysis:

- Compliance of Chapter III (Prospectus and Allotment of Securities) is required for issue of shares to any person u/s 62(1)(c).

Earlier the applicability of the same was prescribed by Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014.

<u>Section 62(2) has been substituted:</u>

(2)The notice referred to in sub-clause (i) of clause (a) of sub-section (1) shall be dispatched through registered post or speed post or through electronic mode or courier or any other mode having proof of delivery to all the existing shareholders at least three days before the opening of the issue.

Analysis:

- Now the Notice (LOO) can also be dispatched through courier or any other mode having proof of delivery.

Rationale of Section 62(2)

- Need was felt to include delivery of notice by 'courier or any other mode having proof of delivery' as multiple modes of delivery permitted the company to leverage without undermining the requirement of ensuring delivery.

<u>Section 76A Punishment for contravention of section 73 or section 76 (09 Feb 2018)</u>

In section 76A clause (a) and (b) has been substituted:-

a) the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than Re.1 crore or twice the amount of deposit accepted by the company, whichever is lower but which may extend to 10 crore rupees
b) every officer of the company who is in default shall be punishable with imprisonment which may extend to 7 years and with fine which shall not be less than Rs. 25 lakhs but which may extend to Rs. 2 crore, or with both.

Rationale of Section 76A

The stakeholders suggested that in addition to the repayment of the amount of deposit and interest due, the fine be not less than Rs.1Cr but which could extend to Rs.10 Cr., however, the committee recommended that the minimum fine be modified to Rs.1Cr or twice the deposit accepted, whichever is lower and the maximum amount be as already prescribed, for stringent punishment provisions for defaulting companies.

<u>Section 77 – Duty to Register charges (07 May 18)</u>

In section 77(1) after third proviso following proviso has been inserted –

This section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India.

Analysis:

Certain charge is not required to be created as per section 77 (1) ,if the central government prescribes as such in consultation with the Reserve Bank of India.

<u>Section 78 –Application for registration of charge (07 May 2018)</u>

In section 78 for the words and figures "register the charge within the period specified in section 77" shall be substituted with the words, brackets and figures "register the charge within the period of thirty days referred to is section 77(1).

Analysis:

In case the company fails to register the Charge as required to be done by it as per section 77 (1) in thirty days from the date of its creation, then the person in whose favour the charge is created may apply to the registrar to register the charge even after thirty days. (earlier no timeline was clarified in Section 78)

<u>Section 89(6) & (7) - Declaration in respect of beneficial interest in any share (07 May 2018)</u>

Section 89(6) and 89(7) have been amended to clarify that declaration is required to be filed within 30 days[section 403 time limit omitted]

Analysis:

- The Company is required to file a return in respect of declaration of beneficiary interest with in a period of 30 days with normal fees, otherwise the company will be liable to pay fees as may be prescribed by the central government . Reference to section 403 is deleted.

Sec 89 (10)– not yet notified

Beneficial Interest in share includes,

- directly or indirectly,
- through any contract, arrangement or otherwise,
- the right or entitlement of a person alone or together with any other person to –

(i) exercise or cause to be exercised any or all of rights attached to such shares, or

(ii) Receive or participate in any dividend or other distribution in respect of such share.

- No definition of beneficial interest in a share
- No obligation on a company to collect information on beneficial ownership,
- No enabling provisions to maintain a separate register on beneficial ownership.

Thus the amendment is proposed.

Section 90 – Register of significant beneficial owners in a company (w.e.f 13.06.2018)

Section 90 has been completely redrafted and substituted:

Analysis:

In order to reduce the compliance related burden, reduce litigation matters related with beneficial ownership, the amendment was made in CAA, 17 by inserting Investigation proceedings under this section.

"Significant Beneficial Owner" (SBO) means-

1. Every individual, acting alone or with together, or through one or more persons or trust and persons resident outside India, :
2. holds beneficial interest of not less than 25 % or more or such other % as may be prescribed, ;
3. in shares of the Company or right to exercise or actual exercising of significant influence or control over company as defined in sec 2(27) of the Act.

- Obligation of SBO

  "Significant Beneficial Owner" shall make declaration of beneficial interest in prescribed form.
  - A Company shall maintain a register of interest declared by SBO and changes therein.
  - Such register shall contain name, date of birth, address, detail of ownership, etc which shall be kept open for inspection by members .
  - Company shall file return of Significant Beneficial Owner and any changes therein to ROC.

- Further Obligation of the Company

  A Company to give Notice to any person whom the Company knows or has reasonable cause to believe :
  - That the person is a SBO
  - That the person has knowledge of the identity of SBO or another person likely to have knowledge of SBO or
  - That the person was SBO at any time during the three years immediately preceding the date of notice issued by the Company.

  And who is not registered as SBO
- Such person to provide information within 30 days from the date of Notice

  And
- in case of failure by such person or the information given is not satisfactory , the Company shall apply to NCLT within 15 days from the expiry of period specified in the notice, for an order directing restricting the transfer of shares and suspension rights attached to the shares.
- **If person fails** to provide information than such person shall be liable for penalty, which is minimum Rs. 1 lakh and maximum Rs. 10 lakh.
- **If company fails** to maintain register/ fails or denies to provide inspection of register than penalty, which is minimum Rs 10 lakh and maximum Rs 50 lakh.

  In case offence is continuing in nature than fine of Rs.1, 000/- for every day of default till the default continues.

Section 92 – Annual Return – Not Yet Notified

Section 92 has been amended:

- Previously company was required u/s 92(1)(c) to disclose its Indebtedness in Annual Return which has been omitted.
- u/s 92(1)(j) It is no longer required to provide details regarding shares held by or on behalf of FII like their names, addresses, countries of incorporation, registration and percentage of shareholding which was previously required as it has been omitted.
- 2nd Proviso added after sec 92(1)
- Abridged form of Annual Return may be prescribed by CG for OPC, small company and such other class of Companies as may be prescribed.
- Sec.92(3): Annual Return is required to be placed on website of the company, link to be mentioned in the Board Report so the extract of Annual Return need not be required to form part of Board Report. Difficult now as you may have to give details in advance

Section 92 – Annual Return – (07 May 2018)

Sec 92(4) &(5)

The Company is required to file annual return within a period of 60 days from the date of AGM or last date by when the AGM should have been held with normal fees, or else the company will be liable to pay fees as may be prescribed by the central government. Reference to section 403 is deleted.

* Central Government has prescribed fees of Rs.100/- per day for any delay in filing Annual Return after the time prescribed. The said notification is dated 7th May 2018 and it shall be effective from 1st July 2018.

Section 93- Return to be filed with Registrar in case Promoter's stake changes (13 June 2018)

Section 93 has been omitted:

Analysis:

- To provide ease of business and reduce the burden on companies, requirement of filing return in Form MGT-10 with the ROC in case of a change in the promoter's and top 10 shareholder's stake is omitted.

Section 94- Place of keeping and inspection of registers, returns, etc. (13 June 2018)

In Section 94 1st proviso has been substituted and in 94(3) proviso has been inserted:

The words 'and the Registrar has been given a copy of the proposed Special Resolution in advance' in Section 94(1) has been omitted.

In Section 94(3), following proviso has been added:

Provided that such particulars of the Register or Index or Return as may be prescribed shall not be available for inspection under Sub-Section (2) or for taking extracts or copies under this Sub-Section

Analysis:

- Requirement to give an advance notice of special resolution to ROC, for the change of place of keeping registers and returns , is omitted
- Proviso to section 94(3) has been inserted stating that particulars of prescribed registers, indexes or returns shall not be available for inspection or for taking extracts or copies.

Section 96 - Annual General Meeting (13 June 2018)

In section 96 (2) proviso number one is added and proviso one is now proviso two

That AGM of an unlisted company may be held at any place in India, if the consent is given in writing or by electronic mode by all the members in advance.

Section 100 - Calling of Extraordinary General Meeting (09 Feb 2018)

The following proviso has been inserted:-

Provided that an EGM of the company, other than of the WOS of a company incorporated outside India, shall be held at a place within India.

Analysis:

- Now EGMs of WOS of a company incorporated outside India can be held even outside India. Reason- Ease of Doing Business

Section 101- Notice of meeting (09 Feb 2018)

In section 101(1), the **following proviso has been substituted**:

"Provided that a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

(i) in the case of an AGM by not less than 95% of the members entitled to vote thereat; and

(ii) in the case of any other GM, by members of the company—

(a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than 95% such part of the paid-up share capital of the company as gives a right to vote at the meeting; or

(b) having, if the company has no share capital, not less than 95% total voting power exercisable at that meeting:

Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolution or resolutions and not in respect of the latter.

Rationale of Section 101(1)

- To protect the interest of the minority shareholders, stringent provisions are inserted in Section 101(1).

Section 110 - Postal Ballot (09 Feb 2018)

In sub-section (1), the proviso has been inserted:

Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

Analysis:

- Now if company wants to transact business in GM for clause (a) can be done through providing facility to vote by electronic means. Items to be transacted only by means of Postal Ballot, may be transacted at a General Meeting of the company which are required to provide e-Voting facility to their members under section 108 of Companies Act, 2013.

Rationale of Section 110(1)

- The mandatory requirement of postal ballot was no longer relevant for companies which are required to conduct voting using electronic means, as this mode equally provides that no shareholder is deprived of his right to vote on resolution in case he cannot attend the general meeting. Thus Section 110(1) is amended to provide that if a company is required to provide for electronic voting, then the same items could be covered in its general meeting too.

Section 117- Resolutions and Agreements to be filed (07 May 2018)

Section 117 has been amended

- Resolutions to be filed within 30 days [omitted reference to section 403]
- However liberal provision has been provided by reducing the penalty from Rs. 5 lac to Rs.1 Lac for non-filing of resolutions and agreements.

In order to avoid the repetition of filing Form MGT 14 which is otherwise also required for special resolution, provision of Section 117(3)(e) has been Omitted, which was for filing of special resolution for borrowing in excess of share capital and reserves as per Section 180(1)(c)

Providing such information by banks may violate their confidentiality obligations towards their customers so proposed amendment exempts Banking Company to file with ROC, the Board resolution passed under section 179(3)(f) to grant loans, to provide security or give guarantee in the ordinary course of its business and hence 2nd proviso to section 117(3)(g) is inserted.

Section 121 Report of AGM by listed public company (07 May 2018)

Every Listed Public Company is required to file with the Registrar a copy of the report referred to in sub-section (1) [report on AGM] in MGT 15 within 30 days of the conclusion of the AGM with such fees as may be prescribed, or with such additional fees as may be prescribed within the time as specified, under section 403 Omitted

Analysis:

- Report on AGM is to be filed within 30 days & reference to sec 403 is omitted, making the provision more stringent.

Section 123 - Declaration of Dividend (09 Feb 2018)

Sub-section (1) clause (a) has been substituted with addition of new proviso:-

(1)No dividend shall be declared or paid by a company for any financial year except—

(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both; or out of the money provided by CG or SG

"Provided that in computing profits any amount representing unrealized gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or"

Analysis:

- While computing profits for dividend any amount representing unrealized gains, notional gains or revaluation of asset and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded.

Sub-section (1) 2nd proviso has been amended

Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the free reserves (earlier it was only reserves), such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:

The sub- section (3) has been substituted- ID

(3)The Board of Directors of a company may declare interim dividend (ID) during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting (i) out of the surplus in the profit and loss account or (ii) out of profits of the financial year for which such interim dividend is sought to be declared or (iii) out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:

Analysis:

Companies are now free to declare interim dividend at any time from closure of FY till the date of holding of the AGM.

In that case the Board of Directors can declare Interim Dividend out of:

- surplus in the profit and loss account;
- profits of the financial year for which such interim dividend is sought to be declared; and

profits generated by the Company till the quarter preceding the date of declaration of interim dividend.

Interim Dividend

- Following Proviso is added u/s 123 (3)

Provided that in case the company has incurred loss during the current FY upto the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher that the average dividends declared by the company during immediately preceding 3 FY.

Section 129 – Financial Statement (07 May 2018)

Section 129 (3) has been substituted which shall reads as –

Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2).

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in such form as may be prescribed:

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed.

Analysis:

At every AGM, the Company has to place Financial Statements of itself and also Consolidated Financial Statements of the Company with its one or more subsidiary or associate company , if any [associate company also includes Joint Ventures as per definition of Section 2(6)]in the same form and manner as that of its own and in accordance with applicable accounting standards.

Section 130 - Re-opening of accounts on court's or Tribunal's orders (09 Feb 2018)

In Section 130 (1) the following proviso has been substituted :

Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned or any other person concerned and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned or the other person concerned before passing any order under this section.

Sub section (3) has been inserted :-

(3) No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than eight financial years Immediately preceding the current financial year:

Provided that where a direction has been issued by the Central Government under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period.

Rationale of Section 130 (09 Feb 2018)

- In the interest of the principle of natural justice, other concerned parties like a company or the auditor/Chartered Accountant of the company should also be given an opportunity to present their point of view.

The CLC felt that while court/tribunal always had the inherent power to call/give notice to any concerned party in the process, it was appropriate to have court/tribunal to give notice to any other party/person concerned in addition to those specifically mentioned in the provision.

Section 132 - Constitution of National Financial Reporting Authority- Substituted (09 Feb 2018)

(c) where professional or other misconduct is proved, have the power to make order for—

(A) imposing penalty of—

(I) not less than Rs.1 lakh, but which may extend to 5 times of the fees received, in case of individuals; and

(II) not less than Rs.5 lakh, but which may extend to 10 times of the fees received, in case of firms;

Analysis:

The penalty for firms has been reduced for professional or other misconduct from 10 Lakh to 5 Lakh but which may extend to 10 times of the fees received

Sub-section (5) has been substituted:-

Any person aggrieved by any order of the National Financial Reporting Authority issued under clause (c) of sub-section (4), may prefer an appeal before the Appellate Tribunal in such manner and on payment of such fees as may be prescribed.

Analysis:
Provisions with respect to constitution of National Financial Reporting Authority (NFRA) has been omitted, so now it has been added that appeal against the orders of NFRA shall lie before Appellate Tribunal on payment of such fees as may be prescribed.
Sub-section (6) ,(7) ,(8) and (9) has been Omitted related to establishment of appellate authority for NFRA omitted.

Rationale of Section 132
• A letter was submitted by ICAI dated 18th August 2015 wherein concerns were raised regarding constitution of NFRA.
The CA profession sees constitution of NFRA as an interference in the functioning of the profession & multiple layers of regulation would lead to delay/duplication of work and therefore Section 132 with respect to NFRA is omitted.

Section 136 - Right of member to copies of audited financial statement (09 Feb 2018)
In sub-section (1) proviso has been substituted
(1) Without prejudice to the provisions of section 101, a copy of the financial statements, including consolidated financial statements, if any, auditor‘s report and every other document required by law to be annexed or attached to the financial statements, which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled, not less than twenty-one days before the date of the meeting:
Provided that if the copies of the documents are sent less than 21 days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members—
(a) holding, if the company has a share capital, majority in number entitled to vote and who represent not less than 95% of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or
(b) having, if the company has no share capital, not less than 95% of the total voting power exercisable at the meeting:

Every listed Company having Subsidiary, shall place separate audited accounts on the Website of the Company, if any.

If the foreign subsidiary is statutorily required to prepare consolidated audited financial statements under any law of the country of its incorporation, then the requirement of posting audited financial statements of subsidiary will be met if consolidated financial statements of such foreign subsidiary is placed on website of listed company.

If the foreign subsidiary is statutorily not required to get its financial statements audited under any law of the country of its incorporation and it does not get its financial statements audited then the holding Indian listed company may place such unaudited financial statement on its website and where such financial statement is in a language other than English, a translated copy of the financial statement in English shall also be placed on the website.

In sub-section (2) proviso has been inserted :
A company shall allow every member or trustee of the holder of any debentures issued by the company to inspect the documents stated under sub-section (1) at its registered office during business hours:
Provided that every company having a subsidiary or subsidiaries shall provide a copy of separate audited or unaudited financial statements, as the case may be, as prepared in respect of each of its subsidiary to any member of the company who asks for it.

Analysis:
Every company having subsidiary company shall provide a copy of audited or unaudited financial statements to any member who asks for it.

Rationale of Section 136

• MCA had clarified with circular dated 21st July 2015 that shorter notice period would also apply to the circulation of annual accounts.

The CLC felt that clarity regarding financial statements to be circulated at a shorter notice period in accordance with the provision for shorter notice meeting under Section101 be provided in Section136.

Section 137-Copy of financial statement to be filed with Registrar (07 May 2018)

In section 137(1) –

- The words and figures "within the time specified under section 403" shall be omitted.
- In second proviso, the words and figures "within the time specified under section 403" shall be omitted.
- After the fourth proviso following proviso has been inserted –

Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the Indian Holding Company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English.

Analysis:

• The Company is required to file financial statement with in a period of 30 days from the date of AGM or adjourned AGM , as the case may be with normal fees, or else the company will be liable to pay fees as may be prescribed by the central government . Reference to section 403 is deleted.

* Central Government has prescribed fees of Rs.100/- per day for any delay in filing Financial Statement after the time prescribed. The said notification is dated 7th May 2018 and it shall be effective from 1st July 2018.

• Additional proviso is added after fourth proviso under section 137 (1) of which states that in case of any foreign subsidiary company, which is not required to get its Financial Statements audited (earlier no such exemption was there) under the law of the country in which it is incorporated, then holding Indian company need to file the unaudited financial statement of such foreign subsidiary in English language along with the declaration of not requirement of audited financial statement.

Section 139- Appointment of Auditors (07 May 2018)

In section 139 (1) the proviso states that-

The company shall place the matter relating to such appointment for ratification by members at every AGM which has been omitted.

Analysis:

Now the Company is not required to place the appointment of Auditors for ratification by members at every AGM.

Section 140 - Removal, resignation of auditor and giving of special notice (09 Feb 2018)

Section 140(3) has been substituted :-

If the auditor does not comply with sub-section (2), he or it shall be punishable with fine which shall not be less than Rs.50,000/- or the remuneration of the auditor, whichever is less but which may extend to 5 lakh rupees.

Analysis:

The fine levied has been reduced in case of failure to file resignation (form ADT-3) within 30 days by auditor.

Now it will be Rs.50,000 or the remuneration of the auditor, whichever is less.

Section 141- Eligibility, qualifications and disqualifications of auditors (09 Feb 2018)

In section 141(3), clause (i) has been substituted:-

The following persons shall not be eligible for appointment as an auditor of a company, namely:—

(i) person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company.
Rationale of Section 141

- The language of Section 141(3)(i) was such that a body corporate which was engaged in any of the activities mentioned in Section144 (auditor to not render certain services) anywhere in the world, and was rendering any such service to companies other than the auditee company, could not be appointed as an auditor of a company in India, even if such services were rendered to an entity which was totally unconnected to the auditee company.
- Thus, clarification was required by amending the clause.

<u>Section 143 - Powers and duties of auditors and auditing standards (09 Feb 2018)</u>

In section 143(1), 1st proviso has been substituted:
Provided that the auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries and associate companies in so far as it relates to the consolidation of its financial Statements with that of its subsidiaries and associate companies.

Analysis:

Now auditors have right to access the records of associate companies along with subsidiary company for consolidation of its accounts.

<u>Section 143(3)(i) has been amended</u>

The auditor‘s report shall also state—
(i) whether the company has adequate internal financial controls system in place with reference to financial statements in place and the operating effectiveness of such controls;

Analysis:

Now the Auditors will have to mention in there report about adequate internal financial controls specifically with reference to financial statements.

<u>In section 143 (14) (a) amended :</u>

The provisions of this section shall mutatis mutandis apply to—
(a) the cost accountant in practice conducting cost audit under section 148; or
(b)the company secretary in practice conducting secretarial audit under section 204.

Analysis:

The words “cost accountant” is substituted for “cost accountant in practice”, as in definition it has been defined that cost accountant means Cost Accountant in practice.

Rationale of Section 143

- Section 143(1): Since Associate companies and Joint Ventures are considered for the preparation of consolidated financial statements, the auditor of the holding company has access to financials of Associate & Joint Venture Companies.
- Section 143(3)(i): The requirement to report on internal financial controls is quite exhaustive and application of the same to the consolidated financial statements enlarged the scope of audit of consolidated financial statements.
- Section 143(14): Consistent with the definition of cost-accountant, changes have been made in this section.

<u>Section 147 - Punishment For Contravention (09 Feb 2018)</u>

In section 147(2) has been substituted:
(2) If an auditor of a company contravenes any of the provisions of section 139, 143, 144 or 145, the auditor shall be punishable with fine which shall not be less than Rs.25000/- but which may extend to Rs.5 Lac or four times the remuneration of the auditor, whichever is less`.
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 Rs.50,000/- but which may extend to Rs.25 lac or eight times the remuneration of the auditor, whichever is less.

Analysis:

The penalty has been modified and is now linked to his remuneration of auditors.

Auditor will be punishable with fine:

- not be less than 25,000/- but may extend to 5 lakh; or
- four times the remuneration of the auditor,

whichever is less

Auditor has contravened provisions knowingly then he will be punishable with imprisonment for a term:

- which may extend to one year and with fine not less than 50,000/- but may extend to 25 lakh; or
- 8 times the remuneration of the auditor,

whichever is less.

In section 147(3) has been amended:

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 members or creditors of the company (not to any other person) for loss arising out of incorrect or misleading statements of particulars made in his audit report.

In section 147(5) proviso has been inserted :

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.

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.

Analysis:

- Now in case of Criminal liability of the Audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.

Rationale of Section 147

- Section147(5): Rule 9 of the Companies(Audit & Auditor) Rules, 2014, provides that in case of criminal liability of any audit firm, the liability other than fine shall devolve only on the concerned partners, who acted in a fraudulent manner or abetted or colluded in any fraud.

Section 148 - Central Government to specify audit of items of cost in respect of certain companies (09 Feb 2018)

Section 148(3) has been amended

The audit under sub-section (2) shall be conducted by a Cost Accountant in practice who shall be appointed by the Board on such remuneration as may be determined by the members in such manner as may be prescribed:

Provided that no person appointed under section 139 as an auditor of the company shall be appointed for conducting the audit of cost records:

Provided further that the auditor conducting the cost audit shall comply with the cost auditing standards.

Explanation.—For the purposes of this sub-section, the expression —cost auditing standards mean such standards as are issued by the Institute of Cost and Works Accountants of India, constituted under the Cost and Works Accountants Act, 1959 (23 of 1959), with the approval of the Central Government.

In section 148(5), proviso has been amended

(5)The qualifications, disqualifications, rights, duties and obligations applicable to auditors under this Chapter shall, so far as may be applicable, apply to a cost auditor appointed under this section and it shall be the duty

of the company to give all assistance and facilities to the cost auditor appointed under this section for auditing the cost records of the company:
Provided that the report on the audit of cost records shall be submitted by the cost accountant in practice to the Board of Directors of the company.

Analysis:

- The words "cost accountant" is substituted for "cost accountant in practice", as in definition it has been defined that cost accountant means cost accountant in practice."

Rationale of Section 148

Section148(3) & Section148(5) :

- In order to be consistent with the definition of cost accountant provided in this amendment act, changes have been made.

<u>Section 149 – Company to have Board of Directors (07 May 2018)</u>

In section 149 of principal Act, (i) for sub-section (3), the following sub-section shall be substituted,

- Every company shall have at least one director who stays in India for a total period of not less than 182 days during the financial year.
- Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated''
- In sub-section (6), in clause (c) for the words ''pecuniary relationship'', the words ''pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten percent of his total income or such amount as may be prescribed.'' shall be substituted.
- (b) for clause (d), the following clause shall be substituted,
- none of whose relatives—
- (i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:
- Provided that the relative may hold security or interest in the company of face value not exceeding Rs.50 Lacs or two per cent. of the paid-up capital of the company,its holding, subsidiary or associate company or such higher sum as may be prescribed;
- (ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;
- (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or
- (iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii)

<u>Section 149 – Company to have Board of Directors (07 May 2018)</u>

- In clause (e), in sub-clause (i), the following proviso shall be inserted,

  Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.

Analysis:

- Resident Director: Every company require to have a Resident Director, who stays in India for atleast 182 days in the financial year (instead of calendar year) and in case of newly incorporated company, this requirement of stay in India will apply proportionately at the end of the financial year in which is incorporated.
- Independent Director (ID) : It was observed that even minor pecuniary relationships attracted ineligibility to a person for appointment as an ID. Hence this amendment. Now the Independence of ID won't be impaired with the Company, its holding , subsidiary or associate company or their promoters or directors, if he receives remuneration as a Director or having a

transactions not exceeding 10% of his total income or such a mount as may be prescribed during the two immediately preceding financial year or during the current financial year.

- Relatives of ID : Independence of ID is impaired , unless his relative enters into any kind of following transactions of holding of any security etc. during two immediately preceding financial year or during the current financial year :
- hold any security or interest in the company, its holding, subsidiary or associate company, except holding it for a value of less than Rs.50 Lac or two percent of the paid up capital of the company, its holding, subsidiary or associate company or such higher amount as may be prescribed ;
- Be indebted to the company, its holding, subsidiary or associate company, or their promoters or directors in excess of such amount as may be prescribed
- Has given any guarantee or provided any security in connection with indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters or directors of such holding company , for such amount as may be prescribed ; or
- has any other pecuniary transaction or relationship with the company or its subsidiary or its holding or associate company amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions referred above.
- Proviso has been added in Section 149 (6)(e), that in case if any relative of ID is just an employee and not Key Managerial Personnel (KMP) of the company, its holding, subsidiary or associate company, during the preceding three financial year , it shall not affect the independence of such ID.

<u>Section 152 - Appointment of Directors (DIN) (09 Feb 2018)</u>

Section 152 (3) and (4) has been amended:

(3) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154 or any other number as may be prescribed under section 153.

(4) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number or such other number as may be prescribed under section 153 and a declaration that he is not disqualified to become a director under this Act.

Analysis:

- Central Government may prescribe any Identification Number (like Aadhar/PAN etc) which can be used as DIN, then any individual who holds such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed.

<u>Section 153 Application for allotment of DIN (09 Feb 2018)</u>

In Section 153 proviso has been inserted:

Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed.

Analysis:

- Central Government may prescribe any Identification Number which can be used as DIN, then any individual who holds such identification number, requirement of this section shall not apply or apply in such manner as may be prescribed.

<u>Section 157-Company to inform DIN to Registrar (07 May 2018)</u>

In section 157 (1), the words and figures, “within the time specified under section 403”shall be omitted.

In section 157 (2), the words and figures, “before the expiry of the period specified under section 403 with additional fees “shall be omitted.

Analysis:

- The Company shall within 15 days from receipt of intimation of DIN of its Director, furnish DIN of all directors to ROC with normal filing fees otherwise with such additional fees as may be prescribed by the central government and the reference to section 403 has been omitted.

Section 160 - Right of persons other than retiring directors to stand for directorship (09 Feb 2018)
In section 160(1) proviso has been inserted:
Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the NRC, if any, constituted under subsection (1) of section 178 or a director recommended by the Board of Directors of the Company, in the case of a company not required to constitute NRC.
Analysis:
- Now, the requirement of deposit of Rs. 1 lakh for nomination of directors will not be applicable in case of appointment of an ID or a director recommended by the NRC or by the Board of Directors of the Company, in case of company not required to constitute NRC.

Rationale of Section 160
- The committee found it unreasonable that in such cases an amount of Rupee 1 Lac be deposited since appointments are recommended by the board members.

Section 161 - Appointment of additional director, alternate director and nominee director (09 Feb 2018)
In section 161(2) has been amended: Alternate Director
The Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.
Analysis:
- A person who is already a director of company cannot be appointed as alternate director in the same Company.

(Earlier no specific restriction was provided)

In section 161(4) has been substituted: Casual Vacancy
In the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.
Analysis:
- Earlier applicable to only Public Company, now appointment of director in case of Casual Vacancy shall be applicable to all the companies and such appointment shall be subsequently approved in the immediate next General Meeting.

Rationale of Section 161
- If there is same individual acting as a director and alternate director for some other director of the same company leads to a conflict of interest and also ambiguity in the calculation of the quorum.

Section 164 - Disqualifications for appointment of director (07 May 2018)
In sub-section (2) proviso has been inserted and in (3) proviso is substituted:
Analysis:
- Where a person is appointed as director of company which has defaulted under section 164(2) (a) or (b) than, he shall not incur the disqualification for period of six months from the date of his appointment.
- In section 164(3) Proviso has been substituted providing that
  disqualifications u/s 164(1)(d),(e) and (g) will continue to apply even if appeal has been filed against the order
  (d)- Convicted by the court of offence involving moral turpitude
  (e)- Court or Tribunal has disqualified
  (g)-Convicted of offence of delaing with RPT

<u>Section 165 - Number of directorships (09 Feb 2018)</u>

The explanation II has been inserted in 165(1):

No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than 20 companies at the same time:

Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

Explanation I.— For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

Explanation II.—For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included.

Analysis:

- Directorship in Dormant Company shall be excluded in calculating the limit of directorship in 20 Companies.

Rationale of Section 165

- Dormant companies are inactive and having insignificant transactions and therefore not impacting on the temporal resources of the director and if their directorship in dormant companies is included in calculating the number of directorship in companies, persons would be dis-incentivized from accepting the position of a director in such companies.

<u>Section 167 -Vacation of office of director (07 May 2018)</u>

Section 167 has been amended

- 167 (1) (a) following proviso is added
- In case a director incurs disqualification under section 164(2) than he shall vacate the office of directorship in all other companies expect in the company which is in default.

This provision is amended so that the director can cure the default.

- In case a director is disqualified by an order of a Court or the Tribunal or he is convicted of an offence involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months than his office of director shall not be vacated till (i) for 30 days from the date of conviction or order of disqualification (ii)if appeal or petition is preferred in 30 days then until expiry of 7 days from the date on which such appeal is disposed off or (iii) where further appeal or petition is preferred against order or sentence within 7 days , until such further appeal or petition is disposed of. [Presently, there is no time limit given to continue his office and his office gets vacate immediately.]

Section 168- Resignation of Director (07 May 2018)

In section 168(1), in the proviso for the words “director shall also forward”, the words “director may also forward” shall be substituted. (His resignation to RoC)

Analysis:

- Now Director is not obliged to intimate about his resignation to the Registrar of Companies and it is made optional.
- (Now filing of e-Form DIR - 11 by the director for his resignation is not mandatory)

<u>Section 173- Meetings of Board (07 May 2018)</u>

In this section 173, after the first proviso the following proviso shall be inserted.

Provided further that where there is a quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio video means in such meeting on any matter specified under the first proviso.

Analysis:

- To encourage wider participation in the board meeting, it is provided that where there is quorum in the meeting through physical presence of directors, then any other director may participate through video conferencing or other audio visual means (VC) on certain items of agenda which are otherwise restricted to be participated through VC.

<u>Section 177- Audit Committee (07 May 2018)</u>
In section 177(1) for the words
"every listed company", the words
"every listed public company" shall be substituted.
In section 177(4), in clause (iv), after the proviso, the following proviso shall be inserted-
Provided further that in case of transaction, other than transactions referred to in section 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board.
Provided also that in case any transaction involving any amount not exceeding Rs. 1 Crore is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within 3 months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it.
Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company.
Analysis:

- Section 177 has been amended as follow :
- Section 177 (1) is amended and now it is provided that constitution of audit committee is mandatory only for every listed public company and not for every listed company. This means that if any private listed company whose debt are listed due to which it is considered to be a listed company, there is no need for it to have a mandatory Audit Committee.
- Under Section 177 (4) (iv) after 1st proviso, three more provisos are added.

(I) Now for any transactions other than related party transactions, the Audit Committee, if it does not approve such transaction, shall make its recommendation to the Board.
(II) in case of any transaction not exceeding Rs. 1 crore is entered into by a director or officer of the company without obtaining approval of Audit Committee, and if the same is not ratified by the Audit Committee within three months from the date of transaction, then such transaction shall be voidable at the option of the Audit Committee and if such transaction is with related party to any director or is authorized by any other director, the director concerned shall indemnify the company against any loss incurred by it.
(III) approval of Audit Committee shall not be required in case of any related party transactions, other than those listed under section 188, between a holding company and its and its wholly owned subsidiary.

<u>Section 178- Nomination and Remuneration Committee and Stakeholders Relationship Committee (07 May 2018)</u>

- In section 178(1), for the words
- "every listed company", the words

"every listed public company" shall be substituted.
In section 178(2), for the words "shall carry out evaluation of every Directors performance" the words "shall specify the manner for effective evaluation of performance of board its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance.

- In section 178(4), in clause (c) for the proviso following proviso shall be substituted –

Provided that such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along with the web address of the policy, if any, shall be disclosed in the Board's report.
In section 178(8), in the proviso, for the words "non consideration of any grievance", the words "inability to resolve or consider any grievance" is substituted.
<u>Analysis:</u>

- The provision of section 178(1) shall be applicable to every listed public company instead of every listed company. This means that if any private listed company whose debt are listed due to which it is considered to be a listed company, there is no need for it to have a mandatory Nomination and Remuneration Committee(NRC).

- Under Section 178 (2) words are substituted and now it reads that NRC shall specify the manner for effective evaluation of performance of Board and its committees and individual directors, either by the Board, or by the NRC or by an independent external agency and review its implementation and compliances.
- Under clause (c) of section 178 (4), the proviso is substituted, Now it reads that policy made by NRC shall be placed on the website of the company, if the company has website and in the Board Report disclosure of salient features of the policy and the changes therein with web address be given.

<u>Section 180 - Restrictions on Powers of Board (09 Feb 2018)</u>

Section 180(1) (c) has been amended:

(1)The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:—

(c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.

Analysis:

- Now Securities premium also included in calculation of maximum limit for borrowing.

Rationale of Section 180

- Since share premium is also a part of capital of the company, it is included in calculation of maximum limit of borrowing.

<u>Section 184 - Disclosure of Interest by Director (09 Feb 2018)</u>

Section 184 (4) has been amended:

(4) If a director of the company contravenes the provisions of sub-section (1) or sub-section (2), such director shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than Rs.50,000/- but which may extend to one lakh rupees, or with both.

Analysis:

- The limit for minimum penalty on failure by Directors to disclose interest has been omitted.

<u>Section 184 (5), clause (b) has been substituted:</u>

Nothing in this section 184 shall apply —

(b) to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the directors of the one company or body corporate or two or more of them together holds or hold not more than two per cent. of the paid-up share capital in the other company or the body corporate.

Analysis:

- Nothing in this section 184 will now apply to any contract or arrangement entered into between one or more companies and one or more bodies corporate, where any director himself or with other director holds less than 2% of the paid share capital of company or Body corporate.
- In other words exemption u/s 184 (5) (b) is now also applicable to Body Corporate.

Rationale of Section 184

- Section184 (5) (b): The term 'body corporate' is included to be in consistent with Section184 (2) where the words 'body corporate' have been used to evaluate the interest of director.

<u>Section 185 - Loan to Directors (07 May2018)</u>

Section 185 has been entirely re-drafted:

- By omitting the words 'save as otherwise provided in this Act', the loans can be made only as per provisions of section 185.
- The Section is divided into four part:

Part 1 is completely restricting any kind of advancing of loan or giving of guarantee or providing of securities to (i) any director of the company or any director of the holding company; (ii) any partner or relative of such director; or (iii) any firm in which such director is a partner or his relative is a partner.

- Part 2 is allowing of advancing of loan or giving of guarantee or providing of securities to Person in whom any of the Director of the Company is interested, which means
- any private company of which any such Director is a director or member;
- (ii) any body corporate at a general meeting of which not less than 25% of total voting power may be exercised or controlled by any such director or by two or more such director, together; or

(iii) any body corporate, whose board of directors , managing director or manager is accustomed to act in accordance with directions or instruction of the board or any of the director(s) of the lending company, subject to following conditions:

- Special Resolution is passed by the company in general meeting and the explanatory statement to the notice shall disclose the full particulars and purpose of utilization for such advancing of loan or giving guarantee of providing security and
- The loans are utilized by borrowing company for its principal business activities.
- Part 3 is exempting advancing of loan or giving of guarantee or providing of securities from application of this section 185, which are as follow :
- (1)Advancing of any loan to a MD/WTD as a part of conditions of service extended by the company to all its employees or pursuant to any scheme approved by the members by a special resolution.
- (2) any advancing of loan or giving of guarantee or providing of securities by the company in the ordinary course of its business by charging interest at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan;
- (3) Any loan made by a holding company to its wholly owned subsidiary company (WoS) or any guarantee given or security provided by a holding company in respect of any loan made to its WoS ; or
- (4) Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company
- Provided that the loans made under clause (iii) and (iv) above are utilized by the subsidiary company for its principal business activities.
- Part 4 is providing of punishment &fines for non-compliances:
- To the company-Rs. 5 to 25 Lacs
- To every officer of the company –Imprisonment for a term of maximum 6 months or fine of Rs.5 to 25 Lac
- To the director or any person to whom the loan is advanced or guarantee is given or security is provided- –Imprisonment for a term of maximum 6 months or fines of Rs.5 to 25 Lac or with both.

Section 186 – Loans and investment by company (07 May 2018)

- In section 186(2) following Explanation shall be inserted -
- For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company.
- Sub-section 3 of section 186 shall be substituted

Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply.
Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4).

Sub-section (11) has been substituted –
Nothing contained in this section, except sub-section (1), shall apply—

(a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;
(b) to any investment—
(i) made by an investment company;
(ii) made in shares allotted in pursuance of clause (a) of sub-section (1) of section 62 or in shares allotted in pursuance of rights issues made by a body corporate;
(iii) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities.

- After Section 186 (13) In the Explanation, in clause (a), explaining “Investment Company” after the words “other securities” the following shall be inserted –
- “and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or if its income derived from investment business constitutes not less than 50% as a proportion of its gross income.”

Analysis:

- The Company can give loan to its employees in excess of specified limit (limit as per section 186) without passing a special resolution.
- Also there has been a modification in the definition of investment company which states that company whose principle business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or if its income derived from investment business constitutes not less than 50% as a proportion of its gross income
- This has changed the criteria of treating a company for this section as NBFC if either of the criteria of 50% of assets or income is satisfied.

<u>Section 188 - Related Party Transactions (09 Feb 2018)</u>

In sub-section (1), after 2nd proviso the following proviso has been added:
Provided also that nothing contained in the second proviso shall apply to a company in which 90% or more members, in number, are relatives of promoters or are related parties:

Analysis:

- For the purpose of voting at general meeting if members who are relatives to Promoter/ related party and are 90% or more in numbers, then vote will be counted on resolution to approve such Contract / arrangement.

<u>In section 188(3) has be amended:</u>

Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting under sub-section (1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board or, as the case may be, of the shareholders and if the contract or arrangement is with a related party to any director, or is authorized by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

Analysis:

- If transaction with any related party is entered into by a Director or any employee without the approval of the Board or Shareholder or not ratified by the Board or Shareholders in 3 months, then the contract shall be voidable at the option of board now even shareholders.

<u>Section 194- Prohibition on Forward dealings in securities of company by director or Key Managerial Personnel- Omitted</u>

<u>Rationale (09 Feb 2018)</u>

- Insider trading prohibitions can be problematic in the context of the rights of first refusal that are frequently contained in the shareholders agreements of private companies.
- SEBI regulations are comprehensive in the matter (and also apply to companies intending to get listed) and in view of the practical difficulties expressed, by stakeholders, this section is omitted.

<u>Section 195 - Prohibition on Insider Trading of Securities- Omitted Rationale (09 Feb 2018)</u>

- Insider trading prohibitions can be problematic in the context of the rights of first refusal that are frequently contained in the shareholders agreements of private companies.
- SEBI regulations are comprehensive in the matter (and also apply to companies intending to get listed) and in view of the practical difficulties expressed by stakeholders, this section is omitted.

<u>Section 216 Investigation of Ownership of Company (13 June 2018)</u>

Section 216 has been substituted:

In Section 216(1)(b) for the word "Company" the words "Company; or" shall be substituted

In Section 216(1), after clause (b), clause (c) has been inserted namely :-

Who have or had Beneficial Interest in the Shares of a Company or who are or have been Beneficial Owners or significant Beneficial Owners of a Company.

Analysis:

- In order to be consistent with Section 90 of CA 2013 (beneficial interest), this amendment being made, which provides for investigation into beneficial ownership in line with substitution u/s 90 which provides for declaration to be made and register of beneficial interest .
  Central Government may appoint inspectors to investigate and report the matters.

<u>Section 223 - Inspector's Report (09 Feb 2018)</u>

Sub-section (3) has been substituted:

A copy of the report made under sub-section (1) may be obtained by members, creditors or any other person whose interest is likely to be affected by making an application in this regard to the Central Government.

Analysis:

- Now, only members, creditors or any other person whose interest is likely to be affected can request for copy of inspector report by making an application.

Rationale of Section 223

- Interim Reports also contain conclusive findings.
- In order to protect the confidential information of the company, only members, creditors or any other person whose interest is likely to be affected can request for copy of inspector report by making an application.

<u>Section 236 - Purchase of Minority Shareholding (09 Feb 2018)</u>

Section 236(4), (5) and (6) has been substituted:

(4) The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by the transferor company company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:

(5) In the event of a purchase under this section, the transferor company company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.

(6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and the transferor company company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by dispatch of such payment.

Analysis:

- The words “company whose shares are being transferred” is substituted for “Transferor Company”.

Rationale of Section 236

- The CLC felt that the use of the term ‘transferor company’ in the Section 236 without providing for a context may ostensibly include even transfer of assets by a company, thereby including amalgamations and mergers within the ambit of this provision, which did not appear to be the intention.

Section 247 - Valuation by Registered Valuers (09 Feb 2018)

In Section 247 (2), clause (d) has been amended:

(d) not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him.

Analysis:

- It is unfair to presume that the valuer would be interested in the asset for an indefinite period after the completion of the valuation of asset. Hence the limit of 3 years prior or after his appointment to be considered

Section 379 - Application of act to foreign companies Chapter 22 (09 Feb 2018)

New sub-section has been inserted as (1):

(1) Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies:

Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of sections 380 to 386 and sections 392 and 393 and a copy of every such Order shall, as soon as may be after it is made, be laid before both Houses of Parliament.

Analysis:

Provisions of Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies.

However, Central Government can grant exemption to any class of foreign companies, by issuing notification.

Rationale of Section 379

- Section 379 (1) is added to cover all such Foreign Companies to comply with Chapter 22 of CA 2013, where 50% of its paid up capital is not held by citizen or companies or body corporate incorporated in India, however these companies have place of business in India directly or through agent, physically or electronically.

Section 384 - Debentures, Annual Return, Registration of Charges, Books of Account and Their Inspection (09 Feb 2018)

Section 384(2) has been amended:

(2) The provisions of section 92 and section 135 shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.

Analysis:

- Provisions of Section 135 (CSR) will now also be applicable to foreign company.

Rationale of Section 384

- Section 92 (Annual Return) of CA 2013 is applicable to a foreign company operating as a branch of foreign company.

For instance, a foreign bank, all the details of annual return may not be available with it. Therefore, the CLC felt that disclosures required under Form FC-4 be amended.

<u>Section 391 - Application of sections 34 to 36 and chapter XX (09 Feb 2018)</u>

Section 391(2) has been substituted:

Subject to the provisions of section 376, the provisions of Chapter XX (winding up) shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed.

Analysis:

- The provisions relating to winding up will apply to a foreign company for closure of place of business in India if such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed.

<u>Section 403 – Fee of filling, etc. (07 May 2018)</u>

- In section 403, of principal Act, (i) in sub-section (1), for the first and second provisos shall ne substituted,
- Provided that where any document, fact or information required to be submitted, filed, registered or recorded, as the case may be, under section 92 or 137 is not submitted, filed, registered or recorded, as the case may be, within the period provided in those sections, without prejudice to any other legal action or liability under this Act, it may be submitted, filed, registered or recorded, as the case may be, after expiry of the period so provided in those sections, on payment of such additional fee as may be prescribed, which shall not be less than one hundred rupees per day and different amounts may be prescribed for different classes of companies.
- Provided further that where the document, fact or information, as the case may be, in cases other than referred to in the first proviso, is not submitted, filed, registered or recorded, as the case may be, within the period provided in the relevant section, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded as the case may be, on payment of such additional fee as may be prescribed and different fees may be prescribed for different classes of companies.
- Provided also that where there is default on two or more occasions in submitting, filing, registering or recording of the document, fact or information, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded, as the case may be, on payment of a higher additional fee, as may be prescribed and which shall not be lesser than twice the additional fee provided under the first or the second proviso as applicable.
- (ii) for sub-section (2), the following sub-section shall be substituted-

  Where a company fails or commits any default to submit, file, register or record any document, fact or information under sub-section (1) before the expiry of the period specified in the relevant section, the company and the officers of the company who are in default, shall, without prejudice to the liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default''.

Analysis:

- First proviso is substituted under section 403 (1), which provides that, where any document, fact or information required to be submitted or recorded , as the case may be, under section 92 (Annual Return) or section 137 (financial statement), is not submitted, filed or registered or recorded as the case may be, within the period provided in those sections, then it may be submitted, filed or registered or recorded after expiry of the period so provided in those sections, without prejudice to any other legal action or liability under the act, on payment of such additional fee as may be prescribed which shall not be less than Rs. 100 per day and different amounts may be prescribed for different classes of companies.
- That is filing of e Form MGT-7 within the period of 60 days from the date of AGM and Filing of e-Form AOC-4 within the period of 30 days of date of AGM, can be filed after the prescribed time with additional fees of Rs.100/- per day.
- Section 403(2) is substituted, which is to align to proviso added as mentioned above.

<u>Section 409 - Qualifications of President and Members of Tribunal (09 Feb 2018)</u>

Section 409(3)(a) has been amended :

(3) A person shall not be qualified for appointment as a Technical Member unless he—

(a) has, for at least 15 years been a member of the Indian Corporate Law Service or Indian Legal Service out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service and has been holding the rank of Secretary or Additional Secretary to the Government of India;

Analysis:

- Qualification for appointment as a technical member has been modified, now technical Member can be appointed if he has been holding the post of Secretary or Additional Secretary to the Government of India.

<u>Section 409(3)(e) has been substituted</u>

(3) A person shall not be qualified for appointment as a Technical Member unless he-

(e) is a person of proven ability, integrity and standing having special knowledge and professional experience of not less than 15 years in industrial finance, industrial management, industrial reconstruction, investment and accountancy; or

Analysis:

- Qualification for appointment as a technical member has been modified, Professional experience has been added and experience in law, labour matters or such other discipline related to management, conduct of affairs, revival, rehabilitation and winding up of companies has been removed.

Rationale of Section 409

- The CLC noted that after the Hon'ble Supreme Court's Order of May, 2015, the Government had initiated the process of constituting NCLT and NCLAT.
- CLC felt that changes in the Companies Act, 2013, in Sections 409(3)(a) & (e), 411(3) and 412(2), as directed by the Hon'ble Supreme Court, be included in the Act.

<u>Section 410 – Constitution of Appellate Tribunal (07 May 2018)</u>

- In section 410 of the principal Act, for the words "orders of the Tribunal" the words "orders or of the National Financial Reporting Authority" has been substituted.

Analysis:

- Powers are given to the Appellate Tribunal (NCLAT) to hear appeals against the Order of NCLT and also against the Order of the National Financial Reporting Authority (NFRA).

<u>Section 411 - Qualifications of Chairperson and Members of Appellate Tribunal (09 Feb 2018)</u>

Section 411(3) has been substituted:

A technical member shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than 25 years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.

Analysis:

- Qualification for chairperson and members of appellate tribunal has been modified, Professional experience has been added and experience in law, labour matters or such other discipline related to management, conduct of affairs, revival, rehabilitation and winding up of companies has been removed.

Rationale of Section 411

- The CLC felt that changes in the Companies Act, 2013, in Sections 409(3)(a) & (e), 411(3) and 412(2), as directed by the Hon'ble Supreme Court, be included in the Act.

<u>Section 412 - Selection of Members of Tribunal and Appellate Tribunal (09 Feb 2018)</u>

Section 412(2) has been substituted and (2A) has been inserted :

(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of—
(a) Chief Justice of India or his nominee—Chairperson;
(b) a senior Judge of the Supreme Court or Chief Justice of High Court—Member;
(c) Secretary in the Ministry of Corporate Affairs—Member; and
(d) Secretary in the Ministry of Law and Justice—Member.
(2A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote. votes on any matter, the Chairperson shall have a casting vote.
Analysis:

- In selection committee, Secretary in the Department of Financial Services in the Ministry of Finance– Member is deleted so now instead of 5 members there are 4 members and hence, in case of equality of votes on any matter, the Chairperson shall have a casting vote.

Section 435 – Establishment of Special Courts (07 May 2018)

For section 435 of the principal Act, the following shall be substituted.
The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

- A Special Court shall consist of—

(a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and
(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences,
who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.
Analysis:

- Earlier, it was provided that the Central Government by notification establish Special Court for speedy trial of offences punishable under the Companies Act, 2013 for 2 years or more, which is now amended that the Central Government by notification establish or designate as many Special Court as may be necessary for speedy trial of offences .
- Amendment is also made for the appointment of Judges in Special Court by the Central Government.

Section 438- Application of Code to proceedings before Special Court (07 May 2018)

In section 438 of the principal Act, for the words “deemed to be a Court of Session” the words “deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the first class as the case may be ” has been substituted.
Analysis:

- It reads that the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purpose of said provisions, the Special Court shall be deemed to be a Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be.

Section 439- Offences to be non-cognizable (07 May 2018)

- In section 438 sub-section (2) of the principal Act, after the words “ a shareholder deemed to be a Court of Session” the words “or a member” shall be inserted.

Analysis:

- The amendment provides for the complaints can also be filed by a person who is a member of a company, which has no share capital.

Section 440- Offences to be non-cognizable (07 May 2018)

- In section 440 of the principal Act, after the words “ Court of Session’’ at both the places, the words “ Court of Session or the Court of Metropolitan Megistrate or a Judicial Megistrate of the First Class, as the case may be” shall be subsituted.

Analysis:

- It provides that until a Special Court is established, the offence committed under this Act, be tried by a Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class.

Section 441- Compounding of certain offences (09 Feb 2018)

Section 441(1) has been amended:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by—

(a) the Tribunal; or

(b)where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the Regional Director or any officer authorised by the Central Government, on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorized by the Central Government, as the case may be, may specify:

Analysis:

Now offences punishable with

- imprisonment only or
- imprisonment and with fine are not compoundable.

It means offences punishable with

- Fine only and
- Fine or imprisonment are compoundable.

Rationale of Section 441

- Leniency is required in the administration because a large number of defaults are of technical nature and arise out of ignorance on account of bewildering complexity of the provisions.
- Hence penalties of FINE only and FINE OR Imprisonment is compoundable by RD or NCLT

Section 446A - Factors for determining level of punishment (09 Feb 2018)

New Section 446A has been inserted:

The court or special court, while deciding the amount of fine or imprisonment under this Act shall have due regard to following factors, namely:

(a) size of the company;

(b) Nature of business carried on by the company;

(c) Injury to public interest;

(d) Nature of the default; and

(e) Repetition of the default.

Section 446B - Lesser penalties for One Person Companies or small companies (09 Feb 2018)

New Section 446B has been inserted:

Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of section 92(5), section 117(2) or section 137(3), such company and officer in default of such company shall be punishable with fine or imprisonment or fine and imprisonment, as the case may be, which shall not be more than one-half of the fine or imprisonment or fine and imprisonment, as the case may be, of the minimum or maximum fine or imprisonment or fine and imprisonment, as the case may be, specified in such sections.

Section 447- Punishment for Fraud – Quantified

Section 447 has been substituted and proviso has been inserted:

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 involving an amount of at least Rs.10 Lac or 1% of the turnover of the company, whichever is lower, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 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:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Provided further that where the fraud involves an amount less than Rs.10 Lac or 1% of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to 5 years or with fine which may extend to Rs.25 Lac or both.

Analysis:

The punishment for any fraud is quantified –

- If amount involved in fraud is at least Rs. 10 lakh or 1% of the turnover of the company, whichever is lower, the punishment will be as provided earlier.
- But where amount involved in fraud is less than Rs. 10 lakh or 1% of the turnover of the company, whichever is lower and does not involve public interest then the person shall be punishable with imprisonment for a term which may extend to 5 years or with fine which may extend to Rs.25 lakh or with both.

Rationale of Section 447

Under CA 2013 the materiality of fraud was not mentioned and hence it was observed that the provision has a potential of being misused and may also have a negative impact on attracting professionals in the post of directors, therefore, under CAA 2017 the materiality issue is being addressed.

- Frauds of any amount of at least Rs.10 Lac or 1% of the turnover of the company, whichever is lower, may be punishable under Section 447 – 6 months to 10 year and 1 to 3 times of fraud amount and
- Fraud of any amount less than Rs. 10 Lac or 1% of the turnover of the company, whichever is lower and does not involve public interest , shall be punishable under section 447- 5 years or 25 Lac or both.

Section 458(1) Delegation by Central Government of its powers and functions- Omitted Rationale (09 Feb 2018)

- Since Section 194 (Forward dealings) and section 195 (Insider trading) have been omitted, consequently the proviso under sub-section (1) of section 458 is also omitted.

CERTAIN AMENDMENT FOR EASE OF DOING BUSINESS

- Section 7- Self Declaration instead of an Affidavit for Incorporation of the Company.
- Section 12- Timeline to have a Registered Office for a newly incorporated company is increased from 15 days to 30 days
- Section 42- Ease in raising fund once Identified Person by the Board / Shareholders
- Section 96- AGM may be held anywhere in India by unlisted company with shorter notice with consent in writing by all members.
- Section134- Board Report – Salient points of various Policies and Annual Return – Link of website can be given
- Section 160- Deposit of Rs.1 Lac in case of appointment of any Director.
- Section 173- Participation by any Board member thru VC facility for any restricted item of agenda for VC, if quorum is present physically at the place of the meeting .
- Section 188-Voting by related party allowed if more than 90% members in number are related.

CONCLUSION = A WELCOME MOVE

- CAA 2017 has addressed matters related to Private Placement, Deposits, Debentures, loan and investments by the companies, Beneficial Declaration , MD Remuneration which are in alignment with international practice.
- This will reduce the cost of compliances without affecting the rights of any stakeholders.