COMPANIES ACT, 2013- AN INSIGHT

Dr Suprava Sahu*

ABSTRACT:

What makes an economy or a country developed, developing or least developed? Undoubtedly the answer that comes to our mind is the level of economic activities backed by industrial growth, development and prosperity. If we talk of industrial activities, the corporates will have a lion's share in it. Ultimately we found that healthy economic growth depends upon healthy corporate growth. But in modern corporate world, the healthy corporate growth is a function of many factors some of which are responsible and accountable corporate governance, greater transparency in management, unbiased accounts and independence in audits , socially responsible corporate behaviour etc. These characteristics of companies which are stated previously sounds pretty good. If these are made optional, then barring a handful of companies, others will not even bother about it. Because the latter thinks that company is a profit or money making machine for the promoters or the investors and not for others. By following this principle companies always try to maximise the profitability and protect their own interest by adopting every possible means.

Therefore the Companies Act 2013 will allow the country to have a modern legislation for regulation of corporate sector in India. The act, amongst other aspects provides for and legalises business friendly corporate regulation / pro-business initiatives, e-governance initiatives, good corporate governance, Corporate Social Responsibility (CSR), enhanced disclosure norms, enhanced accountability of management, stricter enforcement, audit accountability, protection for minority shareholders, investor protection and activism and better framework for insolvency regulation and institutional structure.In this paper efforts have been made in relation to churning out the new and need of the hour provisions incorporated in the Companies Act 2013.

KEY WORDS: Corporate Governance, Corporate Social Responsibility, Disclosure and

* Asst Professor,P.G Dept of Commerce,Ravenshaw University

INTRODUCTION:

The objective behind the 2013 Act is lesser Government approvals and enhanced self-regulations coupled with emphasis on corporate democracy. The 2013 Act delinks the procedural aspects from the substantive law and provides greater flexibility in rule- making to enable adaptation to the changing economic and technical environment. There are several procedural aspects that is prescribed by the Rules is framed by the Central Government.

The Companies Act, 2013 (2013 Act) was assented by the President of India on 29 August 2013 and published in the Official Gazette on 30 August 2013. The 2013 Act will set the tone for a more modern legislation which enables growth and greater regulation of the corporate sector in India. The Companies Act, 1956 (1956 Act) has been under review for some time in view of the rapidly changing economic and commercial environment nationally as well as globally. The 2013 Act is expected to facilitate more business-friendly corporate regulations, improve corporate governance norms, enhance accountability on the part of corporates and auditors, raise levels of transparency and protect interests of investors, particularly small investors. The 2013 Act has been developed with a view to enhance self–regulation, encourage corporate democracy and reduce the number of required Government approvals.

The 2013 Act delinks the procedural aspects from the substantive law and provides greater flexibility in rule making to enable adaptation to changing economic and technological environments. There are still several procedural aspects that would be prescribed by the Rules to be framed by the Central Government.

The different new aspects that are incorporated in the Companies Act 2013 are explained in the subsequent part of the article.

RRSPONSIBLE AND ACCOUNTABLE CORPORATE GOVERNANCE NORMS:

Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals without any clash in between. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.

The Companies Act, 2013 enacted on August 30, 2013 envisages radical changes in the sphere of Corporate Governance in India. It is set to provide a major overhaul in Corporate Governance norms and have far-reaching implications on the manner in which corporates operate in India. Some of the Provisions of Companies Act, 2013 related to Corporate Governance are:

1. Mandatory provisions related to independent directors, woman director, Key Managerial Personnel and Performance Evaluation of the Board.
2. Enhanced disclosures and assertions in Board Report, Annual Return and Directors' Report with regard to Managerial Remuneration, risk management, internal control for financial reporting, legal compliance, Related Party Transactions, Corporate Social Responsibility, shareholding pattern, public money etc.
3. Stricter yet forward-looking procedural requirements for Secretarial compliances and ICSI Secretarial Standards made mandatory.
4. Enhanced scope of Related Party Transactions and introduction of concept of arm's length pricing.
5. Enhanced restrictions on appointment and rotation of Auditors. Separation of role of Chairperson and Chief Executive Officer.
6. Introduction of mandatory provisions regarding Whistle Blower Policy, Audit Committee, Nomination and Remuneration Committee, Stakeholder' Relationship Committee, and Corporate Social Responsibility Committee.

Other specific and vital provisions relating to Management, administration and corporate governance are explained as follows:

a. At least 1 director of a company shall be a person who has stayed in India for 182 days or more in the previous calendar year. Existing companies to comply with this provision within 1 year from the date of commencement of the 2013 Act.

b. Listed and prescribed class of companies to have at least 1 woman director. Existing companies to comply with this provision within 1 year from the date of commencement of the 2013 Act.

c. Prescribed class of companies to have whole-time Key Managerial Personnel (KMP)

d. Electronic voting for Board and shareholders meetings introduced

e. Following committees of the Board made mandatory for listed and prescribed classes of companies:

i. Audit committee

ii. Stakeholder relationship committee

iii. Nomination and Remuneration committee

iv. Corporate Social Responsibility committee

f. Director to vacate office on remaining absent from all the meetings of the Board of Directors held during 12 months with or without obtaining leave of absence

g. Contents of Directors' Report elaborated. Directors to annually report on the existence and effective operations of systems on compliance with all applicable laws

h. Secretarial audit mandatory for listed and prescribed classes of companies

i. Approval of Central Government required for certain managerial remuneration

ENHANCED TRANSPARENCY AND DISCLOSURE REQUIREMENT:

The new Companies Act provides for making stakeholders more informed about the internal development of the company so that they can assess the security of their stake and interest in the company in a better manner. The Companies Act mandates the companies to make disclosure in different facets and manners like disclosures in report of board of directors, annual return, websites and prospectus etc. A brief description of these disclosures are given as under.

Disclosures in Report of the Board of Directors:	a. Extract of the Annual Return in Form MGT 9 b. Number of Board Meetings held during the year c. Director's Responsibility Statement u/s 134(5) d. Statement of Declaration of Independence by Independent Directors e. Company's Policy on Directors' appointment and remuneration f. Explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by auditors & the Company Secretary in practice g. Particulars of loans, guarantees or investments h. A statement indicating development and implementation of a risk management policy

	i. CSR Policy and initiatives taken during the year and reasons for not spending the money
Disclosures in Annual Returns:	a. Principal business activities of the Company (activities contributing 10% or more of turnover ..with their %) b. Particulars of holding, subsidiary and associate companies c. Other Securities issued by the Company (in addition to shares & debentures) d. Indebtedness (secured & unsecured), addition and reduction & interest due but not paid and interest accrued but not due e. Promoters, Key Managerial Personnel along with changes f. Meetings of Members, Board and its Committees with dates and attendance at the meeting g. Remuneration of the Directors and KMP h. Remuneration to ID and non-executive directors
Disclosures in Prospectus	a. Name and address of CFO in addition to existing list b. Management perception of Risk Factors of the project, gestation period, progress in the project and deadline for completion of the project. c. Details of any litigation legal action pending/taken against the promoters by Government Dept. or statutory body during the preceding 5 years and any direction given by such authority.
Disclosures in Web Sites	a. A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and the details, as may be prescribed, in respect of such resolution b. The company shall within a period of 90 days of making any transfer of an amount u/s 124(1) to Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each such shareholder. c. The contents of Corporate Social Responsibility Policy

	d. Details of establishment of such vigil mechanism e. Separate audited accounts in respect of each of its subsidiaries f. The terms and conditions of appointment of independent directors g. Notice of general meeting, voting through electronic means and postal ballots h. Name and address of CFO i. legal action pending/taken against the promoters

AUDIT INDEPENDENCE:

Audit is the act of protecting the interest of those stakeholders who have interest in the company but do not have any direct hand in management and control of the company. Auditors are placed in a very crucial position in relation to companies who are to form an informed and unbiased opinion on the financial integrity and soundness of the state of affairs of the business on which other stakeholders are supposed to rely. Therefore the independence of auditors is a must and inevitable. The Companies Act 2013 provides the following for the independence of the auditors:

Mandatory Rotation	The New Companies Act (Section 139(2)) read with the draft rules provide for the mandatory rotation of auditors. Individual auditors will be compulsorily rotated every five years and the audit firm will be rotated every ten years in all companies except one-person companies and small companies. This step was inserted to ensure that auditors do not increase their familiarity and reduce their independence by continuing to audit a company for an unlimited period of time.
Cooling Period	A cooling period of five years is also prescribed (Proviso to Section 139(2)) before the reappointment of auditors who complete one term. The same company cannot reappoint such auditors or audit firms for the next five years after completion of one term.
Non-audit Services	Similar to the Sarbanes Act, the New Companies Act in Section 144 lists a few services that a company's auditor cannot provide, directly or indirectly, to the company and its holding and subsidiary companies. The intent is to ensure that the auditor avoids any conflict of interest arising from the provision of other services such as accounting and book keeping, internal audit, management, and

	actuarial and, investment advisory services.
Tribunal's Power to Remove Auditors	While no separate regulatory body has been set up to regulate auditors, the National Company Law Tribunal ("Tribunal") has (in addition to the company itself) the power to order the removal of auditors. The Tribunal under Section 140(5) can order a company to remove its auditor, if it believes the auditor has acted in a fraudulent manner, or abetted or colluded in any fraud.
Reporting Fraud	The New Companies Act also enhances the accountability of auditors. It does so by placing on auditors, the onus of reporting fraud noticed by them, during the performance of their duties.
Other Provisions	a. To align with the provisions of the Income tax Act, companies should have a uniform financial year - ending on 31 March each year. b. Consolidation of financials for a company having a subsidiary, associate or a joint venture made mandatory. c. National Financial Reporting Authority (NFRA) to be constituted by Central Government to provide for dealing with matters relating to accounting and auditing policies and standards to be followed by companies and their auditors. d. Restriction placed on provision of specified non-audit services by an auditor to ensure independence and accountability of the auditor. e. Mandatory internal audit for prescribed classes of companies.

SAFEGUARDING OF INVESTOR AND PROMOTING DEMOCRACY:

An investor is a person who allocates capital with the expectation of a financial return. The types of investments include: equity, debt securities, real estate, currency, commodity, derivatives such as put and call options, etc. This definition makes no distinction between those in the primary and secondary markets. That is, someone who provides a business with capital and someone who buys a stock are both investors.

The term "investor protection" defines the entity of efforts and activities to observe, safeguard and enforce the rights and claims of a person in his role as an investor. This includes advice and legal action. The assumption of a need of protection is based on the experience that financial investors are usually structurally inferior to providers of financial services and products due to lack of professional knowledge, information or experience. Countries with stronger investor protections tend to grow faster than those with poor investor protections. Investor protection includes accurate financial reporting by public companies so the investors can make an informed decision. Investor protection also includes fairness of the market which means all participants in the market have access to the same information.

The Companies Act 2013 provides various measures for protecting the interests of investors by regulating the Related Party Transactions, Investments/Loans, Oppression minority and Mismanagement, Fraud Risk Mitigation and Other Investor protection measures. The above mentioned regulations are briefly explained as follows:

Related Party Transactions	The Companies Act, 2013 has made significant amendments vis-à-vis related party transactions making this a significant focus area. The responsibilities are rather onerous with strict consequences in cases of non-compliance. Key highlights are as follows: The transactions of a company with its related parties which are not in the ordinary course of business and which are not at arm's length would require the consent of the Board of Directors of the Company. The Director's Report will also include details of related party transactions requiring consent of the Board/special resolution of members along with the justification for entering into them.
Investments and Loans	Provisions relating to caps on inter corporate loans and investments extended to include loan to any person.. The rate of interest on inter corporate loans not to be lower than the prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan. Loans (as also guarantees/securities in respect thereof) and investments by a private company or by a holding company to or in its wholly owned subsidiary would also be covered by the provisions.
Oppression and Mismanagement	The concept of class action suits introduced empowering a specified number of shareholders and depositors to take legal action in case of any fraudulent action by the company or if the affairs of the company are

	being conducted in a manner prejudicial to the interests of the company or its members or depositors. Class actions suits have been prevalent in US, Australia and some EU countries. The provision is a significant step towards protecting shareholders and depositors.
Fraud Risk Mitigation	Fraud includes any act, omission, concealment of any fact or abuse of position committed by any person, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss. Specific provisions which are made for fraud risk management are explained as follows: a. Increased responsibility on the directors and management to detect and prevent frauds of all kind including financial and non-financial. b. Enhanced auditor's responsibility on fraud detection c. Provision for investigation into the affairs of the Company in case of suspected fraud
Other Investor Protection Measures	Other Investor protection measures like establishment of Investor Education and Protection Fund(IEPF)

INCLUSION OF CORPORATE SOCIAL RESPONSIBILITY:

The European Commission has defined Corporate Social Responsibility (CSR) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" .

The Commission puts forward a new definition of CSR as "the responsibility of enterprises for their impacts on society". Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

o maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;

o identifying, preventing and mitigating their possible adverse impacts.

The requirement of undertaking Corporate Social Responsibility by companies has been introduced in Section 135 of Companies Act, 2013. This section needs to read along with Companies (Corporate Social Responsibility Policy) Rules, 2014 and Schedule VII to the Act. Section 135 provides that

1. Every company having net worth of rupees five hundred crores or more, or turnover of rupees one thousand crores or more or a net profit of rupees five crores or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

2. The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

3. The Corporate Social Responsibility Committee shall –

(a). formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b). recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c). monitor the Corporate Social Responsibility Policy of the company from time to time.

4. The Board of every company shall, –

(a). after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b). ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

5. The Board of every company shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

SIMPLIFYING CORPORATE COMBINATIONS:

The 2013 Act features some new provisions in the area of mergers and acquisitions, apart from making certain changes from the existing provisions. While the changes are aimed at simplifying and rationalising the procedures involved, the new provisions are also aimed at ensuring higher accountability for the company and majority shareholders and increasing flexibility for corporates.

The changes incorporated in the Companies Act, 2013 require companies to consider the scale and extent of compliance requirements while formulating their restructuring plans. These changes are quite constructive and could go a long way in streamlining the manner in which mergers and other corporate scheme of arrangements are structured and implemented in India.

The current procedural requirements in case of a merger and acquisition in any form are quite cumbersome and complex. There are no exemptions even in the case of mergers between a company and its wholly owned subsidiaries. The 2013 Act now introduces simplification of procedures in two areas, firstly, for holding wholly owned subsidiaries and secondly, for arrangements between small companies (section 233 of the 2013 Act). Small companies is a new category of companies, introduced within the 2013 Act, with defined capital and turnover thresholds, which has been given certain benefits, including simplified procedures.

One of the significant restrictions proposed in case of these situations is the restriction on the transferee company to hold any shares either in its own name or in the name of a trust, subsidiary or associate, since all shares will need to be cancelled or extinguished on merger or amalgamation. This requirement will stem the practice followed by several companies which have in the past followed this route. Further, in certain cases, it has also rationalised the requirements, for example in the case of the reduction of the share capital, which is part of compromise or arrangement, the company will need to comply with the provisions of this section only, as against the existing requirement under the 1956 Act, where the company is required to comply with the provision of section 108 in case of reduction of share capital as well those relating to compromise. There are certain additional provisions relating to combinations, mergers & acquisitions are given below:

a. Restriction placed on multi-layer investment subsidiaries

b. Merger of Indian company with a foreign company allowed

c. Fast track merger for small companies and between holding company and its wholly owned subsidiary introduced

d. Person / group of persons holding 90% or more equity shares by virtue of amalgamation etc. can purchase the remaining equity shares of the company from minority shareholders

e. Any valuation of shares / assets etc. required under 2013 Act to be performed by a Registered Valuer

E-GOVERNANCE:

In this age of well-developed information technology and telecommunications, the Electronic Governance of all business-related activities, administrative activities, and managerial functions of the corporate world, can certainly be very convenient, efficient, transparent, and fully accountable and responsible. Therefore, undoubtedly, e-governance in the corporate sector is an imperative and highly prudent requirement in every country of the world, inevitably including India. As India is one of the major, fast-progressing, and highly influential economies of the world, this e-governance is absolutely essential and beneficial to Indian corporate world, especially in present-day world of cutthroat corporate competition, and ever-increasing need for greater transparency and accountability in the corporate sector. Considering these highly significant facts and business scenarios, the Government of India has rightly promulgated the provisions for e-governance in the corporate sector of the country, in its latest Companies Act of 2013.

E-Governance or Electronic Governance is basically proper and efficient utilization of the technologies of the information technology and telecommunications, for performing various functions and activities by an organization. Such use of Information and Communication Technologies [ICTs] can preferably be made at all levels of a business corporation also, in order to obtain faster and more efficient business activities, greater customer satisfaction, more accountable and transparent corporate administration and management, better profits and satisfaction of the shareholders, and the best possible progress and growth of the corporation. Some of the E-Governance provisions are listed below:

a. Maintenance, security, and inspection of books and records in electronic form

b. Service of documents to shareholders, different authorities and registrar.

c. Notice of meetings through electronic means

d. Payment of dividend will be directly remitted to shareholders account electronically

e. Documents and evidences which are kept in electronic form and properly authorised and authenticated are to be considered appropriate and admissible in legal matters.

f. Voting through electronic means

OTHER NEW AND SPECIFIC PROVISIONS:

There are many new concepts brought in by the new Companies Ac, 2013 in different areas as detailed below:

○ **Types of Companies**

a. Maximum number of members in a private company increased from 50 to 200

b. Limit of number of members in an association or partnership (without incorporation) to be increased up to 100

c. One Person Company (OPC) - a new vehicle for individuals for carrying on business with limited liability

○ **Share capital**

a. For defined infrastructural projects, preference shares can be issued for a period exceeding 20 years

b. Provisions relating to further issue of capital made applicable to all companies

c. The terms for offer of securities, form and manner of 'private placement' to be as prescribed

d. Shares cannot be issued at a discount except sweat equity shares

e. Time gap between 2 buy-backs shall be minimum 1 year

○ **Deposits**

a. Stringent norms provided for acceptance of fresh deposits from members and the public

b. Any deposit accepted before the commencement of 2013 Act or any interest due thereon to be repaid within 1 year from the commencement of 2013 Act or from the date on which such payments are due, whichever is earlier.

c. Credit rating made mandatory for acceptance of public deposits

- **Related Party transactions**

a. Requirement of obtaining Central Government approval for related party transactions not required

b. Approval of related party transactions by Board of Directors at Board meeting made mandatory

c. Related party transactions to also require prior shareholder's approval by special resolution for companies having prescribed paid up capital or transactions exceeding prescribed amounts.

d. Related party transactions to be disclosed in the Director's Report along with justification thereof

- **Inter corporate loans / investments**

a. Loans, guarantee and security made to any person (the 1956 Act dealt only with body corporate) will attract the 2013 Act compliance requirement

b. Rate of interest on loan granted cannot be lower than the prevailing yield of 1 year, 3 year, 5 year or 10 year Government Security closest to the tenure of the loan

c. The list of exemptions has been curtailed

- **Loan to Directors**

a. No company shall directly or indirectly advance any loan (including loan represented by a book debt) or give guarantee or provide security in connection with such loan to any director / related persons. But an exception to the above rule is made for MD or a whole time director (WTD) if such loan is in accordance with the terms of services extended to all employees or is approved by shareholders by special resolution

b. Provisions for loan to directors applicable to private companies

○ **National Company Law Tribunal (NCLT)**

2013 Act replaces the High Court with a Tribunal to be known as NCLT, which will consists of Judicial and Technical members, as Central Government may deem necessary, to exercise and discharge the powers and functions conferred including approval of merger, corporate reorganization, capital reduction, extension of financial year etc.

○ **Miscellaneous**

a. Mandatory transfer of profits to reserves for dividend declaration dispensed

b. Inability to pay debts will be considered as criteria for determining a sick company

c. Provisions of revival and rehabilitation of sick companies to apply to all companies and not only to an "industrial company"

d. Central Government to establish Serious Fraud Investigation Office for investigation of frauds relating to a company

e. Any person representing the company is made liable for punishment for fraudulently obtaining credit facilities from any bank or financial institutions for making any false, deceptive or misleading statement, promise or forecast

CONCLUSIONS AND RECCOMENDATIONS:

The 2013 Act has ushered in a new era of corporate democracy making a titanic shift from "government control" to "self-governance". The 2013 Act has a number of measures for protection of minority holders like tighter norms on companies from raising public deposits filing class action suit etc. The introduction of concepts of KMP, independent director and woman director are aimed at ushering quality professionals at management/board level. The provisions relating to transactions with related parties have been simplified; at the same time scope of it being misused to the detriment of minority shareholders have been prevented. The 2013 Act contains several welcome measures to boost M&A activities by allowing merger of Indian companies with foreign companies, putting in place a fast track mechanism for merger between wholly owned subsidiaries and holding company/merger between small companies and exit to minority shareholders at price determined by the valuer. Undoubtedly the Companies Act

2013 is a wholesome regulation most probably in all respect for present India Inc to accept the global challenges in highly and ever increasing competitive scenario.