

## Companies Act Series

April 22, 2014

### WELCOME ABOARD: NEW COMPANIES ACT IN INDIA TAKES OFF!

- The Government of India has on March 26, 2014, notified majority of the provisions of the Companies Act, 2013.
- The new Companies Act seeks to rectify various defects in the existing law governing companies and has brought about radical changes in the Indian corporate law regime.
- The Companies Act 2013 has also introduced new concepts such as a one man company, class action suits etc.
- All companies are required to ensure compliance with the new law with effect from April 01, 2014.
- Lot of questions still remain unanswered on transition from old regime to the new regime.

The Government of India has recently brought into force the Companies Act, 2013 ("CA 2013"), which replaced the erstwhile Companies Act, 1956 ("CA 1956"). The CA 1956 had been in existence for over 50 years, and was proving to be ineffective while handling complex issues in the context of the evolving requirements of India Inc. While the CA 2013 was passed by the Lok Sabha on December 18, 2012 and the Rajya Sabha on August 08, 2013, only some of its provisions were brought into force in September 2013. On March 26, 2014, the Ministry of Corporate Affairs ("MCA") notified most (still not all) of the remaining provisions. The notified sections came into force on April 01, 2014. The CA 2013 marks a seminal shift in India's corporate law regime by introducing new concepts like a one person company, class action suits, etc. which were hitherto not recognized under CA 1956 and establishes new benchmarks for corporate governance by codifying directors' duties, prescribing more stringent independence criteria for independent directors and expanding the definition of related parties etc.

To help understand the panorama of changes introduced under the CA 2013, we shall be analyzing the key changes and their implications for all stakeholders by setting out the changes into our series of updates on the CA 2013 ("NDA CA 2013 Series") touching upon various themes under the new law and setting out the practical aspects of some of the important changes introduced by the new law on India Inc. In addition to the NDA CA 2103 Series, for a quick look at the changes brought forth by the CA 2013, please refer to our previous hotline through this [link](#).

This, the first of our series, is an introduction to the CA 2013 and analyses the framework of the CA 2013, the implementation of the CA 2013 and the transitory phase as we move to a new company law regime.

### FRAMEWORK OF THE CA 2013

The CA 2013 contains 29 Chapters divided into 470 sections and 7 schedules, as opposed to the 658 sections and 15 schedules under the CA 1956. However, the new law also makes extensive reference to sub-ordinate legislation in the form of rules, which form an integral part of the new law governing companies in India. Pursuant to the powers vested under the CA 2013, the MCA has also finalized the rules under each chapter, most of which have been notified.

### PHASED IMPLEMENTATION

The phased implementation of CA 2013 commenced on September 12, 2013 when 98 sections were notified with immediate effect ("Phase I"). This was followed by phase two, when on March 26, 2013, a further 183 sections were notified and which came into effect on April 01, 2014 ("Phase II").

The following table provides a chapter wise break-up of the notified provisions in the CA 2013.

| Chapter number | Chapter name  | Sections notified   |
|----------------|---|---|
| Chapter I      | Definitions   | Fully notified other than 2(23), 2(29)(iv), 2(67)(ix) and proviso to 2(87)                                  |
| Chapter II     | Incorporation of the company and matters incidental thereto | Fully notified other than Section 7(7), Section 8(9) and second proviso to Section 14(1) and Section 14(2). |
| Chapter III    | Prospectus and allotment of securities                      | Fully notified  |
| Chapter IV     | Share capital and debentures                                | Fully notified except Section 48 and Section 66   |
| Chapter V      | Acceptance of deposits by companies                         | Fully notified except Section 75  |
| Chapter VI     | Registration of charges                                     | Fully notified  |
| Chapter VII    | Management and administration                               | Fully notified except Sections 97-99  |
| Chapter VIII   | Declaration and payment of dividend                         | Fully notified except Section 124-125   |

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|----------------|--|---|
| Chapter IX     | Accounts of companies                                    | Fully notified except Section 130-132   |
| Chapter X      | Audit and auditors                                       | Fully notified  |
| Chapter XI     | Appointment and qualifications of directors              | Fully notified  |
| Chapter XII    | Meetings of the board and its powers                     | Fully notified  |
| Chapter XIII   | Appointment and remuneration of managerial personnel     | Fully notified  |
| Chapter XIV    | Inspection, inquiry and investigation                    | Fully notified except Section 213, Section 218, Section 221-222 and Section 226-227       |
| Chapter XV     | Compromises and arrangements                             | Yet to be notified  |
| Chapter XVI    | Prevention of oppression and mismanagement               | Yet to be notified  |
| Chapter XVII   | Registered valuers                                       | Yet to be notified  |
| Chapter XVIII  | Removal of names of companies from register of companies | Yet to be notified  |
| Chapter XIX    | Revival and rehabilitation of sick companies             | Yet to be notified  |
| Chapter XX     | Winding up   | Yet to be notified  |
| Chapter XXI    | Companies authorized to register under this act          | Fully notified except Sections 371-373 and Section 375-378                                |
| Chapter XXII   | Companies incorporated outside India                     | Fully notified  |
| Chapter XXIII  | Government companies                                     | Fully notified  |
| Chapter XXIV   | Registration offices and fees                            | Fully notified  |
| Chapter XXV    | Companies to furnish information or statistics           | Fully notified  |
| Chapter XXVI   | Nidhis   | Fully notified  |
| Chapter XXVII  | National Company Law Tribunal and Appellate Tribunal     | Only Sections 407-414 have been notified. Other sections are yet to be notified.          |
| Chapter XXVIII | Special courts   | Only Section 439 and Section 442-446 are notified. Other sections are yet to be notified. |
| Chapter XXIX   | Miscellaneous  | Fully notified except Section 465-466   |
| Schedule I-VII |  | Notified  |

The phased implementation of the CA 2013 has introduced a large number of difficulties and questions relating to the applicability of the new law.

### I. Compliance time frame

When the Phase I of the CA 2013 was notified on September 12, 2013, companies were provided with just a day's notice to comply with the notified provisions. For the Phase II of the notification, where a total of 183 sections, 6 schedules and rules for 11 chapters were notified, companies were given 5 days. This form of unplanned implementation with limited transitory assistance, has led to a large amount of uncertainty and compliance burden for India Inc.

Certain provisions of the CA 2013 specifically provide for a time frame within which companies are required to comply with the new law. However, these are limited to a few references in the CA 2013, and a majority of the provisions of the new law come into force immediately. The table below highlights the key sections which provide for a timeframe for compliance. The short time frame for companies to comply with the provisions of the CA 2013 may create significant difficulties in ensuring timely compliance.

| Clause number | Provision   | Compliance time frame  |
|---------------|---|--|
| Section 2(41) | Definition of financial year                                      | Companies are required to align their financial year as per the provisions of the CA 2013 within a period of 2 (two) years from the date of commencement of the CA 2013.   |
| Section 74    | Repayment of deposits accepted before the commencement of CA 2013 | If any deposit has been accepted by a company before the commencement of CA 2013 and remains unpaid, the company is required to file a statement with the Registrar of Companies within a period of 3 (three) months from commencement of the CA 2013 or from date on which payments are due and repay the unpaid amounts within 1 (one) year from commencement of the CA 2013 or from the date on which payments are due. |
| Section 88    | Register of members   | Companies have to comply with the provisions related to register of members as set out in the Companies (Management and Administration Rules), 2014, within 6 (six) months from date of commencement of the rules.   |

|                                  |   |   |
|----------------------------------|---|---|
| Section 139(2)                   | Appointment and term of statutory auditors                                      | Companies are required to comply with the requirements set out within 3 (three) years from the date of commencement of the CA 2013.   |
| Section 144                      | Non audit services  | The auditor or audit firm who or which has been performing any non-audit services on or before the commencement of the CA 2013 is required to comply with the provisions of this section before the closure of the first financial year after the date of commencement.   |
| Section 149(1)                   | Minimum / maximum number of directors for public and private companies          | Companies are required to comply with this provision within a period of 1 (one) year from the date of commencement of the CA 2013.  |
| Second proviso to Section 149(1) | Appointment of woman directors  | <ul style="list-style-type: none"> <li>■ Companies are required to comply with this provision within a period of 1 (one) year from the date of commencement of the CA 2013.</li> <li>■ Companies which will be incorporated under CA 2013 are required to comply with this provision within a period of 6 (six) months from the date of its incorporation.</li> </ul> |
| Section 149(3)                   | Appointment of resident director  | Companies are required to appoint a resident director <i>immediately</i> upon commencement of the CA 2013.  |
| Section 149(4)                   | Appointment of independent directors  | Companies are required to comply with this provision within a period of 1 (one) year from the date of commencement of the CA 2013 or notification of the rules, as may be applicable.   |
| Section 165(3)                   | Number of companies in which a person can be appointed a director               | 1 (one) year from the date of commencement of the CA 2013   |
| Section 177                      | Audit committees  | Every audit committee of a company existing immediately before the commencement of the CA 2013 shall, within 1 (one) year of commencement of the CA 2013, be reconstituted in accordance with Section 177(2).   |
| Second proviso to Section 203(3) | Number of companies in which a person can be appointed as key managerial person | A whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of the CA 2013, shall, within a period of 6 (six) months from commencement of the CA 2013, choose one company, in which he wishes to continue to hold the office of key managerial personnel.  |

## II. Transitional challenges: Actions taken but not completed prior to CA 2013 becoming effective

Crucial to the transition from an old regime to a new regime is the effect of past acts – i.e. the 'savings' clause. Section 465 of the CA 2013, the repeals and saving clause, provides for the repeal of the CA 1956, and also provides the consequences of the repeal on actions done under the CA 1956. While Section 465 deals with the consequences of repeal on actions undertaken and completed under CA 1956, it is silent regarding actions undertaken under the CA 1956 but not completed. This has resulted in significant confusion as to the applicability of CA 2013 in such cases. For instance, it is not entirely clear as to the applicability of the CA 2013 in case of transactions initiated prior to April 01, 2014 especially if certain actions such as contracts for slump sale, filing of Draft Red Herring Prospectus, conducting meetings for creation of treasury stock upon merger, etc. have occurred prior to April 01, however the matters with respect to which such actions were taken have not been consummated. These aspects also become important since Section 465 of the CA 2013, the only provision dealing with repeal of CA 1956 and savings has not yet been notified.

### EXISTING JURISPRUDENCE

We may rely on the existing jurisprudence for determining the applicability of CA 2013 for actions undertaken before its commencement:

#### I. Common law

- Under common law, except for transactions past and closed, a statute after its enactment was completely obliterated, as if it had never been enacted. Under this rule, any pending actions or prosecutions could not be proceeded with after the repeal of the law under which they were started. Therefore, unless the repeals and savings provision of a statute specifically preserved the actions initiated under a repealed enactment, pending actions / proceedings could not be proceeded under the repealed law.
- The Supreme Court of India has, in the case of *Keshava Madhava Menon versus State of Bombay*<sup>1</sup>, held that where an act was repealed, in the absence of provision to the contrary, it was formerly regarded as having never existed, except as to matters and transactions passed and closed.

#### II. General Clauses Act, 1897

- In order to relax the above common law rule, the General Clauses Act, 1897 was enacted, which provided a

general savings provision in case of the repeal of any act.

- Section 6 of the General Clauses Act, 1897 provides that the repeal of any enactment does not affect the previous operation of any enactment so repealed or anything duly done or suffered under the previous enactment. Further, Section 6 also states that the repeal shall not affect any right, privilege, obligation or liability acquired, incurred or accrued under the repealed enactment.
- The Supreme Court has held that the relevant question while determining if the provisions of a new law would apply to an act commenced under a repealed act, is not whether the new act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them.<sup>2</sup> The question that arises in this context would be whether the CA 2013 has been enacted with an intention to destroy the rights created under CA 1956. This seems unlikely in view of the preamble to the CA 2013, which states that it is an act to *consolidate and amend* the law relating to companies in India, and does not state specifically that the CA 2013 seeks to *replace* the CA 1956 or override the actions taken under the CA 2013.

Although the MCA by various circulars has tried to clarify what prevails in the overlap of sections between the CA 2013 and CA 1956, the confusion still prevails. In this backdrop, a view may be taken that unless the contrary is established by a specific circular, acts done under CA 1956 should continue to hold good and would be governed under the CA 1956.

Though the CA 2013 is riddled with implementation challenges and snags in compliance at this stage, the CA 2013 is a radical development promising significant changes in the corporate landscape in India. While we seek to address the major implications of the CA 2013 in the NDA CA 2013 Series, several of these issues may require a formal clarification from MCA. With the requirement to ensure compliance at the earliest, the CA 2013 may throw up several implementation glitches, leaving stakeholders in a quandary till the law is clarified.

— Corporate Team

You can direct your queries or comments to the authors

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<sup>1</sup> AIR 1951 SC 128

<sup>2</sup> See *Brihan Maharashtra Sugar Syndicate Ltd. vs. Janardan Ramchandra Kulkarni & Ors.*, AIR 1960 SC 794 and T.S. *Balish v. T.S Rengachari*, AIR 1969 SC 701

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