



# COMPANIES BILL 2008

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# DEFINITIONS

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- Certain new concepts introduced by the Bill
  - Accounting Standards: not the AS of ICAI
  - Associate Company: Significant influence by a company in another company
  - One Person Company
  - Establishment of Special Courts
  - Re- registration of Companies already registered (clause 17)
  - Registered Valuers
  - Auditing standards
  - Company Liquidator: Appointed by the Tribunal, company or creditors from a panel of professionals maintained by the CG
  - Controlling interest: Largest voting power a member can exercise in a general meeting
  - Deemed Director
  - Financial Statement



# Classes of companies

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- From viewpoint of constitution
  - Public company
  - Private company
- Viewpoint of size
  - Small company
  - Other company
- Viewpoint of number of members
  - One person company
  - Multi-persons company
- Nature of liability
  - Limited company/ Limited by shares
  - Unlimited company
  - Limited by Guarantee



# ONE PERSON COMPANY (OPC)

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- One member may form the company
  - The member may be an individual or a body corporate
- Process for conversion of a company into an OPC
  - Alternation of AoA to change a company into OPC – proviso to clause 13 (1)
- An OPC shall end its name with the words “OPC Limited”
- MOA to indicate the name of the person who shall, in the event of the subscriber’s death, disability or otherwise, become the member of the company.
- Need not hold an AGM.
- Annual Return to be signed by the CS or if there is no CS by one director.



## Small companies

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- Separate class of companies
- Based on assets or turnover to be notified
- To-be-specified provisions of the Act will not be applicable to small companies



# Key managerial personnel

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- MD, CEO or Manager, and where there is no MD or Manager, WTD or directors shall be the KMP
- CFO
- Company Secretary also included
- Every KMP to be appointed by a resolution of the Board which shall contain the terms and conditions of appointment including the remuneration.
- Any vacancy in the office of KMP be filled up by the Board at a meeting of the Board within a period of six months from the date of such vacancy



# Provisions for entrenchment

## - clause 6 (3)

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- If the members desire certain provisions to “entrenched”, they may lay down a process, more stringent than special resolution, for amendment of such provisions.
  - Stringent process to apply for entrenched provisions
  - Special resolution for other provisions
- For example, articles may require 100% consent.
- Entrenched provisions may be
  - On formation
  - Added subsequently
- Under present law also, nothing stops a company from having such entrenched provisions or special procedures for alteration
- Notice to be given to Registrar of such provisions



## Procedural formalities made more strict

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- Notice of situation of Regd office or any change thereof to be notified to ROC within 15 days;
- Alteration in any clause of MOA to require special resolution;
- Alteration in Articles to be notified to ROC within 15 days;
- Notice of refusal to register transfer to be given within one month;



## Strict penalties in certain cases

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- Issue of duplicate share certificates with intent to defraud: maximum fine for companies may extend to 10 times the face value of shares. For officers in default imprisonment for 3 years & max Rs.25 lakh
- Same penalty for depositories also
- Where deposits accepted with intent to defraud the depositors, responsible officer of the Company to be personally liable without any limitation.



## Other new requirements

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- Penalty for Company secretary in whole time practice for signing Annual Return otherwise than in conformity with the requirements may extend to Rs. 5 Lakh.
- Requirement to file consent to act as director now applicable to both pvt and pub company



## Other new requirements

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- Seven days' notice required to call Board Meeting;
- Presence of at least one independent director required if meeting called by shorter notice for transacting urgent business.
- Passing of resolution by Postal ballot to apply to every company
- In case of Pub co. Contract of service with MD or WTD to be kept at regd office and shall be open to inspection by any member (clause 168);



## **Stakeholders Relationship Committee – (Clause 159)**

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- New avatar for shareholders' grievance committee:
  - Not grievance alone; "relationship"
- Applicable for companies having combined membership of the shareholders, debenture holders and other security holders being more than one thousand at any time during the financial year
- Purpose to consider and resolve the grievances of shareholders
- Chairman of the committee to attend GM



# Special Courts- (clause 396)

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- Parallel judicial machinery
- New machinery for redressal:
  - NCLT for most matters except prosecution
  - Special courts for trial of offences
    - Jurisdiction of Civil courts ousted and conferred on special courts
- For the speedy trial of offences, the Central Government to establish special courts
- Consist of single judge to be appointed in consultation with the Chief Justice of the High Court within whose jurisdiction the judge is to be appointed.
- Offences under this Act to be triable only by such Special Court.



# Alteration of memorandum

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- Objects clause still remains
  - Hence, ultra vires rule holds
- Special resolution required for any alteration of memorandum
  - This would mean alteration of the capital clause also needs special resolution
- Shifting of registered office:
  - Central Govt sanction
- Alteration of a company into OPC will require affirmation by NCLT



## Issue of further capital – sec 56

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- Corresponding to sec 81
- Made applicable to a private company also
  - May be excluded by general section on exemptions
- The beginning window where companies have to allot shares and increase capital removed
  - This is obviously a mistake



## Issue of debentures – sec 64

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- Secured debentures may be issued only by specified companies, and subject to rules
  - Strange exceptional provision for secured debentures
- DRR requirement once again found in the Act
- Debenture trustees required only for public offers
  - Once again, a confused requirement: trustees are needed for holding security interest



# Public deposits – sec 66

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- Banking companies, NBFCs may accept deposits from public
- Other companies may accept deposits from members only
  - Passing of a special resolution
  - Other compliance with the rules
- Blanket ban on deposits from the public in case of non-financial companies
- All deposits accepted to be paid within 1 year of enactment of the new law – sec 67
- Sec 68: persons responsible for accepting deposits shall be personally liable for all the damage incurred by the depositors
  - No concept of limited liability
  - Throws vicarious liability for commercial failure
  - On the face of it, applicable to NBFCs and banking companies as well



## Registration of charges - 69

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- Registration is essentially a public notification process for perfection of security interest
- The requirement made sweeping and made applicable to every charge
- Pledges were excluded by the existing law
  - Pledge is dealt with by contract law and comes into existence by physical possession: registration is not important
- Time to register charges enlarged . Duty to register charges enshrined on the Company



# Informational requirements

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- Contents of annual return [sec 82] considerably widened
  - Certification of annual return requirements tightened
    - All listed companies and companies with minimum capital
  - Contents of Report by the Board of Directors widened (clause 120).



## Company meetings – enter technology

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- Notice of GM may be given through the electronic mode
- Members may vote in general meetings electronically
- Board meetings may be held by video conferencing – 154 (2)
- Every company to observe secretarial standards with respect to GM and BM.
- Every listed public company shall file a report on AGM to the ROC within 30 days of conclusion of such AGM.



# SHARES

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- A company shall not issue any shares on discount (Sec 47).
- May issue sweat equity shares (shares issued to directors or employees at a discount or for consideration other than cash) of a class already issued (Sec 48).



## Auditing standards – sec 126

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- CG to constitute NACAAS.
- Auditing standards to be notified based on its recommendations
- Auditors to abide by auditing standards
- Until such audit standards are finalised, those of the ICAI shall be applicable



# FINANCIAL STATEMENT

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The Board's Report to be annexed to every financial statement laid before the company in general meeting. Following to be a part of the Board's Report:

- extract of annual return
- no. of BM
- Directors' Responsibility Statement
- declaration by independent directors
- report of remuneration committee
- explanations or comments by the Board on every qualification, reservation or adverse remark made by the auditor
- particulars of inter corporate loans, guarantees or investments
- particulars of related party transactions
- Composition of Audit Committee
- Where Board has not accepted any recommendation of Audit Committee, the same shall be disclosed along with reasons



# AUDIT & AUDITORS

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An auditor shall not render the following services:

- accounting and book keeping services
- internal audit
- design and implementation of any financial information system
- actuarial services
- investment advisory services
- investment banking services
- rendering of outsourced financial services, and
- management services



# Independent directors - 132

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- Definition of independent director brought in law
- “material pecuniary interest” given a legislative meaning
- 10% of the gross turnover or total income of the company (recommendations of JJ Irani Committee taken on board)
- CG to notify minimum no. of independent directors in case of companies other than listed company
- In case of appointment of independent director, Board to give a report in GM that in its opinion he fulfils the conditions specified for such appointment.
- Alternate Director for an independent director also required to qualify as independent director.



## Duties of directors - 147

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- Lays down 6 duties – most sacred principles and nothing concrete at all
  - To act under the articles
  - To act in good faith to promote interest of members as a whole
  - Reasonable care
  - No undue gain for himself or his relatives partners or associates
  - Not to put himself in a conflict of interest
  - Not to assign his office



# More restrictions

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- Restrictions on powers of the board
  - 160 (1), corresponding to 293 (1)
    - Now says, sale, etc of 20% or more of the assets of an undertaking shall be “substantially the whole”
  - In addition, existing provision was an ordinary resolution; now it is special
  - Certain other matters included in clause 159(3) corresponding section 292- power to be exercised only by means of resolution passed at a meeting of Board, viz.,
    - approval of financial statement, Director’s Report,
    - approve amalgamation or reconstruction
    - Take over of a company



# Remuneration of Directors

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- No limits specified for payment of remuneration to managerial personnel (Clause 175).
- No limits specified for payment of sitting fees.



# Related party transactions - 166

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- Almost a replica of sec 297; merges sec 314 as well
  - Except that “related party” has a new definition
- Coverage is wider; also includes
  - Immovable property
  - Agency
  - Appointment to office or place of profit
- Existing section calls for Central govt sanction where capital exceeds Rs 1 crore; new law requires special resolution where capital exceeds specified amount



# Insider trading restrictions

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- 172- Right of directors and KMPs to buy
  - Call option
  - Put option
- 173 – restriction on dealing in securities, counselling about securities or procuring or communicating any price sensitive information
  - Sweeping restriction on “dealing” in securities
  - Restriction applicable to directors also
  - Obviously, this is unintended
- Difficult to understand the purport of the section



## Registered valuers

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- A whole new chapter on valuers has been added
- Chartered accountants, company secretaries, cost accountants, persons possessing prescribed qualifications entitled to register
- Rate of charges of valuers to be notified



# Dormant companies

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- A completely new scheme
- A company which has:
  - Not carried any business
  - Nor carried any significant accounting transaction
  - Or not filed balance sheet and annual return
- For 2 years
- May make an application to be given the status of a dormant company
- RoC may suo motu give a notice to companies that fail to file financial statements/ annual return for 2 years to give it dormant status
- Dormant companies need to maintain directors and pay such annual fees as to be laid down
- Dormant companies may be converted into active companies again on application



# Mergers- significant changes

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- Clause 204 provides for merger of a foreign company with an Indian company
- A very significant change is mergers without court approval
  - Mergers between two small companies
  - Merger of a holding company with subsidiary company
  - May be done without going to any judicial authority
- Compromise or arrangement in unlisted company may include takeover offer.
- Provision included with respect to set-off of fees payable on authorized capital – ambiguity in language;



## More powers to NCLT

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- Clause 191 – new power to pass orders against transfer of funds, disposal of funds, properties or assets – likely to take place
- Power of the NCLT to impose a freeze
- Will give rise to a flood of anticipatory freezes



## Class suits

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- Much hype was made about this provision
- However, the only place where we find this is sec 32
  - This is only in respect of misstatements in the prospectus



# In the name of Class action – clash action at the NCLT- clause 216

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- **Main highlight: Even a single shareholder can move the Tribunal for obtaining relief against the Company**
  - To restrain the company from committing an *ultra vires* act
  - To restrain the company from committing breach of provisions of memorandum or articles
  - To declare a resolution altering memorandum or articles of the company as void if resolution was passed by suppression of material facts
  - To restrain the company from doing an act which is contrary to the provisions of Act or any other law
  - To restrain the company from taking action contrary to any resolution passed by the members
- **Obvious outcome: illegal acts are anyway oppressive;**
- **however, no need to go for the oppression process.**
- **Very wide ranging and almost open-ended right to arm-twist companies.**
- **Capable of wide misuse**