

## E-Governance under the Companies Act, 2013 –Move towards transparency in Management

### Introduction

E-governance, in the context of companies, is commonly understood as technology driven governance by application of information and communication technology (“ICT”) for automation of process, which facilitates efficient functioning, transparency and accountability. Implementation of e-governance in Indian corporations has been a gradual process with its inception lying in the launch of MCA 21 (*electronic filing portal*) by the Ministry of Corporate Affairs (“MCA”) in 2006.<sup>1</sup> While the Companies Act, 1956 (“1956 Act”) enabled use of ICT for limited activities<sup>2</sup>, the need for a robust e-governance structure became crucial for better corporate governance. The Companies Act, 2013 (“2013 Act”) heightens the significance of e-governance for India Inc. to ensure better corporate governance and harmonize diverse stakeholders interest.

This newsletter provides a brief overview of the e-governance mechanism heralded under the 2013 Act, its impact in paving way for better corporate governance and the concerns faced in its implementation.

### 1. E-Governance under the 2013 Act *vis-à-vis* External Stakeholders

External stakeholders are people/groups outside a company who are affected (*directly or indirectly*) by its activities. These include the government, consumers, and the public. Accessibility to information regarding a company’s management and administration enables the protection of external stakeholders’ interest, promotes transparency, and ensures accountability of insiders. Various provisions under the 2013 Act provide for e-governance mechanisms and, in essence, aim at safeguarding external stakeholders’ interests.

#### 1.1 Filings with Government

The first move to enable electronic filings (“E-filing”) with Registrar of Companies (“RoC”) was witnessed with launch of MCA 21. E-filing was introduced to curb corruption and red tapism, automate the process of filings, reduce paperwork, and facilitate handling of documents in an organized, secure manner. Under the flagship MCA 21 project, MCA floated a comprehensive database on compliances and related information for companies and established a paperless system for corporate compliances. 52 e-forms could be filed with RoC under the 1956 Act. The 2013 Act has increased the number of e-forms by introducing new formats and has simplified the process. For instance, it is required that a resigning director files his resignation along with the reasons thereof in e-Form DIR-11 with RoC within 30 days of his

<sup>1</sup> MCA Notification S.O. 1844 (E) dated October 26, 2006

<sup>2</sup> Such as electronic voting by postal ballot (*Section 192A*), online application for director identification number (*Section 266A*), service of records on beneficial ownership by depository through electronic mode (*Section 51*), service and inspection of documents and financial statement in electronic forms and maintenance of records by Registrar of Companies in electronic form (*Section 610B*)

resignation.<sup>3</sup> Similarly, a company is mandated to file relevant e-forms for notifying RoC about appointment (e-Form ADT-1)<sup>4</sup> and resignation (e-Form ADT-3)<sup>5</sup> of auditors.

## 1.2 Maintenance of Books in Electronic Form

Another notable step towards ensuring e-governance is evidenced from the permission to maintain company documents, records, registers, minutes, and copies thereof in electronic form.<sup>6</sup> This is likely to ease and improvise the maintenance mechanisms. In tune with this, the definitions for document, books and paper and register are widened to include all documents, books of accounts, requisition, vouchers, registers, notices, forms, declaration, minutes which can be maintained in electronic form (“**E-Records**”). To ensure the security of such E-Records, responsibility is shouldered on Managing Director, Company Secretary or any other specified director/officer.<sup>7</sup> A positive legal obligation is cast on companies wherein any stakeholder or person interested in company’s affairs can inspect the E-Records upon payment of requisite fees.<sup>8</sup> However, maintenance of E-Records is optional for companies.<sup>9</sup> Such enabling provision on one hand provides a paperless and systematic mechanism for preservation of company’s information and, on the other, improves the transparency in a company’s affairs by increasing accessibility to such information.

## 1.3 Service of Documents

The 2013 Act provides that all documents may be served on a company, or by a company on RoC or member, electronically.<sup>10</sup> Modes of service include facsimile telecommunication, electronic mail, posting in the special electronic message board designated for such communication, or through other means of electronic communication.<sup>11</sup> Since e-governance largely focuses on ensuring better observance of corporate governance principles, the mode of service adopted should enable the company for retaining a copy of served document.<sup>12</sup> Such copy can be reviewed or retrieved by any stakeholder or authority in a legible, tangible form for further reference.<sup>13</sup>

## 2. E-Governance under the 2013 Act *vis-à-vis* Internal Stakeholders

Internal Stakeholders are persons within the company having control over the day-to-day business and are directly affected by the company’s activities such as the Board and the shareholders. The 2013 Act permits the use of ICT by the Board and shareholders for

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<sup>3</sup> Section 168 read along with Rule 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014

<sup>4</sup> Section 139(1) read along with Rule 4(2) of the Companies (Audit and Auditors) Rules, 2014 (“**Auditor Rules**”)

<sup>5</sup> Section 140(2) read along with Rule 8 of Auditor Rules

<sup>6</sup> Section 120

<sup>7</sup> Rule 28 of the Companies (Management and Administration) Rules, 2014 (“**Management Rules**”)

<sup>8</sup> Rule 29 of Management Rules

<sup>9</sup> Earlier the facility was a mandate for listed companies or companies with at least 1,000 shareholders, debenture and other security holders (*Rule 27 of Management Rules*). By virtue of an amendment notification, the same has been made optional for all companies

<sup>10</sup> Section 20

<sup>11</sup> Rule 35 of the Companies (Incorporation) Rules, 2014 (“**Incorporation Rules**”)

<sup>12</sup> Rule 35(2) of Incorporation Rules

<sup>13</sup> Rule 35 (2) of Incorporation Rules

conducting internal processes. Simultaneously, such e-governance methods aim at striking a balance between the requirement of maintaining security and confidentiality of managerial process and promoting transparency and accountability in the conduct of company's affairs.

## 2.1 Notice of Meetings

Under sections 173(3) and 101(1) of the 2013 Act, electronic mode (“**E-mode**”) can be utilized for issuing notices calling for Board and general meetings respectively. E-mode includes any communication transmitted through company's authorized and secure computer program (*which is capable of producing, confirming and keeping record of such communication*) addressed to the concerned person.<sup>14</sup> For sending notices through E-mode, a company must ensure that - (i) member's e-mail address is regularly updated; (ii) in case of general meeting, notice is placed on company's website and on notified website of MCA; (iii) subject-line of e-mail must specify company's name and details of the meeting; and (iv) record of any failed transmission is retained as “proof of sending.” However, the company shall not be held responsible for failure in transmission beyond its control.

## 2.2 E-voting at General Meeting

The 2013 Act opens the facility for electronic voting (“**E-voting**”) for all companies while the same is mandatory for listed companies and companies having 1000 shareholders or more.<sup>15</sup> E-voting is a secured system based process of displaying electronic ballots along with recording of individual member's vote, total number of votes polled, such that entire voting process is registered in electronic form in a centralized server with adequate security.<sup>16</sup> A detailed procedure for conducting E-voting is provided in the Rule 20 of the Management Rules. For E-voting, the company needs to ensure that - (i) notice expressly mentions the option of E-voting along with the manner and the process; (ii) E-voting is carried out in fixed timeline; (iii) E-voting portal is blocked at the end of voting period; (iv) scrutinizer is appointed to supervise the process and furnish his report for approval by the Chairman. Additionally, the scope of postal ballot includes E-voting and all matters which are to be transacted by postal ballot may be transacted through E-voting, as per the procedure provided in Rule 22 of the Management Rules.

## 2.3 Video Conferencing for Board Meeting

The directors can now participate in Board meetings through video conferencing (“**VC**”) or other audio-visual means.<sup>17</sup> However, VC is not permitted for approval of financial statement and Board report; approval of prospectus; audit committee meetings for consideration of accounts; and any reconstruction or acquisition matter.<sup>18</sup> Participation through VC will be counted for the purpose of quorum.<sup>19</sup> Detailed procedure for VC is provided in Rule 3 of the Board Rules. The procedure for VC lays great emphasis on the security of means

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<sup>14</sup> Explanation (i) to Rule 18 of Management Rules

<sup>15</sup> Rule 20 (1) of Management Rules

<sup>16</sup> Explanation (i) to Rule 20(2) of Management Rules

<sup>17</sup> Section 173 (2) of the 2013 Act

<sup>18</sup> Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 (“**Board Rules**”)

<sup>19</sup> Explanation to Rule 3 (5) of Board Rules

employed and requires the audio-visual mode to be capable of recording, recognizing and storing information regarding the participating directors, proceedings of such meeting, and the date and time.<sup>20</sup> It is also essential that the audio-visual means employed for VC enables all participants to communicate concurrently with each other without intermediary and participate effectively in meeting.<sup>21</sup>

## 2.4 Payment of Dividend

To facilitate faster transfer of dividend amount to shareholders, second proviso of the section 123(5) of the 2013 Act allows a company to remit dividend payable in cash by any electronic mode to the concerned shareholder, instead of paying by cheque or warrant.

## Conclusion

The abovementioned measures are major facilitators for a company, its management, external stakeholders in general, and Government in specific. The paperless initiative measures will support companies to comply with their obligation in a timely and organized manner. It will enhance accessibility to a company's information, increase transparency in the management of its affairs and ensure adequate accountability for default. Implementation of the e-governance measures will bring forward better corporate governance for companies. However, effectiveness of the e-governance mechanism is rationed out by the involvement of huge capital expenditure in case of private companies and smaller enterprises. The compliances under the 2013 Act for utilization of electronic facilities are rigorous and require establishing updated and secure ICT, which emerges as a major hurdle for smaller companies. Thus, the effective adoption of the e-governance measures and the technology required for it by Indian companies can be ascertained only in times to come. Nonetheless, steps towards implementation of e-governance would deliver the promise of a responsible and an accountable corporation.

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<sup>20</sup> Section 173 (2)

<sup>21</sup> Explanation to Rule 3 of Board Rules