



news flash

May 2015



The Companies (Amendment) Act, 2015

The decades old law governing the functioning of companies in India underwent a substantial overhauling with the Companies Act, 2013 (“**the Act**”). The new Act draws inspiration from corporate scandals India Inc. witnessed in the past as a result of which, a shift has been made in the governance and transparency in the way companies operate.

Although the Act is a welcome move, practical difficulties faced whilst complying with the provisions of the Act have resulted in representations being made by industrial and trade bodies, professionals, companies etc from time to time. The Government with a view to address some of these concerns thought fit to amend certain provisions of the Act by way of the Companies (Amendment) Act, 2015 (“**the Amendment Act**”). The Amendment Act has now been passed by both Houses of Parliament and has received President’s assent but is yet to be notified in the Official Gazette. The amendments to the Act made by the Amendment Act will thus come into effect only once it is notified.

This newsflash highlights the changes in the Act made through Amendment Act which are stated hereunder:

1. Removal of requirement for public companies and private companies to have a minimum paid-up share capital of Rs. 5,00,000 and Rs. 1,00,000 respectively. Instead the amended Sections provide that public and private companies will be required to have a minimum paid up share capital as is prescribed.
2. Omission of Section 11 of the Act. Section 11 requires a company having a share capital to not commence any business or exercise any borrowing unless a declaration regarding share capital and verification of its registered office was filed with the Registrar of Companies.
3. Making common seal optional for companies. Where companies choose not to have a common seal, documents such as powers of attorney, share certificates, which require affixation of common seal will instead be required to be authorised by two directors of the company or a director and company secretary, where the company has appointed a company secretary.
4. Insertion of a new Section 76A, wherein, the penalty and prosecution¹ for acceptance of deposits by companies in contravention of Section 73² and Section 76³ of the Act has been laid out, which provision was earlier erroneously missed out.

¹ Penalty of the amount of the deposit and interest due and a fine not less than Rs. 10 million but which may extend to Rs. 100 million. Every officer who is in default would be punishable with imprisonment which may extend to 7 years or with fine which shall not be less than Rs. 2.5 million but which may extend to Rs. 20 million or both. The new section further provides that if an officer of the company who

May 2015

5. Prohibiting inspection and the obtaining of copies of board resolutions by the public filed by companies *inter alia* for issuing securities, investment of funds of companies, grant of loans, providing security in connection with loan, diversification of business etc.
6. Declaration of dividend *inter alia* only after setting off the losses and depreciation for the previous year against the profits of the company.
7. Under the Act, any money transferred to the unpaid dividend account of a company pursuant to Section 124⁴ which remains unpaid or unclaimed for a period of seven years from the date of such transfer is required to be transferred by the company along with interest accrued to the Investor Education and Protection Fund established by the Central Government. Further all shares in respect of which unpaid or unclaimed dividend has been so transferred, shall also be transferred by the company in the name of the Investor Education and Protection Fund.

The Amendment Act clarifies the above by introducing a proviso which states that only those shares in respect of which dividend has not been paid or claimed for *seven consecutive years* will be required to be transferred to Investor Education and Protection Fund. It has further been clarified that if any dividend is paid or claimed for any year during the said period of seven consecutive years, the shares shall not be transferred to Investor Education and Protection Fund.

8. The auditors of the company to report to the Central Government only those frauds that involve such amounts as may be prescribed.

Where the amount of fraud is below the prescribed threshold, the auditors will need to report such frauds to the board of directors / audit committee, where there is one. The details of such frauds will also have to be disclosed in the board report of the company.

9. The Amendment Act provides the following exemptions from the applicability of Section 185(1) (which provides that no company shall advance any loan, directly or indirectly, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person):

is in default has contravened these provisions knowingly or wilful with the intention to deceive the company or its shareholder or depositor or creditors or tax authorities, the officer will be liable to be punishable as fraud.

² Section 73 of the Act prohibits a company from inviting, accepting or renewing deposits except in the manner provided in Chapter V of the Act and the rules framed thereunder and provides that a company may accept deposits from its members only if it complies with certain conditions including the requirement of passing a resolution at a general meeting.

³ As per Section 76 of the Act and the rules framed thereunder, a public company having a net worth of not less than 1000 million rupees or a turnover of not less than 5000 million rupees can, subject to obtaining approvals of the members' by way of special resolution and certain other conditions, accept deposits from persons other than its members. In this case as well the conditions specified in Section 73(2) for acceptance of deposits from members would apply in addition to the conditions specified in Section 76.

⁴ Section 124 deals with dividend declared by a company and not paid or claimed within thirty days from the date of declaration to any shareholder entitled to the payment of dividend.

May 2015

- a. Any loan given by a holding company to its wholly owned subsidiary and guarantee or security provided by a holding company with respect to a loan taken by its wholly owned subsidiary; and
- b. Any guarantee given or security provided by a holding company in respect of loan taken by its subsidiary company from any bank or financial institution.

The above two exceptions are subject to a proviso that the loans referred to in (a) and (b) above are used by the subsidiary company for its principal business activity.

10. Easing related party transactions by:

- a. Replacing the requirement of a company passing a special resolution in a general meeting with the requirement of only passing an ordinary resolution in case of a related party transaction where a company has a paid up share capital of Rs. 100 million or proposes to undertake transactions that exceed certain prescribed monetary limits⁵;
- b. Providing that the requirement for passing a resolution as stated above will not be applicable for transactions between a holding company and its wholly owned subsidiary whose accounts are consolidated with the holding company and placed before the shareholders at the general meeting for approval.

Additionally in respect of the Section 177 of the Act which requires the audit committee to approve related party transactions, the Amendment provides for the insertion of proviso to clarify that the audit committee may now provide omnibus approval for related party transactions subject to such terms and conditions as may be prescribed by the Central Government.

11. Limiting the bail restrictions as stated in section 212(6) only to the offences involving fraud.

Section 212(6) of the Act *inter alia* specifies that notwithstanding anything contained in the Code of Criminal Procedure, the offences covered under certain Sections of the Act which attract punishment for fraud and which are enumerated in Section 212(6) shall be cognizable and that no person accused of any offence under those Sections shall be released on a bail bond or on his own bond unless:

- (i) the Public Prosecutor has been provided an opportunity to oppose the application for such release; and
- (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

⁵ These are prescribed in Rule 15(3)(ii)(a) of the Companies (Meetings of Board and its Powers) Rules, 2014.

May 2015

The Amendment Act amends the language of Section 212(6) to remove the specific reference to various Sections and instead substitutes this reference with offences covered under Section 447 of the Act i.e. offences which attract punishment for fraud.

12. Omission of sub-clause (b) of Section 248(1), which empowered the Registrar of Companies to remove the name of a company from the Register of Companies, where the subscribers to the memorandum have not paid the subscription that they had undertaken to pay within a period of 180 days from the date of incorporation of a company and a declaration to this effect has not been filed with the Registrar of Companies within 180 days of the incorporation of the company.
13. Section 435(1) of the Act provides that the central government may, for the purposes of providing speedy trial of offences under the Act, by notification establish or designate as many special courts as may be necessary. The Amendment Act proposes to amend this provision to provide that special courts may be set up by the central government for only trial of only those offences which are punishable with imprisonment of two years or more under the Act. A new proviso is also proposed to be inserted immediately after the above provision to provide that all other offences under the Act shall be tried by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under the Act or under any previous company law.
14. The procedure to be followed by the Central Government for laying draft notifications for granting exemptions from the applicability of the Act to various classes of companies or providing that certain provisions of the Act shall apply to certain classes of companies with certain exceptions, modifications and adaptations, has now been made quicker.

Our Analysis:

The Amendment Act aims to incorporate several provisions which were earlier left out inadvertently. The government has also attempted to largely tone down several provisions of the Act with a view to improve the global ranking of India by facilitating the ease of doing business without compromise on its objective to enhanced governance and transparency. Our analysis of the impact of key changes is summarised herein:

- The impact of removal of the requirement of public companies and private companies to have a minimum paid-up share capital of 5,00,000 Rs. and 1,00,000 rupees respectively will need to be assessed after the central government prescribes what the minimum paid-up share capital is required to be.
- Prohibiting the availability of board resolutions for inspection by public or obtaining copies thereof will largely allay the confidentiality concerns of companies.
- The requirement of reporting the frauds to the Central Government only where it involves the amount prescribed would reduce the burden on the auditors to report to the Central Government where the amounts are very negligible. Also, inclusion of the frauds reported by the auditors in the board report would keep the shareholders informed and would enable them to take a reasoned decision about their investment in the company.

news flash

May 2015

- The requirement of companies to obtain approval of the shareholders for related party transactions by way of an ordinary resolution instead of a special resolution is a major relief for companies, especially in light of past instances where many related party transactions could not get through on account of want of special majority. Further, doing away with the requirement of passing a shareholders' resolution for transactions between a holding company and its wholly owned subsidiaries whose accounts are consolidated with such holding company and placed before the general meeting for approval of the members' will lead to ease of doing business.
- The amendment to Section 212 (6), in our view, will expand the scope of the Section to cover all offences which attract punishment as fraud as opposed to the limited list of Sections that are stated in Section 212(6). The 'Statement of Objects and Reasons' (which has been provided by the government as an explanation of the Amendment Act) however provides that the purpose of the amendment is to limit the bail related restrictions only in the event of fraud. Some clarity on this issue is required.
- Omission of Sections 11 and sub-clause (b) of Section 248(1) is also a welcome move as it does away with the requirement of filing declarations before the commencement of business.

Disclaimer

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