



Regulatory Alert Tracking change

Privileges to a private company under the Companies Act

Issue no: RA/9/2015

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Background

Companies Act, 2013 (2013 Act) was brought into force in phases by 1 April 2014, barring certain provisions relating to compromises, arrangements and amalgamations, prevention of oppression and mismanagement, setting up of/exercise of powers by National Company Law Tribunal / National Company Law Appellate Tribunal, Investor Education and Protection Fund, National Financial Reporting Authority, Special Court etc.

After the commencement of the 2013 Act, the Government received representations from various stakeholders expressing practical difficulties by private companies in complying with some of the requirements laid down in the commenced provisions. Some of the issues raised and suggestions made required amendments to the 2013 Act.

The Government has, on 26 May 2015, notified the Companies (Amendment) Act, 2015 (Amendment Act) thereby amending certain provisions of the 2013 Act.

2013 Act as amended by the Amendment Act empowers MCA – subject to the Parliamentary oversight - to issue one or more notification directing that the provisions of 2013 Act shall not apply or shall apply with specified exceptions, modifications and adaptations to class or classes of companies.

MCA has on 5 June 2015, issued draft notifications relaxing certain provisions of 2013 Act to private companies, Section 8 companies and Government companies. These draft notifications are laid in both the Houses of Parliament as required under 2013 Act.

Key highlights of the draft notification as far as it relates to relaxation to "private companies" are summarized in this Alert.

The term "private company" is defined under section 2(68) of the 2013 Act (read with the Amendment Act¹) as under:-

"private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, –

(i) restricts the right to transfer its shares ;

(ii) except in case of one person company, limits the number of its members to two hundred :

¹ The provisions of the Amendment Act will come into force from the date to be notified by the Government. Different dates may be notified for different provisions of the Amendment Act.

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member :

Provided further that –

- (A) persons who are in the employment of the company ; and*
- (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,*

shall not be included in the number of members ; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company

Highlights of proposed exemptions / privileges for private companies under the 2013 Act

Sr. No.	Section reference of 2013 Act	Subject	Exemption / privileges for private companies
1.	Section 2(76)(viii), 2 nd proviso to section 188(1)	Definition of related party and related party transaction	<ul style="list-style-type: none">• A holding, subsidiary, associate company or fellow subsidiary of a private company, shall not be treated as 'related party' for the purpose of section 188.• Member of a private company can vote on a resolution for contract or arrangement to be entered into by

			the company with related party even if such member is a related party.
2.	Section 43 and Section 47	Kinds of Capital and Voting Rights	Provisions of the 2013 Act relating to kinds of share capital and voting rights will not be applicable to a private company where such provisions are contained in the Memorandum of Association (MOA) and Articles of Association (AOA) of such a company.
3.	Section 62(1)(a)(i) and Section 62(2)	Further issue of share capital (pertaining to rights issue)	With the consent of 90% of the members of a private company, rights issue can be kept open for a period lesser than 15 days and notice of the rights offer can be dispatched for a period lesser than 3 days before opening of the issue.
4.	Section 62(1)(b)	Further issue of shares pertaining to Employees Stock Options (ESOS)	A private company may approve issuance of shares for ESOS by an ordinary resolution instead of special resolution.
5.	Section 67	Restrictions on purchase by company or giving of loans by it for purchase of its shares	The restrictions will not be applicable to a private company if following conditions are fulfilled: <ol style="list-style-type: none"> 1. No other body corporate has invested any money in its share capital; 2. Borrowing from banks, Financial Institutions (FI's) or any body corporate is less than twice its paid up capital or ₹ 500 million, whichever is lower; and

			3. The company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section.
6.	Section 73(2)(a) to (e)	Prohibition on acceptance of deposits from public	Private company permitted to accept deposits from its members upto 100% of aggregate of its paid-up share capital and free reserves without obtaining deposit insurance, credit rating, depositing 15% of the deposit maturing in separate bank account etc. However, such private company will have to file a return with the Registrar of Companies (ROC).
7.	Section 101 to 107 and Section 109	Certain procedures relating to general meeting	Provisions relating to: <ul style="list-style-type: none"> • notice of meeting • explanatory statement • quorum for the meeting • chairman of the meeting • proxies • restrictions on voting rights • voting by show of hands • demand of poll shall be governed as per the provisions of the AOA of the private company. In absence of provisions in the AOA, the provisions of 2013 Act will apply.
8.	Section 117(3)(g)	Resolutions and agreements to be filed with	Resolutions passed by the Board of Directors of a private company on exercise of specified powers by means of

		ROC	a resolution in a Board meeting are not to be filed with ROC.
9.	Section 141(3)(g)	Eligibility, Qualifications and disqualifications of auditors	Audit of private companies having paid up share capital of less than ₹ 1 billion will not be counted in determining ceiling of 20 companies for appointment as auditor.
10.	Section 160	Right of persons other than retiring directors to stand for directorship	Provisions pertaining to submission of candidature of directorship along with deposit of ₹ 1,00,000 shall not apply.
11.	Section 162	Appointment of directors to be voted individually	2 or more directors can be appointed by way of single resolution at a general meeting.
12.	Section 180	Restrictions on powers of Board	Restrictions on powers of Board requiring shareholders approval will not be applicable to private companies.
13.	Section 184(2)	Disclosure of interest by director	Interested director may participate in Board meeting in which a contract or arrangement is discussed wherein he is interested, after disclosure of his interest.
14.	Section 185	Loan to directors, etc.	Prohibition on providing loan to directors and other person in whom director is interested shall not be applicable if following conditions are fulfilled: <ol style="list-style-type: none"> 1. No other body corporate has invested any money in its share capital 2. Borrowings from banks, FI's or any body corporate is less than twice its paid up capital or ₹ 500 million, whichever is lower, and

			3. Such a company is not in default in repayment of such borrowings subsisting at the time of granting loan
15.	Section 196(4) and (5)	Appointment of managing director, whole-time director or manager	Shareholders', Central Government approval and filing of return with ROC not required for appointment of managing director, whole-time director or manager of a private company.

Conclusion

The draft notification once implemented is likely to minimize procedural compliances for private companies. It will provide enhanced operational freedom to private companies - especially family owned private companies and Indian subsidiaries of foreign companies operating as private companies.

This is a step in Government's efforts to ease doing business in India.

The draft notification will be effective on publication of the notification in the Official Gazette after the statutory Parliamentary approval process.

Source: Draft Notification issued by MCA on 6 June 2015

Upcoming webcast

Black Money Act – An Analysis and Implications

Wednesday, 10 June, 2:30 PM – 3:30 PM IST

The Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act, 2015, commonly referred to as the Black Money Act (BMA), has received the assent of the President and has now become law. Tune in to learn more about the Act and its Implications

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Contacts

Ahmedabad

Heritage, 3rd Floor,
Near Gujarat Vidyapith,
Off Ashram Road,
Ahmedabad – 380 014.
Tel: + 91 (079) 2758 2542
Fax: + 91 (079) 2758 2551

Coimbatore

Shanmugha Manram
41, Race Course,
Coimbatore
Tamil Nadu - 641018
Tel: + 91 (0422) 439 2801
Fax: +91 (0422) 222 3615

Kolkata

Bengal Intelligent Park Building Alpha,
1st floor, Block EP and GP Sector V,
Salt Lake Electronics Complex,
Kolkata - 700 091.
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

Bangalore

Deloitte Centre, Anchorage II,
100/2, Richmond Road,
Bangalore 560 025.
Tel: +91 (080) 6627 6000
Fax: +91 (080) 6627 6010

Delhi/Gurgaon

Building 10,
Tower B, 7th Floor,
DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Mumbai

Indiabulls Finance Centre,
Tower 3, 28th Floor,
Elphinstone Mill Compound,
Senapati Bapat Marg, Elphinstone (W),
Mumbai – 400013
Tel: + 91 (022) 6185 4000
Fax: + 91 (022) 6185 4101

Chennai

No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar,
Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5050

Hyderabad

1-8-384 and 385, 3rd Floor,
Gowra Grand S.P.Road,
Begumpet,
Secunderabad – 500 003.
Tel: +91 (040) 6603 2600
Fax: +91 (040) 6603 2714

Pune

106, B-Wing, 7th Floor,
ICC Trade Tower,
Senapati Bapat Road,
Pune – 411 016.
Tel: + 91 (020) 6624 4600
Fax: +91 (020) 6624 4605

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