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**Dear Clients,**

### **REQUIREMENT OF SPECIAL RESOLUTION IN CASE OF BORROWINGS OTHER THAN TEMPORARY LOANS FROM BANKERS**

Decisions regarding borrowings for the purpose of the business of the Company are left at the discretion of the Board of Directors, who are entrusted by the shareholders with the responsibility of making day to day decisions for the proper functioning of the Company.

Under the provisions of Companies Act, 1956, unlimited powers were conferred on the Board of Directors of Private Companies. However, Board of Directors of Public Companies were required to seek approval of Shareholders by way of ordinary resolution in case fresh loans to be taken exceeded Paid-up Capital and Free Reserves.

Companies Act, 2013, which has been enacted with an objective of increasing the emphasis on Corporate Governance, requires the Board of Directors of both Public and Private Companies to seek shareholders approval by way of a special resolution in case the borrowings exceed the limit as stated above. The reasoning seems to be that in case of excessive borrowings (i.e beyond paid up capital and free reserves) the shareholders should consciously decide whether borrowings are in the interest of the company. In this regard **Section 180(1)(c) of Companies Act, 2013 which came into force with effect from 12<sup>th</sup> September, 2013 states that** *“the borrowings (money to be borrowed, together with the money already borrowed) should not exceed the aggregate amount of Paid Up Share Capital & Free Reserves without passing special resolution in the general meeting.”*

The loans and borrowings discussed in Section **180(1)(c)** does not include **temporary loan obtained from company’s bankers in the ordinary course of business. Further Temporary Loan** for this purpose means *loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature.*

Earlier the same was governed by Section 293(1)(d) of the Companies Act, 1956 i.e. the Old Companies Act.

#### **Conclusion**

Now, **private companies** have also come under the ambit of this section and **public companies** which were earlier required to pass only ordinary resolution, now have to pass special resolution and file the same with RoC.



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### **Treatment in the Transitional Phase**

Questions may arise about the compliances to be done by those private companies wherein the quantum of borrowings as on the date of notification of Section 180 already exceeds the Paid Up Share Capital and Free Reserves, as in the Companies Act 1956 such provisions were not applicable to Private Companies. Section 465 of the Companies Act 2013 which has not been notified as yet addresses such issues and contains Repeals and Savings provisions. Therefore, there is lack of clarity about applicability due to parallel existence of two sets of provisions dealing with such matters. MCA will have to clarify this matter, till that time we feel that there is no need for the companies to ratify the existing positions prevailing prior to Section 180 coming into picture.

### **Action Points for Companies**

At the time of making fresh borrowings, if the aggregate amount of existing or new borrowings {other than temporary loan obtained from Banker} is more than the paid up share capital and free reserves of the Company, than there is a need to pass special resolution by calling an Extra Ordinary General Meeting and file Form No. 23 with the Registrar of Companies. Further, Companies must also specify in the resolution, maximum amount up to which the borrowings can be made by the Company.

In case you want to discuss any of the issues regarding the implementation or the interpretation of the said Section of the new Companies Act feel free to contact us.

**Thanks & Regards,**

**Rohan**