

The Companies Act 2013

Deciphering the term “related parties” under the Companies Act, 2013 and Clause 49 of the listing agreement

October 2014

Summary

This update, divided into the following four parts, aims to discuss the nitty-gritties of the relevant provisions of the 2013 Act and the amended Clause 49 of the listing agreement. Besides, through this update, we aim to provide practical guidance for the implementation of the provisions and to ensure compliance with the relevant provisions. Subsequent to the enactment of the 2013 Act, there has been a flurry of notifications/ amendments being issued by the MCA with respect to the definition of related party, etc. This update covers notifications/ amendments in the 2013 Act and Clause 49, as of 30 September 2014.

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I. Defining a related party

The 2013 Act, for the first time, has introduced a definition for related party, and has re-defined the term “relative”, to be read with the Companies (Specification of definitions details) Rules, 2014 (“the Definition Rules 2014”) as amended.

Unlike the amended Clause 49 of the listing agreement, which defines a related party using both rule and principal-based approach, the 2013 Act has used only a rule-based approach. The 2013 Act has defined the following parties, as listed below, under items 1 to 10.10 as a related party, in the context of a company:

1. A director
2. A manager
3. Key managerial personnel (KMP)
4. KMP of the holding company

5. Directors, other than independent directors, of the holding company
6. Holding company
7. Subsidiary
8. Associate
9. Fellow subsidiary i.e. subsidiaries of the holding company
10. Following persons related/connected with the directors/ manager/ KMP

Other parties connected with: <ul style="list-style-type: none"> • Director / Manager / KMP of a company; • KMP, other than the independent director of the holding company of a company 	Director of a company	Manager of a company	KMP of a company	KMP of a holding company	Other than the independent director of the holding company
10.1 Relative, as defined in note A below (<i>read with Rule 4 of Definition Rules 2014</i>)
10.2 Other members of HUF, where the aforementioned is a member
10.3 Firm(s) in which the aforesaid is a partner
10.4 Firm(s) in which relatives of the aforesaid are partners
10.5 Private company in which the aforesaid and his relative is a member
10.6 Private company in which the aforesaid or his relative is a director
10.7 Public limited company in which the aforesaid is a director. Such a person should also hold more than 2% of the paid-up share capital of such a public company
10.8 Public limited company in which the aforesaid, along with his/ her relatives, is holding more than 2% of the paid up share capital
10.9 A person on whose advice, directions or instructions, other than those provided in professional capacity, the aforesaid is accustomed to act
10.10 A body/ corporate where the following members are accustomed to act in accordance with the advice, directions or					

instructions of the aforesaid, other than the ones offered in professional capacity:					
• Board of directors	.	.	▪	▪	▪
• Managing Director	.	.	▪	▪	▪
• Manager	.	.	▪	▪	▪

Notes:

A. For the purpose of point 10 in the list above, the term relative includes the following:

- spouse
- mother and father, including step-father and step mother
- son and step son
- son’s wife, including step-son’s wife
- daughter and daughter’s husband
- brother, including step-brother
- sister, including step-sister

B. For the purpose of related parties referred to in points 3, 4 and 10, the term KMP includes the following, which have not been covered above:

- Chief executive officer
- Company secretary
- Chief financial officer

The Securities and Exchange Board of India (the SEBI) vide circular no CIR/CFD/Policy Cell/2/2014 had revised the clause 49 of the listing agreement, and has used a very wide definition of related parties. However, subsequently, on 15 September 2014, vide its circular number CIR/CFD/Policy Cell/7/2014 further amended the earlier circular referred above. By virtue of the revised circular dated, the SEBI has aligned the definition of related parties in line with the provisions of the 2013 Act, and Accounting Standard 18 Related Party Disclosures as prescribed under the Companies (Accounting Standards) Rules, 2006 which are deemed to be the accounting standards under the 2013 Act until accounting standards are specified by the Central Government under Section 133.

II. Scope of related party transactions

The 2013 Act

Chapter XII of the 2013 Act, and more specifically Section 188 thereof, deals with the provisions relating to related party transactions.

The following is a list of transactions covered under the 2013 Act, which may require board/ members’ approval by way of a special resolution, where such transactions are not in the ordinary course of business and/ or carried out at other than arm’s length price:

1. Sale of goods, material, services and supply of material
2. Purchase of goods, material and services
3. Sale or purchase of any kind of property (movable or immovable, tangible or intangible, financial or non-financial)

4. Disposing of any kind of property
5. Leasing of property of any kind (movable or immovable, tangible or intangible, financial or non-financial)
6. Appointment of any agent for purchase of goods, purchase of material and purchase of services
7. Appointment of any agent for purchase of property
8. Appointment of any agent for sale of goods material and services
9. Appointment of any agent for sale of property
10. Appointment of related party to any place of profit or to any office in the company
11. Appointment of related party to any place of profit or to any office in the subsidiary company
12. Appointment of related party to any place of profit or to any office in the associate company
13. Underwriting the subscription of any securities and derivatives

Amended Clause 49

The revised Clause 49 of the listing agreement has used a principal-based approach to define a related party transaction. According to the revised Clause 49, a related party transaction is a transaction, either with a cost or without it, for transfer of resources, services; and/ or obligations between a company and related party.

III. Conditions to be fulfilled for contracts and arrangements with related parties for transactions as listed in Part II and covered under Section 188 of the 2013 Act

Rule 15 of the Companies (Meeting of Board and its Powers) Rules, 2014 (“the Board Meeting Rules 2014”) and other provisions of the 2013 Act require a company to comply with the following in relation to the transactions specified in Part II above with related parties, as defined under the 2013 Act.

1. Board of Directors must evaluate the following indicative but not a complete list of matters, in the board meeting held in order to pass necessary resolutions in respect of transactions with related parties:

S. No.	Particular
1.	The name of the related party and nature of relationship
2.	The nature of the contract or arrangement
3.	The duration of the contract or arrangement
4.	The particulars of the contract or arrangement
5.	The material terms of the contract or arrangement including the value, if any
6.	Advance paid or received for the contract or arrangement, if any
7.	The manner of determining the pricing, both included as a part of contract and not considered as part of the contract
8.	The manner of determining other commercial terms, both included as part of contract and not considered as part of the contract

S. No.	Particular
9.	All factors relevant to the contract should be considered, if not, the details of factors not considered with the rationale for not considering those factors
10.	Any other information relevant or important for the board to take a decision on the proposed transaction

Note: Directors interested in any contract or arrangement shall not be present in the meeting during discussion on the subject of the resolution relating to such contract or arrangement.

- Pursuant to Rule 15 (3) of the Rules, contract or arrangement with related parties, *which are not in the ordinary course of the business and/ or which are carried out at other than arm's length*, shall be entered into only after obtaining prior approval of the members of the company by way of a special resolution, in the following circumstances:



Applicable from 1 April 2014 to 13 August 2014

- where the paid-up capital of a company is ₹ 10 crores or more;
- where the aggregate value of goods and material sold, purchased or supplied, *directly or indirectly through related party agents*, exceeds 25% of the company's annual turnover;
- where the aggregate value of any kind of property (tangible/ intangible) sold or purchased or disposed of, *directly or indirectly through related party agents*, exceeds 10% of the company's net-worth;
- where the aggregate value of leasing any kind of property (tangible/ intangible) exceeds 10% of the company's net-worth or exceeds 10% of the company's annual turnover;
- where the aggregate value of services rendered or availed, *directly or indirectly through related party agents*, exceeds 10% of the company's net-worth;
- where the appointment of a related party to a place of profit or to any office in the company is at a monthly remuneration exceeding ₹ 250,000;
- where the appointment of a related party to a place of profit or to any office of a subsidiary company is at a monthly remuneration exceeding ₹ 250,000;
- where the appointment of a related party to a place of profit or to any office of an associate company is at a monthly remuneration exceeding ₹ 250,000;
- where the aggregate of remuneration for underwriting the subscription of any securities or derivatives thereof of the company exceeds 1% of the net-worth.

Applicable from 14 August 2014

- where the aggregate value of goods and material sold, purchased or supplied, *directly or indirectly through related party agents*, exceeds 10% of the company's turnover or ₹ 100 crores, whichever is less;
- where the aggregate value of any kind of property (tangible/ intangible) sold or purchased or disposed of, *directly or indirectly through related party agents*, exceeds 10% of the company's net-worth or ₹ 100 crores, whichever is less;
- where the aggregate value of leasing any kind of property (tangible/ intangible) exceeds 10% of the company's net-worth or exceeds 10% of the company's turnover or ₹ 100 crores, whichever is less;
- where the aggregate value of services rendered or availed, *directly or indirectly through related party agents*, exceeds 10% of the company's turnover or ₹ 50 crores, whichever is less;
- where the appointment of a related party to a place of profit or to any office in the company is at a monthly remuneration exceeding ₹ 250,000;
- where the appointment of a related party to a place of profit or to any office of a subsidiary company is at a monthly remuneration exceeding ₹ 250,000;
- where the appointment of a related party to a place of profit or to any office of an associate company is at a monthly remuneration exceeding ₹ 250,000;
- where the aggregate of remuneration for underwriting the subscription of any securities or derivatives thereof of the company exceeds 1% of the net-worth.

Notes:

1. Net-worth and annual turnover shall be based on the audited financial statements of the preceding financial year
2. In case of related party transactions between holding and a **wholly-owned subsidiary** meeting above thresholds, such wholly owned subsidiaries are not required obtain approvals through special resolution as long as such approvals have been obtained the company.

IV. Conditions to be fulfilled for contracts and arrangements with related parties for transactions under clause 49 of the listing agreement

The re-revised clause 49, exempts all transactions from shareholders and audit committee approvals, irrespective of the nature and materiality of such transactions, where such transactions are between two government companies, or with a wholly owned subsidiary of a listed company. However, such exemption is withdrawn if such wholly owned subsidiary is excluded from the preparation of the consolidated financial statements.

Amended clause 49 of the listing agreement has prescribed the following conditions to be fulfilled by a listed company in respect of transactions with related parties:

- Listed companies shall obtain approval of shareholders through special resolution in respect of all material related party transactions [*Please refer to FAQ No.5 for definition of material related party transactions*].
- transactions with related parties, *other than material related party transactions*, including those which are in the ordinary course of business and at an arm's length price require **prior approval** of the audit committee.
- in respect of other than material related party transactions, the audit committee of listed companies are authorised to grant an omnibus approval for transactions, subject to compliance with the following conditions:
 - omnibus approval is granted only in respect of transactions which are repetitive in nature, and only if the audit committee is satisfied for the need of such approval in the interest of the company;
 - such approval is granted in compliance with a detailed guidelines/criteria laid down by the audit committee
 - omnibus approval shall specify the following details:
 - i. Name(s) of the related party
 - ii. Nature of transactions
 - iii. Period of transactions [cannot exceed beyond one year]
 - iv. Maximum amount of transaction covered by such approval
 - v. Indicative base price / current contracted price
 - vi. Formula for variation in the prices, if any
 - vii. Any other conditions, audit committee may deem fit in this regard.
 - Audit committees are authorized to grant an omnibus approval for transactions which are not foreseeable or not expected at the time of the above approval, however, the value of such transaction should not exceed ₹ 1 crore.
 - Audit committee shall review, at least once in a quarter the details of transactions entered covered by omnibus approval.



V. Frequently asked questions

1. What are the key provisions of the Companies Act, 2013 and the listing agreement in connection with related party transactions?

Following is the list of important sections pertaining to ‘related party’ and ‘related party transactions’:

- Section 2(76) of the 2013 Act, to be read together with Rule 3 of the Definition Rules, 2014
- Section 2(77) of the 2013 Act, to be read together with Rule 4 of the Definition Rules, 2014
- Section 2(51) for list of KMP under the 2013 Act and for the purpose of Section 2(76)
- Rule 15 of the Board Meeting Rules, 2014
- Section 177(4)(iv) relating to the responsibility of audit committee in connection with transactions with related parties
- Section 188 of the 2013 Act, which deals with the nature of related party transactions and provides operating guidelines in connection therewith
- Part B Clause VII of the revised Clause 49 - in case of a listed company
- disclosures as required by Schedule III to the 2013 Act
- Accounting Standards as referred to in Rule 7 of the Companies (Accounts) Rules 2014
- Section 134(3)(h) regarding disclosures of transactions in the board’s report
- the Companies (Specification of definitions details) Rules, 2014
- the Companies (Meeting of Board and its Powers) Rules, 2014

Note: The 2013 Act has prescribed several other provisions relating to administration/ maintenance of records of related party and transactions with such parties, which a company shall comply with.

2. What is the effective date of applicability of the provisions/ sections/ rules referred in 1 above?

Provisions of the 2013 Act and Rules framed thereunder in relation to related party and related party transactions are effectively applicable from 1 April 2014.

The clause 49 of the listing agreement is now effective in a piecemeal basis. However, the applicability of provisions relating to related party transactions remains effective from 1 October 2014.

3. Whether the provisions pertaining to ‘related parties’ are applicable based on a financial year?

No, the provisions pertaining to ‘related party’ and ‘related party transactions’ are applicable for all contracts or arrangements with related parties entered on or after 1 April 2014, irrespective of the accounting year followed by the company.

4. Whether the contracts or arrangements of transactions with related parties entered on or before 1 April 2014 are also governed by the provisions of the 2013 Act?

No, the contracts or arrangements of transactions with related parties entered on or before 1 April 2014 shall continue to be governed by the provisions of the erstwhile Act, and other applicable provisions. However, modifications made to such contracts/ arrangements on or after 1 April 2014 shall be governed by the provisions of the 2013 Act. However, in the case of a company that is listed on any of the recognised stock exchanges in India, for which it is expected that “material related party transactions” entered before 1 October 2014, will continue beyond 31 March 2015, the contracts or arrangements for material transactions shall be placed for approval before the shareholders in the first general meeting held after 1 October 2014.

5. What is the definition of material related party transactions under the amended Clause 49 of the listing agreement?

Under clause 49 of the listing agreement, transactions with a related party is considered to be material, where value of such transactions (individually or taken together with previous transactions) during a financial year exceeds 10% (ten percent) of annual consolidated turnover of the company.

6. Whether provisions of the Companies Act, 2013 and relevant rules framed thereunder are applicable to every company?

Yes, as of now the provisions in connection with ‘related party’ and ‘related party transactions’ are applicable to every company including private, public or public listed companies. The MCA has issued a draft notification on 24 June 2014 which aims to provide various exemptions to private limited companies, including exemption from Section 188 of the 2013 Act. However, pending final notification, every company shall continue to be governed by the relevant provisions.

7. Could you explain the broad operating procedures of the Companies Act, 2013 and Clause 49 of the listing agreement in connection with related party transactions?

The following is a broad operating procedure prescribed under the 2013 Act and relevant Rules framed thereunder with regards to ‘related party transaction’:

Particulars	Procedure as prescribed under the 2013 Act
A Company having an audit committee, under Section 177 of the 2013 Act	Audit committee shall approve all: <ul style="list-style-type: none"> related party transactions; and Subsequent modifications to the previously approved related party transactions.
A Company operating only through Board of Directors	The Board of Directors must approve all the related party transactions, where such related party transactions are: <ul style="list-style-type: none"> not in the ordinary course of its business; in the ordinary course of its business, but carried at other than arm’s length price.
Transactions covered by Rule 15(3) of Board Meeting Rules, 2014	No contract or arrangement for a transaction with a related party shall be entered into without prior approval of: <ol style="list-style-type: none"> the Board of Directors/ Audit committee, as the case may be, and by members by way of a special resolution <p>If such a contract or arrangement is for:</p> <ul style="list-style-type: none"> transactions which are not in the ordinary course of the business; transactions which are in the ordinary course of the business, but are carried at other than arm’s length price.
Listed company - Material related party transactions	Every listed company must obtain an approval of its member by way of a special resolution in respect of material related party transactions. Such approval is mandatory even if the related party transactions are: <ul style="list-style-type: none"> in the ordinary course of the business; and carried at an arm’s length price <p>Please refer to FAQ No 5 for the definition of material related party transactions.</p>

8. Whether the above procedures are applicable to loans to directors or loans to any other person in whom a director is interested?

The 2013 Act strictly prohibits giving loans/ security or guarantees to directors or any other person in whom a director is interested, except if such other person is a wholly-owned subsidiary of a company. Further, a company is allowed to give security or guarantee in respect of loans availed only by its subsidiary from banks or financial institutions.

9. How to interpret the term “Ordinary Course of its Business” (OCB) as used in the context of ‘related party transaction’ under the 2013 Act?

The 2013 Act requires approval from the board/ members for related party transactions which are not in the ordinary course of its business. However, the 2013 Act has not defined the term “OCB” and the ministry of corporate affairs has refused to define the term. In the absence of an authoritative guidance, the said term should be interpreted in the stricter sense and be applied to transactions which are directly or indirectly connected to or necessary to conduct its business. For example, company ABC which is primarily engaged in the business of manufacturing and selling auto parts, and advancing loans to a related party which is in the business of providing information technology services, could be viewed as a transaction not in the OCB. Whereas, if the company ABC entered into a contract with related party to avail travel services for its employees/ staff, such services, being necessary for ABC’s ordinary activities, could be regarded as transaction in the OCB.

10. Is there any guidance available for the determination of arm’s length transaction?

The term “arm’s length transaction” has been defined as a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest. Assessment of what is an arm’s length transaction could be extremely subjective, thus it may warrant a careful understanding and analysis of factors used in the determination of pricing.

11. Can a director who is interested in a contract or arrangement with a related party be present during the discussion at the board meeting for approval of such transactions?

Pursuant to the provisions of Sub rule 2 of Rule 15 of the Companies Board Meeting Rules, 2014, none of the interested directors shall be present during the course of discussions at the board meeting.

12. What are the provisions of the 2013 Act and clause 49, in connection with voting rights of related party at the general meeting?

Under the 2013 Act, a related party, being a member of the company and also interested in a contract or arrangement for which a special resolution is passed in the general meeting, shall not be entitled to vote on such special resolution.

Whereas, under the clause 49 every related party, whether interested or not in a transaction being subject to special resolution, shall mandatorily be abstain from voting.

13. Can a related party transaction entered into without obtaining approval from the board/ members be ratified subsequently?

Yes, contract or arrangement entered into without obtaining the consent of the board or approval by a special resolution in the general meeting, as the case may be, shall be ratified by the board or members, by way of a special resolution, within three months from the date of such contract or arrangement being entered.

14. What are the consequences of non-compliances with the provisions relating to subsequent ratification – for other than listed companies?

Nature of non-compliance	Consequences
Non-compliance with the provisions of the ratification	<p>The contract or arrangement with the related party becomes voidable by the Board of Directors; and</p> <p>The Director(s) who has/ have authorised such transaction shall indemnify the company for the losses incurred on such un-authorized related party transactions.</p>
Non-compliance with the provisions of Section 188	<p>Directors or other employees who have authorised or entered into contract or arrangement in violation of the Section 188 shall be subject to:</p> <p>In case of a listed company</p> <p>a. Imprisonment which may extend up to one year; or</p> <p>b. Fine of ₹25,000 which may extend upto ₹500,000 or</p> <p>c. Both a and b above</p> <p>In all other cases</p> <p>Fine of ₹25,000 which may extend upto ₹500,000.</p>

15. Whether the thresholds Sub-rule 3 of Rule 15 the Board Meeting Rules, 2014 is applicable to individual transaction of sale or purchase or is applicable at an aggregate level?

The Second amendment to the Board Meeting Rules 2014 includes an explanation clarifying that the limits listed under the sub-rule 3(i) to (iv), shall apply for transaction or transactions to be entered into either individually or taken together with all the previous transactions during a financial year.

Please refer to FAQ No 18 and 19 for listed companies.

16. How to compute annual turnover and net-worth for the purposes of Rule 15(3) and Clause 49?

For the purposes of Rule 15(3) and amended Clause 49 of the listing agreement, net-worth and the annual turnover shall be based on the audited financial statements of the preceding financial year.

17. How should a listed company deal with conflicting requirements relating to special resolution?

Both Clause 49 and Rule 15(3) of the rules differ in respect of timing of special resolution. The later requires a prior approval through a special resolution whereas the former requires only a special resolution which could be obtained even subsequent to the date of contract or arrangement with the related party. However, we recommend that the company applies the stricter of the two and obtain prior approval, through a special resolution, for all material related party transactions or the transaction which are governed by the Rule 15(3).

18. Whether the threshold limits for special resolution under the amended Clause 49 and the 2013 Act are different from each other?

Yes. Please refer to FAQ No 5 for limits as prescribed under the amended Clause 49 of the listing agreement.

19. Can there be a situation in which contracts or arrangements require special resolution with related party only under amended listing agreement, and not under the 2013 Act?

Yes. Contracts or arrangements with related parties in the ordinary course of business and at arm's length prices are exempted from approval from shareholders and board, except the prescribed approvals under Section 177. Whereas Clause 49 requires material related party transactions to be approved by way of a special resolution in the members meeting, in spite of such transactions being in the ordinary course of business and carried out at an arm's length price.

20. Whether the provisions relating to special resolution under Section 188 are also applicable to transactions with wholly owned subsidiaries?

No! Wholly owned subsidiary companies are exempted from the requirement of passing a special resolution, provided requirement of the special resolutions have been complied by the holding company.



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