

Analytical Speaking

Enforcement of Companies Act, 2013- a day too soon?



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The Regulators seem to be in haste and accelerated to now reduce the delay caused in to bring the Companies Act, 2013 (“**Act 2013**”) into force. However, as the saying goes, “Take time for all things- great haste makes great waste”. Evidently, the Act has taken several years to be finally drafted and received the President’s nod, though even then there are glaring loopholes in the Act. Now, that MCA is trying to speed up but even after the glaring loopholes and even before one could think of it has acted within the blink of an eye; and not much surprising, the act surely has several ambiguities. Though the provisions have been notified to come into force, however, we here analyse why the same is premature and therefore, may not really be in spirit.

First of first of all, the Act 2013 says that existing Act shall be repealed by section 465. That section has not been repealed. However, several sections have already been enforced by the department on September 12, 2013¹. Technically, this means both the Acts are currently in operation.

Important notified sections likely to affect

Very importantly, the scheme of the new law is that exempting notification will be issued u/s 462. Therefore, unless exempted, all the provisions become applicable to all the Companies.

Insider Trading

Some of the provisions enforced on 12th September, 2013 are eminently inapplicable to private companies. For example the prohibition in relation to provisions of insider trading under section 195. This is shocking as to how the same can be applicable to a private company? However, the section has been enforced surprisingly without any exemption to a private company and unlisted companies.

Loans to Directors

Likewise, the provisions related to loans to directors under the Companies Act, 1956 is exempted for private companies. However, with section 185 coming into force **all** companies are barred from extending loans to directors except under circumstances as mentioned in the said provision. Therefore, such bar applies now to **all** the Companies, including a private company.

Non-cash transactions and forward dealings

Other provisions mentioned under section 192, 194 are also now applicable to all companies with relation to non-cash transaction and prohibition on forward dealings

¹ CommencementNotificationOfCA2013



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in securities of company by director or key managerial personnel. Therefore, these also become applicable to private companies.

Powers of Board

This is a very important change. The section is a lot different from existing section 293 of the 1956 Act. There is a new definition of “undertaking”, and additionally, the section requires **special resolution as against ordinary resolution required by 1956 Act.** Hence, in all pending matters in the process of approval, companies will need to comply with the new law.

This season being the peak season for all the Annual General Meetings where notices may have already been issued including that of postal ballots for companies opting the same, the change in law can surely not at all be implemented. Does it mean that these transactions then become non-set? Surely not, but all what is seems that they have really acted too soon.

Reference to National Company Law Tribunal (NCLT)

At least one section refers to appeal to NCLT – section 59 on rectification of register of members. It is again startling that the whole idea of enforcing the section was to enforce those which do not require functioning of new bodies or prescription of relevant rules/forms will be enforced. However, the power to rectify the register of members is with NCLT under the Act 2013, and there is no NCLT right now. So there was no way the section could have been enforced. This is surely a glaring loophole and goes against the spirit of the enforcement.

Other provisions

Likewise, section 39 (except sub-section 4) restrains on allotment of shares unless minimum subscription is attained. Sub-section (4) is the filing of return of allotment, which has not been enforced. Once again, the intent seems to be that the existing requirements of the 1956 Act remain in force as far as filing of returns is concerned.

Fine and prosecution

Some sections provide for fine/prosecution. Surprisingly, the prosecution section has been enforced, but the substantive section has not been enforced. One such section, section, i.e. section 86 which provides for fine/imprisonment on contravention of Chapter VI on charges. As long as the provisions of the Chapter are not enforced, this section will remain redundant



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Analysis

In essence, it was premature to implement the sections without the relevant exemption notifications and therefore, notification is surely premature. Caution has to be immediately exercised both by the department and the companies.

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