Confederation of Indian Industry

POLICY watch

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Focus: Legal and Regulatory Architecture – The Companies Act, 2013

The Companies Act, 2013 and Rules made thereunder have been in force for over nine months now, however, industry has been experiencing obstacles in compliance with some of the provisions. With implementation effective from 1 April, 2014, it has surely changed the way companies operate and are regulated in the country – be it governance, management, auditing or disclosures or transparency - given its sizeable canvas and reach.

CII has been advocating and bringing these compliance challenges to the notice of the Ministry of Corporate Affairs (MCA) through various mediums including consolidated CII Representations; closed-door meetings with industry captains; one-to-one meetings with concerned Ministers and other key officials at the MCA. Based on these submissions and interactions, many concerns highlighted by CII post notification of the Act and Rules have been clarified / notified by MCA. It is reassuring and encouraging to see that the Government has been taking cognizance of stakeholders' views in a constructive manner and steadily easing implementation of the Act and the Rules keeping compliance lucidity in mind.

Some of the concerns addressed include clarification on the status of private company being subsidiary of foreign company; treating directors of public companies as 'related party'; pecuniary transactions or relationships for determining the status of a director with reference to his independence; payment of remuneration to an independent director of the holding company by a subsidiary; saving provisions in respect of the existing equity shares with differential rights; NBFCs exempted from creating Debenture Redemption Reserve in case of privately placed debentures; transition period for undertaking deposit insurance.

Acceding to industry submissions, some of the issues with respect to related party transactions; confidentiality in business; loans; fraud etc are slated to be settled with notification of the Companies (Amendment) Bill, 2014. While the Bill has been passed in Lok Sabha, it awaits passage in the Upper House of Parliament. Draft notifications have also been initiated by MCA for exempting private companies from some of the more stringent requirements under the Act. However, till the Amendment Bill is notified and final notification for private companies is promulgated, applicability of these provisions should be postponed by MCA.

There are still many concerns being faced by industry. CII has submitted three detailed representations to MCA during September / October 2014 covering unresolved issues; supplementary issues faced in the course of implementation; and recommendations for Amendments to the Act.

A summary of these three representations have been highlighted in the Policy Barometer section of this publication. These include provisions relating to onerous requirements for private companies and closely-held unlisted public companies; related party transactions; CSR; amounts treated as deposits; loans to employees; criminalisation of offences; certification of internal financial controls instead of internal control over financial reporting; consolidation of accounts; cost accounting and audit; alignment with SEBI regulations, etc amongst others. These provisions require reconsideration either due to their extended reach or complexity in drafting the regulation or practical difficultly in compliance.

This issue of Policy Watch is intended to be one of the mediums of apprising regulators, industry and stakeholders of the issues that need to be tackled for smoother implementation of the Act. With continual advocacy by CII, we do hope these and other pertinent issues highlighted by the industry will receive kind attention and consideration from the Government.

The provisions of the Act have a huge impact on corporate functioning. It is vital that the same is designed and implemented in a manner that boosts business as against being an impediment. Legislation should not be framed keeping only the outliers in mind. A large part of the industry is law-abiding. Imposition of rigours to discipline some errant companies should not be made applicable to the entire spectrum of corporate India. The Companies Act prescribes adequate disclosures to pre-empt and weed out frauds, collusion, corruption and other misdemeanours, obviating the need to follow a stringent approach. ■

Chandrajit Banerjee
Director General
Confederation of Indian Industry

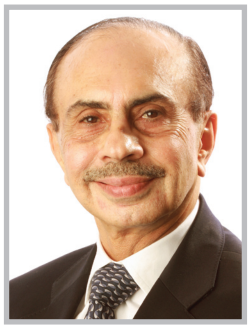
Inside this Issue

Implementation Challenges of The Companies Act, 2013

The Companies Act, 2013 has been in force for close to a year now. Companies now have a realistic familiarity in terms of understanding how the new provisions are panning out practically. While the Act has a bearing on the entire functioning, there are some provisions which have a huge impact on corporates.

CII has been engaged with the Government in the evolution of the Act and several concerns highlighted by CII have been addressed to the satisfaction of industry. However, with implementation effective from 1 April, 2014, the regulatory regime brought in by the new Act has thrown up multiple challenges for industry and business. While there are some issues that can be sorted by way of clarifications, there are quite a few provisions which would need an amendment to the Act.

Industry appreciates that the Ministry of Corporate Affairs (MCA) has been heeding industry concerns and making conscious efforts to streamline them. MCA has been coming out with a slew of notifications and clarifications which have been very helpful - especially clarifications that are allowing continuation of actions taken under the regime of the 1956 Act and those that are allowing time for transition to the new provisions. The Companies (Amendment) Bill, 2014 passed in the Lok Sabha will address many of the implementation issues being faced by industry on notification. Easing provisions with respect to related party transactions (RPTs) will ease corporate functioning. Provision of omnibus approvals for RPTs on annual basis by empowering Audit Committees will ease the burden of the Audit Committee while helping align the requirements with that of SEBI. Prohibiting public inspection of Board resolutions filed with the RoC will help restore corporate confidentiality. Prescribing materiality for frauds that need to be reported to the



Adi Godrej
Past President, CII and Chairman, Godrej Group

Government will keep the auditor's reporting focused on material frauds.

Specific Issues

The Government needs to focus on some of the larger issues which need to be addressed - lest they hamper corporate functioning in the long run. The new Act has made it very challenging for directors of companies. Too many requirements, certifications and responsibilities have been cast making it practically difficult to fulfil them. Such extensive certifications by directors need to be reconsidered – especially, say provisions including certifying detection and avoidance of frauds; effectiveness of internal financial control and compliance systems; and performance evaluation. In fact, the Act mandates that directors shall declare that the company has devised systems to ensure compliance with multiple laws and that they are operating effectively. The provision does not consider materiality of laws and expects companies to disclose all non-compliances across the globe. This is humungous and does not provide information which is meaningful or useful. Non compliance or violation under each law needs to be dealt with under respective laws and not under the Companies Act.

Responsibilities of independent directors especially to balance interest of multiple stakeholders - company, employees, shareholders, community, and environment – need to be streamlined and made clearer since there are no measurement parameters for the same. In fact to enable evolution, definition, role, liabilities of independent directors, Schedule IV needs careful review. Company threshold for appointing independent directors need to be revised upward, lest there be a shortage which we are facing already. Nomination and Remuneration Committees are expected to prescribe evaluation criteria; carry out evaluation; recommend appointment and removal; lay down remuneration policies. Provisions such as these could make the Board's functioning very difficult, resulting in break-down of trust and too much caution. In fact, I think the methodology of evaluation should be left to the corporates.

Public companies which did not have certain obligations under the 1956 Act are now covered by such requirements like independent directors, minority shareholder voting for related party transactions, which are onerous. MCA is proposing to exempt Private Companies from many of the requirements. It is our submission to extend such exemptions also to Public Companies with insignificant Public holding.

Provisions pertaining to Related Party Transactions indirectly seek to vest power in minority in most cases which is against the fundamental principle of shareholders' democracy and majority rule. Legislation should balance interests of multiple stakeholders and equity must apply to both big and small shareholders to avoid misuse of the provisions by any class - majority or minority.

While on Related Party Transactions, the need for disinterested quorum in shareholders' meeting will also be a challenge - especially since further investments in subsidiaries or joint venture companies have not been specifically exempted. Such an exemption needs to be provided to avoid a complete deadlock situation - say for JVs where one of the JV partner is a related party. A provision needs to be inserted in Rules to take care of such situations. This issue is also a huge concern for PSUs.

On the crucial issue of Corporate Social Responsibility (CSR), we would again assert that corporates should be allowed adequate legroom to comply with the CSR provision in a self-responsible manner. Incidental and supplementary activities even if related to Company's business should be allowed as CSR so long as they fall in the activities specified in schedule VII. Onerous provisions would hold back innovation, defeat legislative intent and shift the focus from 'comply with conscience' to 'tick-box compliance.' Also, there needs to be more clarity on CSR for it to be a tax deductible expenditure.

Requirement of rotation of auditors for companies other than listed companies is prescribed under the Act. CII strongly suggests that Private Companies and Public Companies which do not have substantial public funding be exempted from this requirement.

In fact, PSU members have also been suggesting how they need to be specifically exempted from selective requirements of the Act given their ownership and management. Some of these include segregation of position of CMD; retirement of directors by rotation; constitution of nomination and remuneration committee; performance evaluation.

For deposits, advances received from customers and outstanding for more than 1 year to be treated as public deposits puts unreasonable restrictions on corporates. In certain businesses like heavy engineering, IT services, hotel, accepting customer advance is a routine matter and hence exemption should be provided from the one year restriction if such customer advances are backed by duly signed commercial contracts for supply of goods or services to such customers.

On consolidation of accounts, in view of the roadmap issued by ICAI and Finance Minister's proposal, Indian GAAP would exist in its present form, atleast from the perspective of consolidated financial statements, for another one year. In such a scenario, mandating Indian GAAP for consolidated financial statements is not appropriate. With more and more Indian companies going global and most of the countries adopting/permitting IFRS, listed companies must be given the option to prepare Consolidated Financial Statement as per IFRS. This will facilitate consolidation and result in reduction of time and compliance costs for Indian companies. Standardized accounts will also help in raising funds in foreign markets at a faster pace and cheaper cost due to improved comparability of financial statements with global peers.

Conclusion

CII has all along underscored the need for ensuring that the new Law aims at progression and development of business instead of impeding it. The Law needs to contemplate and weigh up the interests not just of stakeholders but also take forward the business objects of the corporates. At a time when the situation warrants decentralization of decision making to lower levels, the new Act prescribes more centralization at Board levels. Industry hopes that the Ministry would take into consideration the challenges being faced by corporates and take corrective steps in consultation with all stakeholders.

I feel that the Government needs to proceed with a basic premise of trust in mind. While the corporates are expected to comply with the new Law; the expectation from the regulatory mechanism is clarity and certainty on implementation of the new provisions. One or two incidence of corporate malfeasance should not lead to mistrust of the entire spectrum of corporate India. The Prime Minister is showing us the way by reposing trust in the citizens of the country - through a series of self certification measures. While the country is on its way to improving its image, a rational corporate and investor friendly Company Law would clearly pave a way for corporate India to adhere to the new Law in true letter and spirit. India needs to be put back in the League of Nations having simple and investor friendly legislations. ■

The Companies Act, 2013 has thrown various challenges, especially for PSUs. In particular, Government Companies (where appointments as well as terms and conditions of appointment of Directors, their remuneration, tenure etc. are decided by the Government of India) face various issues in ensuring compliance with the provisions pertaining to composition of the Board, Woman Director, appointment of requisite number of Independent Directors, vetting the independence of Independent Directors, Provisions of nomination & remuneration committee, succession planning and performance evaluation of Directors / Board. PSUs also face increased compliance requirements pertaining to Related Party Transactions (including those between Government Companies) as well as CSR expenditure etc. The compliances under Companies Act, 2013 have also put onerous responsibilities and liabilities on the Board of PSUs for protection of all stakeholders, ensuring sustainable practices and overall corporate governance across the company.

B Prasada Rao

Chairman, CII Public Sector Enterprises Council and Chairman & Managing Director, Bharat Heavy Electricals Limited (BHEL)

Accounting and Reporting Changes – Need for MCA to Support Corporate India

The Indian Companies Act, 2013 marks a paradigm shift in India's corporate law regime and has far reaching implications for both domestic Indian companies and overseas investors with a presence in India. The Act promises to substantively raise the bar on governance and deal with investor protection and fraud mitigation, inclusive agenda, auditor accountability, reporting framework, director responsibility and efficient restructuring. On the other hand, certain provisions of the Act may result in unintended hardships for some companies, especially in the area of reporting framework.

B Srikanth
Global CFO
Bharti Airtel Limited

IGAAP, Ind AS and IFRS

In the earlier Companies Act, there was no mandatory requirement for companies to prepare consolidated financial statements (CFS); however, SEBI had mandated CFS for listed companies. In April 2010, in view of the proposed convergence to International Financial Reporting Standards (IFRS), SEBI issued guidelines granting an option to listed companies to publish CFS drawn either in accordance with Indian GAAP (IGAAP) or IFRS. This flexibility was a very significant and positive development, and several companies adopted IFRS as the standard for publishing CFS. Since then, we have seen many Indian companies publishing accounts based on IFRS.

Needless to mention, with Indian companies becoming more and more global and capital market boundaries thinning, IFRS offers significant advantages over IGAAP, such as:

i. Reduction in time and compliance costs for Indian multinational companies which have overseas subsidiaries maintaining accounts in IFRS.

ii. Increased acceptability of consolidated financial statements globally and ease in raising of funds in foreign markets at a faster pace and cheaper cost.

iii. Improved comparability of financial statements with global peers, since their IFRS based statements speak uniform accounting language.

The Companies Act, 2013 mandates publication of CFS, which is a welcome move, since the Act is now aligned with SEBI's Listing Agreement. However, the Act prescribes IGAAP as the standard for preparation of CFS. With the notification of Indian Accounting Standards (Ind AS), consolidated financial statements would be required to be prepared in accordance with Ind AS (the Rules mandates implementation of Ind AS in a phased manner). The Institute of Chartered Accountants of India (ICAI) has done a superb job of achieving near convergence of Ind AS with IFRS, with the exception of a few 'carve outs'. The overall reporting standards and governance would undoubtedly improve after companies' transition to Ind AS in line with the mandated time line, which is 1st April 2016.

At this moment, it may be worth reflecting on the opportunity that this situation presents to the Government and Corporate India. Companies with vast global presence, international capital market presence either in the form of debt or equity and many subsidiaries in overseas countries are anyway keen on continuing the pristine IFRS as their main standard for publishing CFS. SEBI having recognized the global nature of IFRS had permitted adoption of IFRS for publishing CFS, way back in April 2010. After 5 years and with increased globalization, it would be rather odd for the country's regulation to now disallow IFRS, and mandate Ind AS, whatever be the degree of convergence. Ultimately, what matters to investors is the harmonization of the accounting language in its fullest form.

Hence, it is requested that:

1) The MCA should align itself fully with SEBI, by amending the Act / Rules to give an option to listed entities to publish CFS based on IFRS instead of Ind AS. This would ensure continuity of the global standard for reporting, and sustain investor confidence. Such an option of continuing IFRS for CFS would be a big relief to groups which have many overseas subsidiaries.

2) A few listed entities who have adopted IFRS may however decide on transition to Ind AS for practical reasons, such as: their Indian entities anyway would be into Ind AS, and overseas subsidiaries may be few. In such cases, the ICAI should amend Ind AS 101 - First-time Adoption of Indian Accounting Standards to allow transition from IFRS to Ind AS directly. In the absence of this flexibility, such groups will need to migrate in two steps – IFRS to IGAAP, and then IGAAP to IFRS, which is an unwanted and cumbersome migration!

Information Asymmetry in a Highly Competitive World Should be Avoided

The Companies Act, 2013, requires uploading of the audited financial statements of its subsidiaries on the website of the parent company. It is important to note that in some jurisdictions, audit is not mandatory for companies which are below the prescribed threshold. It also requires a summary of financial information to be presented for each of the subsidiaries, joint ventures and associates. Further, the new Act also requires the report of the Board of Directors to be prepared on the basis of standalone financial statements of the parent company and each of the subsidiaries, associates and joint venture companies. No such rules / requirements are prevalent in any other country.

Many Indian companies are competing in overseas markets through subsidiary companies, joint ventures and associates registered in those countries. By publishing the financial statements of all such entities and by including a report on each of their performance and financials in the main Board of Directors' Report, thus making them available in public domain, information asymmetry will be created to the disadvantage of Indian companies operating overseas.

In these circumstances, it is important that the requirement to upload audited subsidiary financial statements and presentation of summary financial information for subsidiaries, associate companies and joint ventures be dispensed with. Alternatively, this requirement be made mandatory only for Indian subsidiaries, associates and joint ventures. Also it is equally important that the requirement to present the Board Report based on the standalone financial statements may be modified, so as to be based on consolidated financial statements though the summary financial information may be presented on a standalone basis. ■

CSR Prescribed in The Companies Act, 2013

Introduction and notification of Corporate Social Responsibility (CSR) in the Companies Act, 2013 is a historic development, with India leading such an initiative for the first time in the world. While notifying the Section and Rules, the scope of CSR activities has been limited to those enshrined under Schedule VII. It needs to be appreciated that the term 'CSR' does not have a universally accepted definition. Companies should be allowed to creatively innovate and integrate CSR strategies within their businesses that create enduring sources of livelihood and other societal value. Precluding corporate Boards from determining what would constitute CSR goes against the very premise of the Act, which is built on self-governance and enhanced disclosures.

J Sridhar
Company Secretary
Bajaj Auto Limited

Before the CSR provisions became mandatory, industry opposed mandatory inclusion of CSR in law mainly on the ground that conscience cannot be mandated. Industry represented that if mandated, it should, at the most, provide an enabling framework rather than a narrow and prescriptive one. It suggested that scope of CSR be kept as wide as possible with scope for inclusion of additional intervention areas. CII also suggested that industry bodies be encouraged to prepare voluntary guidelines with ways in which social responsibility could be integrated into business persuasion by companies.

The current provision that has finally emerged appears rather prescriptive and hence is challenging. As Indians, community development is ingrained in our system and therefore CSR initiatives have been deeply embedded in the corporate culture from the very beginning. In view of some path-breaking initiatives undertaken by corporates across the spectrum – in rural development, in agriculture, in rehabilitation post-natural calamities, for poverty alleviation, skilling, education, etc – the Government should

allow legroom to corporates to comply with the provision in a manner best suited to each one of them beyond the prescribed Schedule VII. This will help industry develop pioneering strategies and undertake meaningful CSR initiatives in a self-responsible manner. The provision in its current form being onerous, it may just shift the focus from 'comply with conscience' and relegate it to another tick-box compliance – which, I am sure is not the intent at all! Social responsibility should be allowed to be integrated into business persuasion by companies in a gradual manner instead of being mandated forcefully. Only then will it be embedded into business strategy in a wilful manner.

The new rules, not surprisingly, do not provide clarity on the taxation front for companies. There is no reference to tax treatment of CSR expenses - something that falls under the exclusive domain of the Income Tax law. There needs to be clarity in the Income Tax regulations. The question is whether CSR spend - now mandated by law – can be treated as a deductible business expenditure.

Industry has been suggesting that the power to decide CSR activities should be vested with the Boards. Such delegation of powers would be with the very premise of the Companies Act – self-governance and enhanced disclosures. It is suggested that while considering various proposals that may come up before the Ministry for clarification, the scope of CSR be kept as wide as possible with scope for inclusion of additional intervention areas.

Anomalies

Some of the many anomalies in the CSR statutory provisions and rules thereunder are given below:

1. **Applicability**

   Provisions relating to CSR are primarily contained in Section 135 of the Companies Act, 2013. It is applicable to every company having –

   a) net worth of Rs.500 crore or more; or

   b) turnover of Rs.1,000 crore or more; or

   c) a net profit of Rs.5 crore or more during any financial year.

   Thus even if one of the criteria is met, the company gets covered under Section 135.

   Section 135(1) talks about `every company'. This term is defined in Section 2(20) "as a company incorporated under this Act or under any previous company law."

   Rules 3(i) of the Companies (CSR Policy) Rules, 2014 expands the scope by stating `every company' including its holding or subsidiary and a foreign company defined under Clause 42 of Section 2 of the Act having its branch office or project office in India which fulfils the criteria specified in Section 135(I). In other words, by a delegated legislation, a holding company or a subsidiary or a foreign company also gets covered under Section 135(1).

2. **Any Financial Year**

   MCA issued a General Circular No.21/2014 dated 18 June 2014 giving clarifications on the provisions of CSR under the Companies Act, 2013. As per that, any financial year referred to herein implies `any of the three preceding financial years'. It is difficult to understand as to how `any financial year' can be read to mean any of the three preceding financial years. This clarification also seems `ultra vires' the original provision. It should have been just the preceding financial year.

3. **Transition Time for Compliance**

   Section 149(5) provides companies with one year from 1 April 2014 to comply with the requirements of independent directors. Such companies need to be given one year similarly to comply with the requirement of having a CSR Committee with at least one independent director. Such a provision, however, has not been made in the Rules or the clarifications.

4. **Types of CSR Activities**

   We can see major shifts in the thinking of MCA with regard to carrying out the activities specified in Schedule VII. Section 135(3) refers to a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII. CSR Rules departed from this thinking and in Rule (6) & (7) on CSR Policy and CSR Expenditure respectively stipulate that CSR activities should fall within the purview of the Schedule VII to the Act. The see-saw continued when the clarifications were issued, with liberal interpretation being permitted "to capture the essence of the subjects enumerated in the said Schedule". For instance, promotion of road safety or consumer protection services are getting covered under promotion of education, provisions for aids and appliances to the differently abled persons are getting covered under promoting health care and trauma care is getting covered under `health care' etc.

5. **Net Profit**

Net profit has been defined in Section 135 giving reference of Section 198, while in the Rules, further provisions have been provided. In case of overseas branch offices etc, where net profit is not calculated separately; how would the deduction in respect of overseas profits take place - that has not been clarified. There is quite a bit of confusion in the interpretation of the term 'Net profits'.

6. **CSR Reporting**

Rule 8 provides that 'The Board's Report shall include an annual report on CSR containing particulars specified in Annexure'.

Coming to the proforma of CSR Reporting each financial year, it is probably not envisaged that some large companies may have to report projects or programs which may run into several pages. Where the projects or programs involve less than 5 per cent of the total CSR expenditure during a financial year, disclosure should not be required individually and it should suffice, if all such items are clubbed together in `Others' category.

In the Annexure to the CSR Policy Rules, there is also a requirement for a Responsibility Statement of the CSR Committee that the implementation and monitoring of CSR Policy is in compliance of CSR Objectives & Policy of the company. This apparently is an additional Responsibility Statement over and above the Responsibility Statement which is also part of the Board Report.

7. **MCA Circular**

Expenses incurred by companies for compliances under any Act / Statute (Labour Laws, Land acquisition etc.) also would not qualify as CSR expenditure. Obviously, it is presumed that CSR expenditure incurred under Section 135, which actually is expenditure for compliance purposes, would qualify as CSR expenditure.

There are many such anomalies in the current provisions and the same are not elaborated here. CSR provisions in India are evolving and it may take some time before the issues settle down both from the corporate point of view as well as from the regulator's. MCA should act fast and proactively to resolve all these issues. ■

Harmonizing Indian Laws – A Step Towards 'Ease of Doing Business'

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DH Consultants Pvt. Ltd.

The Companies Act, 2013

The Companies Act, 2013 ('the Act') has been in limelight since its notification in the official gazette. It's a modern piece of legislation and a rule based law, paving the way for lesser regulation, more compliance and igniting the entrepreneurial spirit in India by offering 'freedom' to entrepreneurs.

The Act is being notified in Phases. The first phase saw 98 of the 470 Sections (spread over 29 Chapters) being notified on September 12, 2013. After a couple of months, the Ministry further notified 183 Sections in March, 2014, making almost 60 per cent of the Act live and in force. In March 2014, rules for 19 Chapters out of the 29 chapters were notified. The notification of the rules brought about the much needed clarity for implementing various sections of the Act.

The Act is highly dynamic in nature and continuous amendments/clarifications are being issued on the notified Sections and Rules. The Ministry has till date issued 49 Circulars, 20 Notifications and 7 Orders for ease of implementation and interpretation of various provisions of the Act.

Quick Snapshot

Particulars	Period
Notification of Companies Act 2013, encompassing 470 Sections	August 2013
Notification of 98 Sections	September 2013
Notification of 183 Sections	March 2014
Rules related to 19 Chapters	March 2014

As on date 189 Sections and Rules for 19 chapters are yet to be notified. The Chapters/Sections that are pending to be notified by the Government mainly relate to Compromises, Arrangements and Amalgamations, Prevention of Oppression and Mismanagement, Registered Valuers, Removal of Names of Companies from the Register of Companies, Revival and Rehabilitation of Sick Companies, Winding Up, Class Action Suits, National Company Law Tribunal & Appellate Tribunal and Special Courts.

The new Act is a significant departure from the erstwhile Companies Act, 1956 mainly in the areas of governance, compliance and enforcement, outlining duties and liabilities of directors, rotation of auditors, disclosure norms, mergers & acquisitions. It provides stringent penalties for non compliances. Also, certain new concepts such as one-person company, small companies, dormant company, registered valuers and corporate social responsibility have been introduced.

In order to eliminate the difficulties faced by Private Limited Companies, Ministry of Corporate Affairs (MCA) has issued a draft notification granting certain exemptions. Further MCA has also introduced Companies Amendment Bill, 2014 to address various anomalies under the statute.

The Ease of Doing Business in India

At the recent 'Vibrant Gujarat Meet', our Honourable Prime Minister, on the Government's commitment to great future for India, said "we know that to do this, we need the enabling policy framework. We are working constantly to improve it further." He also promised to make India the easiest destination to do business with a suitable tax regime and predictable, transparent and fair policy environment.

Even though India slipped to the 142nd position in World Bank's annual report on 'Ease of Doing Business Report – 2015' from 134th last year, as the rankings given in 2015 were based on reforms introduced by the previous Government till May 2014, the new government is committed to bring India amongst the top 50 nations in 'Ease of Doing Business'.

Recent Regulatory Changes

Apart from the Companies Act, 2013, which is a dynamic law and has seen various changes since its notification, there have been various other changes in the recent past with regard to the other regulatory frameworks. Securities and Exchange Board of India (SEBI) amended the Clause 49 of the Listing Agreement for Listed Companies effective October 1, 2014. Central Government came out with new insurance ordinance bringing in significant changes related to FDI limits, investment norms, Commission payments, etc.

The MCA has also revised the Roadmap for Ind AS implementation in India, making India's commitment to move towards Global accounting standards, a reality.

Conflicting Provisions

Considering the complex regulatory and legal structure of India, carrying out the business by Indian companies within single framework is quite farfetched. The immediate need is to resolve conflicting provisions on various matters between the Act and SEBI laws and regulations, some of which are highlighted below:

Related Party Transactions

Related Parties and transaction therewith have been dealt with in the Act and also in Clause 49 of the Listing agreement. The Act requires Companies having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, to obtain prior approval for transactions which are not at arms length or in the ordinary course of Business. However, Clause 49 of the listing agreement requires all related party transactions exceeding 10 per cent of latest audited consolidated turnover to be approved by shareholders. There are no carve outs for 'arms-length' and 'ordinary course of business' transactions as set out in the Act, hence it is extremely onerous for listed companies to comply with these provisions. Related parties for whom approvals need to be taken are also different under the two since MCA has clarified that it will mean related party only with respect to the transaction in question whereas SEBI has not clarified this yet.

Independent Director – Pecuniary Relationship

The Act mandates Companies falling under the prescribed criteria to appoint on its Board, Independent Directors and so does Clause 49 of the Listing Agreement. However, a conflict arises on who can be appointed as an Independent Director on Board. As per Clause 49, an Independent Director is defined to mean a director who has or had no 'material' pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. However, the word 'material' has been missed out in the definition under the Act which would reduce the chances of quality people to act as Independent Directors.

Issue of Shares at a Discount

Section 53(1) of the Act restricts a company to issue shares at discount except in case of issuance of stock options. However, SEBI ICDR Regulations allows a Company to issue shares based on market price which could be less than the face value for certain kinds of companies like the loss making or start up companies.

Insider Trading

The offence of insider trading is expressly dealt with under the SEBI Act. Now, with the insertion of similar provision in the Companies Act, there is dual offence for the same violation.

Why Harmonisation is Important

India always had great potential for doing business but the hardships faced due to multiple and complex laws and regulations makes it difficult to do business in India. However, now with commitments of the new Government to simplify the laws and facilitate ease of doing business, a positive sentiment has been created and entrepreneurs and companies from the world over are now looking forward to come to India. Similarly, global investors are also looking for opportunities to invest in Indian businesses. Various regulatory changes such as the new dynamic Companies Act, increased FDI limits for the Insurance sector, move towards Ind-AS, etc are signals to the globe that we are moving towards change.

Continuing ambiguities in existing laws, may act, as a hindrance and Government needs to resolve such conflicting situations to fulfil its commitment. ■

Applicability of Reporting on Internal Financial Controls in The Case of Consolidated Financial Statements Under The Companies Act, 2013

Audit of Financial Statements and Audit of Internal Financial Controls

Section 143(9) of the Companies Act, 2013 (the Act) requires the auditor to comply with the Standards on Auditing. The Standards on Auditing to be followed by an auditor is applicable only to an audit of financial statements and will not be adequate for reporting on internal financial controls.

SA 200 dealing with 'Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Standards on Auditing' states that the standards do not apply for conducting an audit for expressing an opinion on the operating effectiveness of internal controls and that the auditor would be required to undertake further work if the auditor had additional responsibilities to provide such opinions.

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Chairman
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Consequently, audit of financial statements and an audit of internal financial controls are not the same.

Possible Interpretation of Provisions Relating to Internal Financial Controls in the Act

Scope of Section 129(4) does not extend to internal financial controls.

Section 129 (4) of the Act specifies that the provisions of the Act applicable to the preparation, adoption and audit of the financial statements of the holding company shall, *mutatis mutandis*, be applicable to the preparation, adoption and audit of the consolidated financial statements. Thus, the provisions relating to internal financial controls are not stated in Section 129 of the Act which relate to financial statements.

In Section 134 of the Act, which deals with financial statements and Board Report, the requirements relating to internal financial controls are not dealt with in either Sub-section (1) or (2) of Section 134 which relate to financial statements and attaching the auditors' report. The requirements relating to internal financial controls are explained only as part of the provisions of Sub – section (5) relating to the directors' Responsibility Statement.

Considering the above and the fact that audit of internal financial controls and audit of financial statements are not the same, Section 129(4) appears to deal with only the audit of the consolidated financial statements.

Director's Responsibility on Internal Financial Controls Limited to Stand-alone Company

Section 134(5)(e) specifies director's responsibility on internal financial controls only in respect of listed companies. However, Rule 8(5)(viii) of the Companies (Accounts) Rules, 2014 requires the Board Report of all companies to state the details in respect of adequacy of internal financial controls with reference to the financial statements.

It may be noted that as per Rule 8(1) of the Companies (Accounts) Rules, 2014, the Board's Report shall be prepared based on the stand-alone financial statements of the company. Further, with respect to the subsidiaries, associates and joint ventures, the Board Report shall contain a separate section reporting the performance and the financial position for each such entity. However, the Rule does not specify the Board reporting on internal financial controls for the subsidiaries, associates and joint ventures considered in the consolidated financial statements.

Consequently, the Directors Responsibility with respect to internal financial controls, have been specified under section 134(5)(e) only in case of listed companies and appears restricted to that of the standalone financial statements. The responsibility of the directors for internal financial controls does not seem to extend to the consolidated financial statements.

Absence of Provisions in India Similar to the Requirements in the USA Pursuant to SOX

The Public Company Accounting Oversight Board (PCAOB) was constituted under the Sarbanes Oxley Act to regulate the audits of companies with securities listed in the United States of America.

In 2003, the PCAOB finalised a set of rules requiring registration of firms that audit US listed companies. Audit firms outside of the US that audit entities with a primary or secondary listing in the US, or a significant subsidiary thereof, need to register with the PCAOB.

The ability of US audit firms to sign-off on internal controls over financial reporting on a consolidated basis is primarily and probably solely because of the registration requirements with the PCAOB.

In India, we do not have a similar law that requires foreign audit firms to register with a regulator in India who would then permit them to carry out an audit of a significant subsidiary of an Indian company or perform a substantial role on such audits. Consequently, an auditor in India cannot impose the requirements of Companies Act, 2013 on a foreign auditor with respect to components situated outside the country.

Further, foreign audit firms reporting on the financial statements of foreign subsidiaries of an Indian holding company normally report under the International Standards on Auditing (ISA), which are similar to the SA in India and, therefore, do not conduct an audit or express an opinion on the adequacy or operating effectiveness of internal financial controls, as explained in the paragraphs above.

Considering the above, and the high standards of auditor's duties and responsibilities specified in the Act, including the consequences of any non-compliance or erroneous reporting, auditors in India may not be able to meet the reporting requirements relating to internal financial controls in the case of consolidated financial statements.

Clarification Required from the MCA Regarding Internal Financial Controls

Based on the matters discussed above on

i. the possible interpretation of exclusion of internal financial control from the purview of the requirements of Section 129(4);
ii. the possible limitation of director's responsibility on internal financial controls only to the standalone company; and
iii. the Indian auditor's limitation/ inability in obtaining sufficient information from foreign auditors on matters relating to internal financial controls.

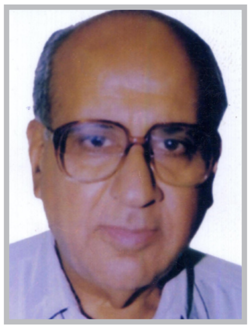
It may be clarified by the MCA that auditor's reporting on internal financial controls under section 143(3)(i) of the 2013 Act is limited only to the stand-alone financial statements of the company and will not be applicable in the case of consolidated financial statements. ■

Facilitating Funding Requirements of Private Companies

The Companies Act, 2013 by way of Section 73 and Section 76 has brought many changes in respect of acceptance of deposits by a company and the changes are applicable to Private Limited Companies also. Earlier the amounts that were outside the purview of 'deposit' included any amount received by a private company from a person who, at the time of the receipt of the amount, was a director, relative of director or member. This has now been restricted and companies will only be allowed to receive money from a director of the company – totally excluding relatives of the director.

This comes as a big blow to Private companies who now cannot borrow money from relatives of directors. Most Private Limited Companies have accepted unsecured loans from Directors' relatives or from its members as allowed under the provisions of Companies Act, 1956. As per Companies (Acceptance of Deposit) Rules, 2014 as applicable from 1st April, 2014 all such companies now have to refund such unsecured loan/deposit on or before 31st March, 15. By virtue of these provisions all private companies have to make huge arrangement for repayment and by the exodus of such deposit, most of the companies will face severe scarcity of the funds/ working capital. Businesses may come to standstill, which will have an adverse effect in terms of loss of employment, loss of revenue thereby having a negative impact on overall growth of the industry and economy.

One of the basic objectives of forming Private Companies is that such Companies may arrange means of finance through private resources. The company inducts directors' relatives / friends / associates as members so that they can finance



Subhash Vithaldas
Managing Director
Permali Wallace Pvt Ltd

business through personal resources by accepting secured / unsecured loan. If this basic advantage is taken away, the whole purpose of forming a private company may stand a challenge. Restricting this avenue will leave them only with the option of availing bank finances - which may or may not be available, not to mention the huge dependency it would create on the banking system. It may also be a very time-taking process due to lengthy disbursement procedure and regulations. This will be a huge impediment.

As per the old Act, a private company was allowed to issue secured debenture while giving security of immovable property. The value of security was to be greater than the value of issued debentures. As per the new act, a company can issue secured debenture and the money received against it will not be treated as a deposit by the company only if a first charge or first pari passu charge is created in favour of debenture holders.

This is creating practical implementation issues. For example, if the value of property is ten times of the issue of debenture and company also takes loan from the bank, the total loan is less than the value of the property. Example - Debenture issue Rs. 5.00 cr. Banks loan 10.0 cr.(for term loan) Rs. 5.00 cr (for CC Limit) total loan is 20.00 cr whereas value of property charged is Rs. 50.00 cr. The issue is that the Bank will not permit the first charge or first pari passu charge for debenture holders - they will permit only say the third charge.

The rules should be amended to say that the issue of debenture will be secured by proper value of property instead of first charge/first pari passu charge. This is vital for qualifying secured debentures as not being the deposits, as per Section 73 of the Act read with Companies (Acceptance of Deposits) Rules, 2014. When the First Pari passu charge is given to any Bank for the term loan, it will be very reluctant to give First Pari passu charge to Debenture holders/Depositors.

Generally, private companies are rather small set-ups and borrowing from a willing relative is a common phenomenon as very often, they are genuinely not in a position to avail of loans from banks etc. This needs to be set right and private companies should be allowed to take deposits not only from directors but also their relatives. Private Limited Companies should be out of the ambit of such provision. Rule 2(c) (viii) of the Companies (Acceptance of Deposit) Rules, 2014 should be amended to include director, relative of director or member. ■

Key Issues and Recommendations on The Companies Act, 2013

With implementation effective from 1 April, 2014, the regulatory regime brought in by the new Companies Act, 2013 has thrown up multiple challenges for industry and businesses.

CII has been advocating and bringing these challenges to the notice of the MCA and we are grateful that many concerns highlighted by CII post notification of the Act and Rules have also been clarified / notified. However, there are still many concerns and issues being faced by industry.

We are grateful that some of the issues with respect to related party transactions; confidentiality in business; loans etc have been settled in the Companies (Amendment) Bill, 2014. Post the passage in Lok Sabha, we now await its passage in the Upper House.

[Text in italics indicate issues that have been resolved / partially resolved by the Amendment Bill, 2014 – but are yet to be notified]

However, till this is done, the applicability of these provisions covered in the Amendment Bill and few other important ones – especially the following - must be postponed till amendments are approved by Parliament. For the other issues, they must be addressed by amending the Rules by the Ministry without any Parliament intervention:

- Disclosure of key Board decisions with Registrar of Companies (Section 117(3)(h) read with Section 179(3))
- Related Party Transactions (RPT): Section 188 and Section 177
- Exemption for certain class of companies including private companies and closely held companies with less than 10 per cent public shareholding
- Reporting in Directors' Report – Internal Financial Control and other disclosures (Section 134)
- Inter Corporate and Other loans, etc. (Section 186)
- Prohibition on Insider Trading (Section 194 and 195)

CII Submissions on Specific Provisions

Subsidiary / Associate

- Alignment of definition of subsidiary and associate with accounting standards.
- Need for defining the term 'joint venture'.
- Need to require consideration of only 'optionally convertible preference shares' in the definition of 'total share capital'.
- Transition period of a minimum of 3 years be provided for compliance with these definitions since companies will need to restructure themselves in line with the new definition, which would take some time.

Related Party Transactions

- *Remove restriction on voting by interested related parties, especially in case of wholly owned subsidiaries.*
- Ease provisions for related party transactions and provide guidelines as to which transactions would be or not be in the ordinary course of business or on arm's length basis.
- Clarify the concept of interested shareholders in case the minimum quorum is not met without the presence of interested shareholders - otherwise there will be a deadlock at shareholder meetings for such related party transactions in which shareholders are interested.
- Disclosure of sensitive information to shareholders could adversely affect the competition of the Company and must be revisited.
- There should be right for the Company to appeal to the Company Law Tribunal if the shareholders do not approve a proposed RPT.
- *Audit Committee is also required to approve each and every RPT.*

Loan and Investment by Company

- *Holding company should be exempted from charging any interest on loans extended to its wholly owned subsidiaries.*
- Based on exemption granted to joint venture companies, MCA should consider extending the exemption to all subsidiaries and not just wholly owned subsidiaries.
- Considering that many companies extend interest free or concessional rate of interest as an employee benefit, loans to employees should be exempt from the coverage of section 186.

Loan from Relatives of Directors

- Earlier amount received by a private company from a relative of a director was not considered deposit. This has now been restricted and companies are only allowed to receive money from a director of the company – totally excluding relative(s) of director. Generally, private companies are rather small set-ups and borrowing from a willing relative is a common phenomenon for funds. This needs to be restored and private companies should be allowed to take loans from not only directors but also their relatives.

Deposits

- Awaiting insurance product(s) for deposit cover, allow existing public FD programmes to renew existing deposits and accept fresh deposits.
- Clarification that commercial advances taken against specified goods / services in the normal course of business will not be covered within the purview of Rule 2(1)(c) and will not be treated as 'deposits' under the Companies (Acceptance of Deposits) Rules, 2014, even if not appropriated within the period of 365 days.

Accounts

- Safeguards may be provided for provisions relating to reopening of accounts since this provision may be misused and any transaction may lead to reopening of accounts.
- Publishing financial statement of a subsidiary, especially if it is a foreign company, on the website is a threat for confidentiality for the companies in terms of competition and should not be mandated.

Consolidated Financial Statements

- Option to prepare consolidated financial statements in accordance with IFRS (as permitted under the Listing Agreement) be continued. This will facilitate the IFRS convergence process as originally intended.

Internal Financial Controls

- Internal controls should be restricted to only internal controls over financial reporting, which refers to specifically only those controls which directly have an impact on the financial reporting. This will be in line with international practices.

Debentures

- Definition of the term 'debentures' be reworded to delete 'or any other instrument of a company evidencing a debt.' Currently appears to bring within scope almost all instruments available for raising debt including Commercial Paper (CP).
- Explicitly mention that a company may issue unsecured debentures.
- Requirement to secure bonds against specific property be deleted.
- On issue of secured debentures, 'specific' appearing before movable property (not being in the nature of a pledge) may be deleted.

Buyback

- Clarify that the securities premium account is available for buy back.

Independent Director

- Base the threshold for appointment of Independent Directors in public companies on the actual public shareholding in such companies and define the term 'Public'.
- In view of the shortage in the number of Independent Directors that meet the specific criteria the threshold limit needs to be revised; especially unlisted Public Companies.

Woman Director

- The thresholds for the requirement for woman director for unlisted companies should be reviewed and considerably enhanced.
- Any intermittent vacancy of a woman director shall be allowed to be filled-up within 6 months as against the currently prescribed (immediate next Board meeting or three months).

KMP

- Needs to be clarified that the requirement is only to appoint one such KMP and not all three wholetime KMPs.

Board Evaluation

- Methodology of board evaluation be left to corporates.

Nomination and Remuneration Committee

- Even small unlisted companies falling within the threshold (paid up capital as low as Rs 10 crore) will now be required to constitute an Audit Committee and Nomination & Remuneration Committee.
- Review the applicability of this provision to the unlisted companies. If complete dispensations of unlisted companies are not possible, at least the threshold should be significantly increased upward.

Board Meetings

- Remove total prohibition on conducting matters through audio visual means.

Auditor Rotation

- Re-consider the retrospective application of rotation of auditors and limit its applicability to listed entities and public interest entities.
- Rotation should not be mandated for private companies (particularly private companies which are subsidiaries of foreign companies) and public companies which do not have substantial public funding as it is not likely to have significant impact on auditor independence.
- Restriction on the services of an Auditor to companies, especially the management service and investment advisory, should be removed.
- Limit on number of audits has now been restricted to 20 and includes all the types of companies i.e., private companies. This limit should be reviewed.

Narrow and Prescriptive CSR Framework

- Allow corporates enough legroom for innovative initiatives to conduct CSR beyond the prescribed Schedule VII and revise thresholds for CSR.
- Expenditure on CSR must be allowed as a tax deductible expenditure.

Excessive Disclosures

- *Filing of Board resolutions with ROC which will destroy confidentiality of the Board minutes, which is not open to shareholders / public and hence, must be avoided.*
- Review and streamline disclosure requirements to avoid duplication, especially in the Board Report and Annual Return.
- Certifications by directors in the Board Report need to be reconsidered – especially provisions including certifying proper and sufficient care in preventing and detecting fraud/ other irregularities; adequacy, operation and effectiveness of internal financial control and compliance systems; statement indicating the manner in which annual formal performance evaluation of the Board was conducted; etc. are onerous and difficult in compliance.
- Many requirements require reproduction of matters in the Board's Report, which may be avoided by clarifying in the Act / Rules that disclosures on the website with web-link should suffice in such cases.
- Requirement for disclosure of salary details of all employees increases vulnerability and poaching. This puts Indian companies at a disadvantage compared to global companies which are not required to follow these disclosure requirements – and hence should be deleted.
- Secretarial Audit Report requires disclosure of compliance with all applicable laws and casts onerous obligations on the directors / officers / secretarial auditors. Such disclosures should consider materiality of laws / non compliances which has significant financials and/ or reputational impact.

Fraud Reporting

- *Clarifications required with respect to consideration of materiality, allegations vis-à-vis confirmed investigations, safeguarding the interests of auditors and directors*

Definition of 'Control'

- In the definition of the term 'control', 'or in any other manner' appearing after the words 'voting agreements' be deleted - the term is highly ambiguous and open to more than one interpretation.

Definition of Relative

- Limiting the definition of the term 'relative' to only 'financially dependent' relatives in the context of independent directors / auditors.

Exemption to Certain Companies

- Provides exemption to private companies from selective sections.
- Reinstate exemptions for Section 8 Companies [companies with charitable objects, etc.]
- Even public companies with less than 5 per cent public shareholding and not having Public Deposits should be considered at par with private companies and exempted from restrictive provisions.
- PSU companies need to be given specific exemption from selective requirements of the Act given their ownership and management. Some of these include segregation of position of CMD; retirement of directors by rotation; constitution of nomination and remuneration Committee; appointment of Independent Directors; performance evaluation etc.
- MCA also should bring in similar exemption and clarification, like SEBI has done, for small listed companies and relieve them from economically burdensome provisions, which do not have commensurate benefits for anyone.

Provisions Regarding Insider Trading (Section 195)

- The new provisions relating to Insider Trading under Section 195 of the Act may be deleted as the said offence is comprehensively addressed in the new SEBI Insider Trading Regulations notified by SEBI in January 2015. By the very nature of the offence, such offence can take place only in relation to the shares of listed companies and those companies that come under the jurisdiction of SEBI.

Cost Accounting

- MCA has announced amendments to the Companies (Cost Records and Audit) Rules, 2014 dated 31 Dec 2014. The amendments have listed additional sectors that have been mandated to maintain cost records and get the same audited, while reducing prescribed thresholds for companies to be covered. This has resulted in enhanced coverage of companies. Need for regulation in a particular industry needs to be considered before notifying a particular industry for mandatory maintenance of cost records and audit. The amended rules will impact confidentiality; non-disclosure agreements etc.

Stringent Penal Provisions

- Penalties prescribed be rationalized and the concept of minimum penalty and imprisonment be deleted from all sections. Judiciary should have the final authority and discretion to decide punishments for contravention and no minimum punishment should be part of law.
- Both under the Companies Act, 1956 and the new Act, whenever a company defaults in complying with any of the requirements of the law, it entails criminal liability that includes prison term. Technical defaults which are in the nature of minor infractions of the law should not carry criminal liability.

Detailed, section-wise Representations have been submitted to the MCA

Sections 235 and 236 provide an acquirer who acquires 90 per cent or more of the share capital of a company with the ability to offer to buy out the minority shareholders holding 10 per cent or less. However the acquirer has no squeeze out right and it is optional for the minority shareholder to tender his or her shares – effectively rendering the provisions powerless. We should consider, as recommended by the Standing Committee and as is also in line with practices in developed markets such as the US and UK, giving the acquirer the power to squeeze out and acquire the shares of minority shareholders holding not more than 10 per cent at the same price as that offered to the majority of shareholders, at a fair valuation of course.

Zia Mody
Chairperson, CII National Committee on Regulatory Affairs and Senior Partner, AZB & Partners

The Companies Cost (Records and Audit) Amendment Rules, 2014 notified by MCA on 31st December 2014 have lowered the thresholds for companies that need to maintain cost records and get the same audited – while also enhancing the sectoral coverage. The thresholds should be increased and sectors reduced. Companies have to provide cost data at CETA heading level, at times pertaining to only one product and in such cases there will be no confidentiality with respect to the product sales/cost/margin. This must be set right. For sensitive contracts governed by non-disclosure commitment clauses, it will not be possible for companies to provide access of information and documents for audit and disclosure purposes as it would amount to breach of contract.

N Hariharan
Executive Vice-President & Company Secretary, Larsen & Toubro Limited

Many additional obligations have been imposed by the new Companies Act on small public & companies such as induction of Independent Directors, minority shareholder voting for Related Party Transactions, mandatory Committees of the Board etc. We recognize the benefits of these changes in improving compliance and protecting public interest in large companies. However we need to keep in mind that India has a lot of closely held companies including Joint Venture companies with 2 or 3 partners. Also in many of the companies, though the number of shareholders could be more than 50, public shareholding would be minimal. These onerous requirements for such closely held companies would reduce the ease of doing business for such entities and be a hurdle to the employment as well as investment opportunities created by such companies. The Government has initiated action for exempting private companies from many of these requirements and it is our strong submission (which has also been looked at favourably by the Government) to extend these exemptions to public companies where public interests are minimal.

Rostow Ravanan
Executive Director & Chief Financial Officer, Mindtree Limited

While relief from deposit insurance has been provided till 31st March 2015, currently the Indian insurance sector does not offer any product for deposit cover as yet. On enquiry, Deposit Insurance & Credit Guarantee Corporation (DICGC) has also clarified that deposit insurance cover is currently available to banks only. Pending availability of such product(s), companies willing to offer deposit insurance will not be in a position to comply with this new requirement. Even though they may ensure compliance with all other requirements, they would not be able to renew existing deposits or accept fresh deposits because of non-compliance with the clause requiring provision of deposit insurance. This will result in a deadlock and would adversely impact expected cash-flows that the company may have factored in. More importantly, non-renewal / non-acceptance of public deposits w.e.f 1st April, 2015 would be hurting the retail investor community, especially the retired senior citizens whose savings plan and resultant interest income would be gravely compromised. It is submitted that MCA amend the Act/Rules to do away with the requirement of deposit cover. This matter must be given time to evolve, and as and when the Indian insurance sector is ready, the requirement may be considered.

Yezdi S Sabavala
Corporate Finance, Banking, Treasury & Insurance, Godrej & Boyce Mfg. Co. Ltd.

The erstwhile section 372A of the Companies Act, 1956 regulated only "inter-corporate" loans and advances; however section 186 of the Companies Act, 2013 extends the scope to loans given to "any persons" which is wide enough to include employees of a company. There needs to be a clear exemption provided for any company having an employee welfare scheme or any other company policy applicable to employees for providing them financial assistance in the form of interest free loans/advances, for personal exigencies namely loan for medical assistance including surgery, loan for higher education, etc. The Companies are currently left with no option but to either start charging interest, or suspend or put on hold the existing employee welfare scheme/ other financing policies, either of which is not likely to be taken favourably by the employees and could become a source of disharmony. MCA may through a clarification / rule exempt applicability of the provisions of Section 186 of the Companies Act, 2013 to financial assistance granted/ to be granted to the employees of a company.

Narayan Shankar
Vice President And Company Secretary, Mahindra & Mahindra Ltd

The definition as per Rule 4 still includes brother, sister, father, mother, son, daughter in law, daughter and son in law. It has been used across multiple sections making implementation challenging. These include (i) Disqualifying an Independent Director (ID) if relative has or had (in the previous 2 years) pecuniary relationship or transaction with the company, its holding company, subsidiary or associate company or their promoters, or directors amounting to specified some (ii) relative of ID should not have (in last 3 financial years) held the position of KMP in the company, its holding company, its subsidiaries or associates (iii) Directors have to disclose the shareholding of his Relative in the Company to the Company (iv) Audit Firm cannot take up audit of companies if partners and their relatives hold securities or interest in the company, its holding, its subsidiary associates or fellow subsidiaries, of face value not exceeding rupees one lakh. In a modern world it is difficult to influence relatives who neither live together nor have substantial financial dependence. Hence, an additional qualifying criteria of substantial financial dependence as an adjective to those relatives who do not live together would be more practical. These restrictions should be made applicable to only relatives who are "financially dependent".

Harinderjit Singh
Partner, Price Waterhouse & Co

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