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The Companies Act, 2013 has provided various new definitions and new provisions which did not exist in the erstwhile Companies Act, 1956. Such new concepts have been introduced in view of the global corporate governance trends and to make the Companies accountable for their stakeholders.

This issue of **InSync** aims at explaining few such concepts introduced for the first time in the Companies Act, 2013.

### **Officer**

The term “Officer” has immense meaning under Companies Act. It specifies the persons coming under the periphery of liability towards an offence. It includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act.

The definition of the term Officer is specified under Section 2(59) of the Companies Act, 2013 and is similar to its erstwhile counterpart defined under Section 2(30) of the Companies Act, 1956. The only difference in the definition is that the new Act includes the term Key managerial personnel instead of the term Secretary. Thus, it includes all KMP’s under the definition of Officers of a Company.

**The term Officer specifies the persons coming under the periphery of liability towards an offence**

**Officer is specified under Section 2(59) of the Companies Act, 2013**

**The term Key managerial personnel included in the definition of Officer**

**Act includes persons as Officers of a**

The Companies Act realizes the fact that Directors are the agents of the shareholders and majorly the penal provisions rotates around the Directors. However, there can be a situation where clandestinely, the control of company has been shifted from the actual owner to a dummy director. The Companies Act therefore attempts to cast the liability of director on persons who conceal their identity behind the dummies but retain full control over the company. The statute maker thus realizing the said anomaly had included persons as Officers of a Company in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act. The said aspect continues in the new Act also.

**Company in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act**

**Section 2(60) defines the term Officer in Default**

**It lists out the persons who shall be held guilty in the case of any non-compliance, contravention of the ACT**

**Act also includes share transfer agents, registrars and merchant bankers to the issue or transfer of shares of a company in the definition of officer in default**

## **Officer in Default & Directors' Liability Insurance**

Companies Act not only sets out the compliance mandate but also the onus of non-compliance's. The persons who shall be responsible for any non-compliance are specified in the provisions. The Section 2(60) of the Companies Act, 2013 defines the term "Officer in Default", thereby defining the persons who shall be held guilty in the case of any non-compliance. The Section is an advanced version of the erstwhile Section 5 of the Companies Act, 1956, thereby including the officers and directors of the Company, who are in charge of the management or who have been charged with the responsibility of complying with any of the provisions of the Act to be held responsible for any contravention of the Act.

The Section 2(60) of the 2013 Act defines the term "**Officer in Default**" as an officer of the company who is

**The major difference brought out by the 2013 Act is including any of the persons as officer in default mentioned in the definition instead of including all the persons specified under erstwhile Section 5 of the 1956 Act**

**The provisions for Directors and Officers Liability Insurance made simpler**

**The 2013 Act allows indemnification of officers of a company, however premium paid will be treated as remuneration in case the officer is held guilty**

in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:—

- i. whole-time director;
- ii. key managerial personnel;
- iii. where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;
- iv. any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- v. any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- vi. every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- vii. in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.

The new Act brings out major changes in determining the persons as Officers in Default. One of the many is the inclusion of the term ***Key Managerial Personnel*** in to the definition of Officer in Default. Thus, setting out the

liability of the Chief Financial Officers, Chief Executive Officers for the offences under the Act. Another change brought out in the new Act is ***inclusion of share transfer agents, registrars and merchant bankers*** to the issue or transfer of shares of a company.

Although the new Act is more specific and is stringent as compared to its erstwhile counterpart, still at places the statute maker has provided room for relief. One of the such instances is the inclusion of phrase **“any of the following officers”** in the definition of the term officer in default.

The erstwhile Section 5 specifically stated that all the officers falling in the provision will be treated as Officer in default. However, the new Act provides a room by stating that any of the persons mentioned shall be treated as Officer in default.

Further any person even authorized by the KMP shall be held liable for any contraventions of the Act. The presence of mens-rea for any director has been specifically excluded by inclusion of the clause that ***“every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance”*** shall be treated as officer in default.

The new Act not only has brought a change in the definition of the term Officer in default but also the provisions interlinked with it. The erstwhile Section 201 of the Companies Act, 1956 specifically prohibited the Companies from indemnifying their officers or employees of their auditors on any default, misfeasance, breach of duty or breach of trust of which he may be guilty in

relation to the Company. Any such indemnifications, whether contained in Articles or otherwise were treated to be void, subject to certain exceptions.

However the Section 197(13) allows the indemnifications and insurances, subject to a sole exception that if the person is found guilty, then the insurance premium paid shall be treated as remuneration of that officer. This brings out an entire shift in the insurance policies to be drawn by companies in the name of Directors and Officers liability insurance. Thereby, bringing new avenues for the companies engaged in insurance businesses.

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