INDIAN GOVERNMENT AMENDS COMPANY LAW, INTRODUCES MANDATORY SECRETARIAL STANDARDS AND A NEW INCORPORATION FORM

Introduction

On August 29, 2013, the Companies Act, 2013 (the "**2013 Act**") received the assent of the President of India. Since then, 282 sections of the 2013 Act have been brought into force in three (3) phases. Further, between March 27 and March 31, 2014, twenty-one (21) new rules were notified under the 2013 Act (the "**2014 Rules**"), all effective from April 1, 2014.

Ever since the 2013 Act and the 2014 Rules have been made effective, the Ministry of Corporate Affairs, Government of India (the "**MCA**") has been issuing clarifications and amendments to the 2014 Rules on the basis of feedback received from companies. However, to address some important concerns of corporate India, the Indian government has enacted the Companies (Amendment) Act, 2015 (the "**Amendment Act**"), and has notified the secretarial standards for board and shareholder meetings (the "**Secretarial Standards**"). It has also introduced an integrated company incorporation e-form.

This update discusses the key amendments made to the 2013 Act by the Amendment Act, the key new compliances introduced under the Secretarial Standards and the integrated company incorporation e-form.

Key amendments made by the Amendment Act

The Amendment Act was published in the official gazette of India on May 26, 2015, and has become effective from May 29, 2015. Listed below are the key amendments made by the Amendment Act to the 2013 Act.

- No minimum capital requirements: The 2013 Act requires every private company to have a minimum paid-up share capital of INR100,000 (US$1,562.5) and every public company to have a minimum paid-up share capital of INR500,000 (US$7,812.5). As per the Amendment Act, the foregoing minimum capital requirements have been done away with. Therefore, now companies can be incorporated with any share capital on the basis of the business requirements of the shareholders.

- Common seal to be made optional: The 2013 Act made it mandatory for every company to have a common seal. A common seal is affixed on share certificates and powers of attorney issued by a company; however, the common seal was not required to be affixed on documents to be authenticated by the company or contracts made by or on behalf of the company. The Amendment Act has made the requirement of having a common seal optional as a common seal has lost significance in the age of digital signatures. A company that does not have a common seal can issue share certificates and powers of attorney signed by one (1) director and the company secretary or two (2) directors of the company, if the company does not have a company secretary.

- Declarations for commencement of business: The Amendment Act has deleted Section 11 of the 2013 Act which required companies to file declarations with the Registrar of Companies prior to commencing business or exercising any borrowing powers in: (i) Form 21, certifying that each

subscriber had paid the value of the shares agreed to be taken up by such shareholder and that the company was in compliance with the minimum paid-up share capital requirements; and (ii) Form 22 for verification of the registered office address of the company (if not filed at the time of incorporation).

- Penalty for non-compliance with deposit-related provisions: While the 2013 Act and the Companies (Acceptance of Deposits) Rules, 2014 (the "**Deposit Rules**") imposed stringent compliance requirements for companies accepting deposits, only a nominal penalty was imposed for non-compliance of these requirements under the Deposit Rules.

The Amendment Act introduces Section 76A under the 2013 Act under which if any company accepts or invites any deposits in contravention of Section 73 or Section 76 of the 2013 Act or the Deposit Rules or fails to repay the deposit or any part thereof or any interest thereon within the time specified or such further time as allowed by the National Company Law Tribunal (presently, the Company Law Board):

- the company will be liable to a fine not less than INR10 million (US$156,250), but which may be extended up to INR100 million (US$1,562,500) in addition to the payment of the amount of the deposit or any interest thereon; and

- every officer of the company who is in default shall be liable to imprisonment of up to seven (7) years and/or a fine not less than INR2.5 million (US$39,062.50), but which may extend up to INR20 million (US$312,500). Additionally, if the contravention is knowingly or willfully committed with the intention to deceive the company, its shareholders, depositors, creditors or the tax authorities, then an action for fraud may also be taken against such officer under Section 447 of the 2013 Act.

The Amendment Act imposes hefty penalties and liabilities on deposit-taking companies and its officers in an attempt to reduce incidences of depositors losing their money.

- Related party transactions: The 2013 Act requires that prior approval of at least three-fourths (75%) majority of the shareholders of a company should be obtained to undertake related party transactions. The Amendment Act now provides for approval by a simple majority (50% + 1) of the shareholders, thereby ensuring rule by majority as opposed to rule by minority. Further, the Amendment Act exempts related party transactions to be undertaken between a holding company and its wholly owned subsidiary (whose accounts are consolidated and approved before the shareholders at a shareholders meeting) from the requirement of obtaining shareholder approval for related party transactions.

- Procedure for notification of exemptions under the 2013 Act: The 2013 Act empowers the MCA to exempt classes of companies from applicability of any provisions of the 2013 Act. Previously, such exemption notifications were required to be placed before both houses of India's Parliament for thirty (30) days (which could be comprised in one (1) session or in two (2) or more successive sessions) and if, before the expiry of the session immediately following the session or the successive sessions, both houses disapproved the notification or suggested a modification, then the notification would not be issued or would be issued with such modifications only.

As per the Amendment Act, the exemption notifications will have to be placed before both houses of India's Parliament for a period of thirty (30) days and if within this period both houses agree to disapprove the notification or to modify the notification, then the notification will not be issued or will be issued with such modifications only. Further, the time period of thirty (30) days will not take into account time periods during which Parliament is prorogued or adjourned for more than four (4) consecutive days. This may lead to quicker notifications from the MCA, more specifically in respect of applicability of certain provisions of the 2013 Act to private companies.

Key new compliances under the Secretarial Standards

On April 23, 2015, the Indian government notified new Secretarial Standards under Section 118(10) of the 2013 Act for board and shareholder meetings, which will mandatorily have to be complied with by all Indian companies (except a one person company). The Secretarial Standards will apply to all board and shareholder meetings in respect of which notices are issued on or after July 1, 2015. The Secretarial Standards prescribed earlier were not binding and were merely recommendatory in nature.

Listed below are the key new compliances for board and shareholder meetings as per the Secretarial Standards, which were previously either not mandatory or not prescribed under the 2013 Act or the 2014 Rules.

For board and shareholder meetings

- The 2013 Act and the Secretarial Standards contain restrictions on convening a board or shareholder meeting on a "National Holiday". For the first time, the term "National Holiday" has been defined by the MCA to include January 26th (Republic Day), August 15th (Independence Day) and October 2nd (Gandhi Jayanti).

- If notice of board or shareholder meetings is sent by speed post, registered post or courier, an additional two (2) day period has to be added to the minimum notice period prescribed under the 2013 Act (i.e., seven (7) days in case of board meetings and twenty-one (21) days in case of shareholder meetings) or the articles of association of the company, whichever is higher.

- The quorum of board and shareholder meetings must be present not only at the commencement of the meeting, but also while transacting business.

- Minutes of board and shareholder meetings that are maintained in electronic form will have to be maintained with a "Timestamp", which is recorded by a secured computer system and indicates the time at which the data was added, removed, sent or received.

For board meetings

- Along with the notice of a board meeting, an agenda setting out the business to be transacted at the board meeting and notes on agenda setting out the details of the proposal, relevant material facts, scope and implications of the proposal and nature of concern or interest of any of the directors in the proposal (as disclosed earlier) will have to be circulated to all directors. However, notes on items of

business in the nature of "unpublished price sensitive information" can be given by shorter notice with the consent of a majority of the directors including at least one (1) independent director (if any).

- The 2013 Act specified certain matters that could not be dealt with at board meetings held through audio-visual means. However, now, as per the Secretarial Standards, with the express permission of the chairman of the board meeting, such matters can now be taken up in board meetings held through audio-visual means, except that director(s) attending through a video link will not be entitled to vote or be counted for the purposes of the quorum.

- At board meetings, matters not included in the agenda may be taken up only with the consent of a majority of the directors present at the board meeting including at least one (1) independent director (if any).

- Any director of the company may call for board meetings.

- The Secretarial Standards specify a list of matters in respect of which resolutions are required to be passed at a board meeting and cannot be passed by way of circulation to the directors. This list is more detailed than the list under the 2013 Act and the Companies (Meetings of Board and its Powers) Rules, 2014, and additional items have also been included specifically for listed companies.

- Companies will now be required to maintain attendance registers for board and committee meetings. The Secretarial Standards also prescribe detailed compliances in respect of maintenance of attendance registers, including authentication by the company secretary or where the company does not have a company secretary, by the chairman of the meeting, and signatures of attendees of the meeting including invitees.

- Minutes of board meetings are now required to include certain additional details including a brief summary of deliberations in respect of each item of business, and in case of major decisions, the rationale for such decisions.

- A board meeting may be conducted at a shorter notice, however, decisions taken at such a board meeting will only be final if passed by majority of the directors of the company at the board meeting or ratified by the majority of the directors of the company.

- Signed minutes of a board meeting are required to be circulated to all directors within fifteen (15) days of signing the minutes.

<u>For shareholder meetings</u>

- As per the Secretarial Standards, an extraordinary general meeting of a company may be conducted only in India.

- Consents for conducting shareholder meetings at a shorter notice are to be received at least a day prior to the date of the shareholder meeting.

- The Secretarial Standards prescribe mandatory attendance requirements for directors, secretarial auditors and the chairmen of the audit committee, the nomination and remuneration committee and the stakeholder relationship committee (if any) at shareholder meetings.

- The Secretarial Standards also alter certain requirements for the e-voting procedure specified under the 2014 Rules such as keeping e-voting facilities open for at least three (3) days (as opposed to one (1) to three (3) days under the 2014 Rules and completion of e-voting period at 5:00 PM on the day preceding the date of the shareholders meeting (as opposed to at least three (3) days prior to the date of the shareholders meeting prescribed under the 2014 Rules).

Integrated company incorporation e-form

An integrated e-form for incorporation of companies under the 2013 Act has been notified on May 1, 2015 under the Companies (Incorporation) Amendment Rules, 2015. Under the integrated e-form, a combined application for: (i) allotment of the director's identification number for up to three (3) directors, (ii) approval of name of the company, and (iii) incorporation of the company, can be made. Note that this is an alternate route for incorporation of companies and the existing procedure under the 2013 Act and the Companies (Incorporation) Rules, 2014, as per which separate forms are filed with the MCA for each step specified above continues to remain in force. Incorporation of companies under this e-form is expected to reduce timelines for incorporating of a company in India.

Conclusion

The compliance requirements under the 2013 Act and the 2014 Rules are stringent, and the penalties significantly higher. Therefore, concerns have been raised on the effect of the 2013 Act on the ease of doing business in India.

While the amendments made by under the Amendment Act are welcome, many more amendments are necessary. India's Finance Minister has mentioned in the Rajya Sabha that an expert committee is reviewing the 2013 Act to examine the possibility of further improvements. The regime on related party transactions has been subject to much debate, and additional reforms are expected on this front.

Although the applicability of the Secretarial Standards to board and shareholder meetings imposes stringent compliance requirements on companies (which may prove to be a burden for private companies), from a practical standpoint such requirements add transparency and accountability in the management and operations of a company.