

First Notes



MCA amends provisions relating to remuneration for independent directors and other amendments

30 April 2021

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Others

Transition

Immediately

Within the next three months

Post three months but within six months

Post six months

Forthcoming requirement

Introduction

Currently under Section 197(3) of the Companies Act, 2013 (2013 Act), in case of no profits or inadequacy of profits, a company is not allowed to pay any remuneration (other than sitting fee) to its directors, including managing director, whole-time director or manager, except as provided under Schedule V to the 2013 Act. The Schedule V provides certain conditions to be fulfilled by a company to pay managerial remuneration. Schedule V consists of following four parts:

- Part I – Conditions to be fulfilled for the appointment of a manager or whole-time director or a manager without the approval of the Central Government.
- Part II – Remuneration
- Part III – Provisions applicable to Parts I and II
- Part IV – The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in Schedule V.

The Companies (Amendment) Act, 2020 (2020 Amendment Act) introduced amendments to Section 149 and 197 of the 2013 Act, to provide remuneration for non-executive directors, including independent directors, in case of inadequacy of profits in a manner similar to executive directors. The 2020 Amendment Act received the assent of the President of India on 28 September 2020. Many sections of the 2020 Amendment Act were notified on 21 December 2020, 22 January 2021 and 11 February 2021 by the Ministry of Corporate Affairs (MCA).

New development

On 18 March 2021, the Central Government notified amendments to Sections 149 and 197 of the 2013 Act introduced through 2020 Amendment Act relating to remuneration payable by companies having no profit or inadequate profit. Further, MCA notified amendments to Part II of the Schedule V of the 2013 Act. The notification is effective from the date of its publication in the Gazette i.e. 18 March 2021.

Additionally, on 24 March 2021, the Central Government also notified amendments to Sections 124 and 247 of the 2013 Act relating to decriminalisation of offences.

This issue of First Notes aims to provide an overview of the recently notified sections of the 2020 Amendment Act and changes to Schedule V of the 2013 Act.

Overview of the amendments

Following are the recent amendments introduced by MCA:

Amendments to sections of the 2013 Act

- **Section 149 (Independent directors):** New provision has been added to provide that in case a company has no profits, or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under Section 197(5), in accordance with the provisions of Schedule V of the 2013 Act.
- **Section 197 (Remuneration to directors):** Section 197(3) has been amended to provide that in any financial year, if a company has no profits or its profits are inadequate, the company should not pay to its directors, including any managing or whole time director or manager or **any other non-executive director, including an independent director**, by way of remuneration any sum exclusive of any fees payable to directors under Section 197(5) hereunder except in accordance with the provisions of Schedule V of the 2013 Act.

(Emphasis added to highlight the changes)



Amendment to Schedule V

Consequent to the notification of the amendments relating to remuneration of non-executive directors and independent directors, MCA has also issued amendments to Part II (section I, II and III) of the Schedule V of the 2013 Act. The amendments make Schedule V applicable to other directors as well. **Other director means non-executive director or an independent director** in the Schedule V.

Section I relates to situations where companies have adequate profits. In this case, remuneration payable by companies to a managerial person/persons or **other director/directors** should be subject to the provisions and limits specified in Section 197 of the 2013 Act.

Section II relates to situations where companies have no profits or inadequate profits. Due to the amendment, now a company with no profits/inadequate profits, may pay remuneration to the '**other directors**' also in addition to managerial personnel, amount not exceeding the limits given below:



Where the effective capital is	Limit of yearly remuneration payable shall not exceed (INR) in case of a managerial person	Limit of yearly remuneration payable shall not exceed (INR) in case of other directors
Negative or less than INR5 crore	60 lakh	12 Lakh
INR5 crore and above but less than INR100 crore	84 lakh	17 Lakh
INR100 crore and above but less than INR250 crore	120 lakh	24 Lakh
INR250 crore and above	120 lakh plus 0.01 per cent of the effective capital in excess of INR250 crore.	24 Lakh plus 0.01 per cent of the effective capital in excess of INR250 crore.

Schedule V allows a company to pay remuneration in excess of above limits if a special resolution is passed by the shareholders.

(Emphasis added to highlight the changes)

Amendment to Schedule V (cont.)

Section III relates to remuneration payable by companies having no profit or inadequate profit in certain special circumstances. In the following circumstances a company may pay remuneration to a managerial person **or other director** in excess of the amounts provided in Section II above:

- a) Where the remuneration in excess of the limits specified in Section I or II is paid by any other company and that other company is either a foreign company or has got the approval of its shareholders in general meeting to make such payment, and treats this amount as managerial remuneration for the purpose of Section 197 and the total managerial remuneration payable by such other company to its managerial persons **or other directors** including such amount or amounts is within permissible limits under Section 197.
- b) Where the company is a newly incorporated company, for a period of seven years from the date of its incorporation, or is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction for a period of five years from the date of sanction of scheme of revival, or is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 for a period of five years from the date of such approval, it may pay any remuneration to its managerial persons **or other director**
- c) Where remuneration of a managerial person **or other director** exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal.

(Emphasis added to highlight the changes)

Other amendments

Decriminalisation of certain compoundable offences: The MCA through its notification dated 24 March 2021 notified following amendments relating to compoundable offences which have been recategorised to In-house Adjudication (IAM) framework for levy of civil penalties by adjudicating officers.

- **Section 124(7), Failure to comply with the requirements given in this Section for dealing with unpaid dividend, etc.:** As per the amendment in case of default, the penalty amount has been reduced to INR1 lakh from fine of INR5 lakh. In case of continuing default, a company would be liable for penalty of INR500 per day and maximum penalty has been capped at INR5 lakh. For every officer in default, penalty has been fixed at INR25,000 and in case of continuing default, penalty of INR100 per day would be levied which has been capped at INR2 lakh instead of imprisonment punishment and fine of INR5 lakh.
- **Section 247(3), Contravention of provisions relating to valuation by a valuer:** As per the amendment, in case of default, a penalty of INR50,000 would be levied on the valuer, for each default instead of current requirement of fine of INR25,000 which could extend to a maximum of INR1 lakh.



Our comments

There was a long standing ask from various corporates especially startups to permit independent directors in such companies to draw remuneration. Independent directors are an important cog in the wheel of corporate governance under the 2013 Act and the ability of such startups to invite independent directors and have them devote time is now being encouraged with the changes brought up by the 2020 Amendment Act. The current inconsistency in payment of remuneration to executive directors *vis-à-vis* non-executive directors when there is a situation of inadequacy of profits or there is a loss has now been addressed. The 2020 Amendment Act amended relevant provisions under Section 149 and 197 of the 2013 Act, to enable provisions regarding payment of remuneration to non-executive directors, including independent directors, in case of inadequacy of profits similar to executive directors.

Based on the preliminary reading, it seems that the schedule V can be applied for the non-executive directors including independent directors even for FY 2020-21. However, it advisable that a company consults its legal counsels.

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Issue no. 57 – April 2021

The topics covered in this issue are:

- IAASB's new guidance on EER Assurance Engagements
- US GAAP updates - SEC's focus on ESG and SPAC disclosures
- Regulatory updates.



Accounting software for maintaining books of account, changes to board's report and additional reporting in an auditor's report - New norms

14 April 2021

On 24 March 2021, the Ministry of Corporate Affairs (MCA) has issued certain amendments to the provisions of the Companies (Accounts) Rules, 2014 and the Companies (Audit and Auditors) Rules, 2014 under the 2013 Act. The amendments mainly relate to the following:

- Manner of books of account to be kept in electronic mode
- Additional disclosures in the board's report
- Additional matters to be reported in the auditor's report.

On 1 April 2021, MCA amended the circulars issued on 24 March 2021 regarding the applicability date of the newly prescribed requirements on the 'manner of books of account to be kept in electronic mode' and 'related auditor's report' changes. Now these two requirements would be applicable from the financial year commencing on or after 1 April 2022.

This issue of First Notes provides an overview of these amendments.

Voices on Reporting



KPMG in India is pleased to present Voices on Reporting (VOR) – a series of knowledge sharing calls to discuss current and emerging issues relating to financial reporting

On 20 April 2021, KPMG in India released the VOR - Annual updates publication. The publication provides a summary of key updates from the Securities and Exchange Board of India (SEBI), the Ministry of Corporate Affairs (MCA), the Institute of Chartered Accountants of India (ICAI) and the Reserve Bank of India (RBI) that are expected to be relevant for stakeholders for the year ended 31 March 2021.

To access the publication, please click [here](#).

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