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and understanding



WHITE PAPER - EXEMPTION TO PRIVATE COMPANIES UNDER COMPANIES ACT, 2013

THE POWER OF BEING UNDERSTOOD



1.0 Background

The Companies Act, 2013, which was introduced in a phased manner, with effect from 12 September 2013, resulted in severe hardships to private limited companies. There were various provisions which were made applicable to such private companies just like listed public companies. The representations of such stakeholders did not go unnoticed and the MCA gave numerous exemptions to private limited companies by way of Companies (Amendment) Act, 2015 and also vide its notification dated 5 June, 2015. This being done, there are still areas where it is felt that private companies deserve certain further exemptions. In this white paper, we have tried to cover all major exemptions that are available to private limited companies, as issued by the MCA from time to time.

2.0 Exemptions to private limited companies under the Companies Act, 2013

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
1.	2(40)	Financial Statement	Apart from One Person Companies (OPCs), Small Companies, Dormant Companies and Private companies (if such private company is startup) are also exempted from mandatory requirement of preparation of cash flow statement.
2.	2(68)	Definition of Private companies	There is no requirement of minimum paid up share capital even for a private limited company.
3.	2(76)(viii)	Definition of Related Party	As per section 2(76) (viii) "Related party" includes Any company which is <ul style="list-style-type: none">• a holding, subsidiary or an associate company of such company; or• a subsidiary of a holding company to which it is also a subsidiary; Now a holding company or a subsidiary company or an associate company or another subsidiary of its own holding shall not be considered as a related party in respect of Section 188 of the Companies Act, 2013 for a private company.
4.	2(85)	Definition of Small Company	Small company means, a company other than a public company whose <ul style="list-style-type: none">• paid-up share capital does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; and• turnover as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees: Thus private limited companies can classify themselves as Small Companies if they meet the above criteria.
5.	11	Commencement of Business	Section 11 has been omitted. Now any company (including private company) can commence business immediately on incorporation without obtaining certificate of commencement of business.

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
6.	43	Kinds of Share Capital	<p>Section 43 which gives the power to classify the share capital in equity with voting rights or equity with differential rights and preference share capital, shall not apply to a private company if the Memorandum of Association (MOA) and Articles of Association (AOA) specifically provide that section 43 shall not apply.</p> <p>In case of private companies, the shareholders shall have the voting rights as stated in their MOA or AOA.</p> <p>A private company may issue shares with differential voting rights provided its MOA and AOA so provide.</p>
7.	47	Voting Rights	<p>Section 47 which provides that every member holding equity share shall have the right to vote on every resolution placed before the company and that such right shall be in proportion to the share in the paid up equity capital of the company and the right of preference shareholders to vote on the resolutions which affect their interest, shall not apply to a private company where its MOA and AOA specifically provide that it shall not be applicable.</p>
8.	62(1)(a)(i) & 62(2)	Further Issue of Share Capital	<p>In case of rights issue by a private company the offer period and the period for dispatching of the offer letter can be reduced from 15 days to 3 days, if 90% of the members give their consent in writing or in electronic mode.</p>
9.	62(1)(b)	Further Issue of Share Capital under Employees Stock Option (ESOP) scheme	<p>A private company can pass an ordinary resolution for issue of shares to its employees under Employees Stock Option (ESOP) scheme.</p>
10.	67	Restrictions on purchase by company or giving of loans by it for purchase of its shares	<p>Restrictions on purchase by company or giving of loans by it for purchase of its shares shall not apply to private companies:</p> <ul style="list-style-type: none"> • In whose share capital no other body corporate has invested any money; • If the borrowings of private company from banks or financial institutions or any body corporate is less than twice its paid-up share capital or fifty crore rupees, whichever is lower, and • The company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section.

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
11.	73(2)	Prohibition on Acceptance of Deposits from Public	<p>Section 73(2)(a) to (e) shall not apply to private companies in following cases:</p> <p>which accepts from its members monies not exceeding one hundred per cent of aggregate of the paid up share capital, free reserves and securities premium account; or</p> <p>(B) which is a start-up, for five years from the date of its incorporation; or</p> <p>(C) which fulfills all of the following conditions, namely:</p> <ul style="list-style-type: none"> • which is not an associate or a subsidiary company of any other company; • if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and • such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section <p>Provided that the company referred to in clauses (A), (B) or (C) shall file the details of monies accepted with the Registrar in such manner as may be specified.</p>
12.	92(1)(g)	Annual Return	For private companies which are small companies instead of remuneration of Directors and Key Managerial Personnel (KMP), only aggregate remuneration drawn by Directors is required to be mentioned in its Annual Return.
13.	92(1)	Signing of Annual Return (Proviso)	In case of OPC, small company and private company (if such company is a start-up) the annual return needs to be signed by Company Secretary (CS) of the company and if there is no CS then it can be signed by any director of the company.
14.	101	Notice of Meeting	The provisions of Section 101 with respect to days of prior intimation, mode of notice and other related details need not be followed by private Company, if same is explicitly mentioned in the AOA of the company.
15.	102	Statement to be annexed with Notice, i.e. the Explanatory Statement	A statement showing material facts related to special business to be transacted at a general meeting need not be annexed to notice of the meeting if same is explicitly mentioned in the AOA of the company.

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
16.	103	Quorum for Meetings	The provision of Section 103 related to quorum of general meeting need not be followed, if same is explicitly mentioned in the AOA of the company.
17.	104	Chairman of Meetings	The provision of Section 104 related to appointment of chairman of meeting need not be followed, if same is explicitly mentioned in the AOA of the company.
18.	105	Proxies	The provision of Section 105 related to proxies need not be followed, if same is explicitly mentioned in the AOA of the company.
19.	106	Restriction on Voting Rights	The provision of Section 106 related to restriction on voting rights in case of unpaid calls, where there is lien on the shares, etc. shall not apply if same is explicitly mentioned in the AOA of the company.
20.	107	Voting by show of hands	The provision of Section 107 related to validity of voting by show of hands in case of voting by poll or electronic means is not demanded, shall not apply if same is explicitly mentioned in the AOA of the company.
21.	109	Demand for Poll	The provision of Section 109 related to demand of poll in case where voting is not confirmed by show of hands, etc. shall not apply if same is explicitly mentioned in the Articles of Association (AOA) of the company.
22.	117(3)(g)	Resolutions and agreements to be filed	<p>Clause (g) of Sub-section 3 of Section 117 shall not apply.</p> <p>Private company is now not required to file form MGT14 for resolution passed under section 179(3) i.e. powers of Board such as to make calls on unpaid shares, buy-back, issue of securities, borrow funds, etc.</p>
23.	138	Internal Audit	<p>Only private companies having</p> <ul style="list-style-type: none"> • turnover of two hundred crore rupees or more during the preceding financial year; or • outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year <p>shall be required to appoint an internal auditor.</p>

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
24.	139	Appointment of Auditors	All private limited companies having paid up share capital of rupees fifty crores or more or public borrowings from financial institutions, banks or public deposit of rupees fifty crores or more shall not appoint or re-appoint: an individual as auditor for more than one term of five consecutive years; and an audit firm as auditor for more than two terms of five consecutive years:
25.	143(3)(i)	Powers and Duties of Auditors and Auditing Standards	In case of private companies which are: • One person Company, Small Companies or • Companies with turnover less than Rs. 50 Crores and aggregate borrowings less than Rs. 25 Crores, the auditor is not required to report on the Internal financial controls system in his Audit Report.
26.	149	Company to have board of director- Rules 3 of The Companies (Appointment and Qualification of Directors) Rules, 2014	Appointment of woman director is not mandatory.
27.	160	Right of Persons Other than Retiring Directors to Stand for Directorship	Section 160 shall not apply. While proposing the appointment of director in general meeting, the director himself or any member intending to propose the appointment is not required to give 14 days' prior notice or deposit of Rs. 1,00,000/- .
28.	162	Appointment of Directors to be Voted Individually	Section 162 shall not apply. Pre-approval without any vote cast against the motion to appoint two or more directors by single resolution shall not be required.
29.	164(3)	Disqualifications for Appointment of Director	A private company may by its AOA provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of Section 164
30.	167(4)	Vacation of office of Director	Private companies may by its AOA, provide any other ground for the vacation of the office of a director in addition to those specified in the section.

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
31.	174(3)	Quorum for meetings of Board	In case of considering the quorum for board meeting, if the interested director has disclosed his interest in any given agenda item, then the interested director shall be considered for quorum.
32.	177(1)	Audit Committee	In case of private company constitution of Audit Committee is not mandatory.
33.	177 (9)	Vigil Mechanism: Rule 7(1) – Companies (Meetings of Board and its Powers) Rules,	Vigil mechanism is applicable to a Private Company only if it has borrowed money from banks and public financial institutions in excess of fifty crore rupees.
34.	178 (1)	Nomination and Remuneration Committee	In case of private company constitution of Nomination and Remuneration Committee is not mandatory.
35.	180	Restrictions on powers of board	<p>Section 180 shall not apply.</p> <p>Private company shall now not be required to consent of the Company by a special resolution for following transactions</p> <ul style="list-style-type: none"> • To sell , lease or dispose of whole or substantially the whole of the undertaking; • To invest in trust securities the amount received by way of compensation received in terms of any merger or amalgamation; • To borrow money where total borrowing including earlier borrowing exceeds aggregate of its paid-up share capital and free reserves apart from temporary loans obtained from company's bankers in ordinary course of business; • To remit or give time for the repayment of any debt due from a director.
36.	184(2)	Disclosure of interest	An interested director may participate in the meeting after disclosure of his interest.

Sr. No.	Section of the Companies Act, 2013	Particulars	Exemption to private limited companies thereunder
37.	185	Loan to Directors	<p>Section 185 pertaining to loans to directors and other persons in whom the director is interested shall not apply to a private company:</p> <ul style="list-style-type: none"> • In whose share capital no other body corporate has invested any money; • If the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees whichever is lower; and • Such a company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.
38.	188(1)	Related Party Transactions	Section 188(1) Second proviso shall not apply, i.e. a member can vote on a resolution to approve any contract or arrangement even if such member is a related party to such a contract or arrangement.
39.	190	Contract of Employment with Managing or Whole-Time Directors	<p>The provisions of this section shall not apply to a private company. Private company is not required to maintain at its registered office, contracts of service with Managing or Whole time Directors and the members do not have the right to inspect the same.</p>
40.	196(4) & (5)	Appointment of Managing Director, Whole time director or Manager-	<p>Provisions of Section 196(4) & (5) are not applicable, therefore the remuneration and terms and conditions of appointment of a Managing Director (MD), Whole-time Director (WTD) or Manager of a private Company need not be subject to the provisions of Section 197 , Schedule V and approval of members in their general meeting.</p> <p>Filing of Form MR-1 is also not applicable.</p>
41.	197	Limits for Managerial Remuneration	<p>This section is not applicable to Private company. Section 197 pertaining to cap on overall managerial remuneration in case of profit, in case of absence or inadequacy of profits and Schedule V are not applicable.</p>
42.	203	Appointment of Key Managerial Personnel	Appointment of Managing Director, Chief Executive Officer (CEO), Manager, Whole-time Director, Chief Finance Officer (CFO) is not applicable. However, all private Companies having a paid up share capital of Rs. 5 crores or more is required to appoint a whole time Company Secretary.
43.	204	Secretarial Audit for Bigger Companies	Section 204 shall not be applicable to private company.

3.0 Definitions

3.1 Private Company

"private company" means a company having a minimum paid-up share capital [Omitted] as may be prescribed, and which by its articles,-

- (i) restricts the right to transfer its shares;
- (ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that

- (A) persons who are in the employment of the company; and
- (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and
- (iii) prohibits any invitation to the public to subscribe for any securities of the company;

3.2 Small Company

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

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; and
- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to-

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act;

3.3 Start-up Company

"Start-up company" means a private company incorporated under the Companies Act, 2013 (18 of 2013) or the Companies Act, 1956 (1 of 1956) and recognised as start-up.

For further information please contact:

RSM Astute Consulting Pvt. Ltd.

13th Floor, Bakhtawar, 229, Nariman Point, Mumbai - 400021.

T: (91-22) 6108 5555 / 6121 4444

E: emails@rsmindia.in

W: www.rsmindia.in

Offices: Mumbai, New Delhi - NCR, Chennai, Kolkata, Bengaluru, Surat, Hyderabad, Ahmedabad, Pune, Gandhidham and Jaipur.



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In this white paper, we have tried to cover all major exemptions that are available to private limited companies, as issued by the MCA from time to time. It may be noted that nothing contained in this white paper should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the said notification and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this white paper.

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