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Stricter Investment Norms for Neighbouring Countries



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Indian government has adopted a protectionist approach towards the foreign investment from neighbouring countries. It has proved yet again that it is not taking too uncritical an attitude towards the benefits of foreign investment. Foreign investment adversely affects a host wherein the underlying intent remains to exploit the vulnerabilities of the host. Under such circumstances, the foreign investment may result in fire-sale of domestic entities, transfer of control and management in foreign hands and under leverage. To tackle hostile inbound investments from neighbouring countries, India has demonstrated an iron fist under a velvet glove and the same is evident from spade of recent corporate amendments pertaining to foreign investments from neighbouring countries. Without prejudice to its commitment to an inclusive industrial policy, government has demonstrated a confrontationist outlook towards investments coming from neighbouring countries. In the recent pronouncement from Ministry of Corporate Affairs, additional security clearances have been prescribed

for foreign directors who are nationals of countries sharing land border with India.

The Ministry of Corporate Affairs ("MCA") vide notification dated June 1, 2022, has introduced Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 ("2022 Amendment Rules") to further amend has the Companies (Appointment and Qualification of Directors) Rules, 2014.

The amendment mandates an individual seeking to hold directorship position in an Indian Company to obtain security clearance from the Ministry of Home Affairs (MHA), Government of India, if such individual is a national of a country which shares land border with India.

The countries which share land border with India are China, Nepal, Bhutan, Pakistan, Bangladesh and Myanmar.

Key highlights of this amendment are as follows:

(i) Form DIR-2 (Consent to act as a Director)

Rule 8 of the Appointment and Qualification of Directors Rules requires that every person who has been appointed to hold the office of a director shall on or before the appointment furnish to the company a consent in writing to act as such in Form DIR-2.

Provided that the company shall, within thirty days of the appointment of a director, file such consent with the Registrar in Form DIR-12 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.

After the proviso to Rule 8, the following proviso has been inserted through the aforesaid amendment:

"Provided further that in case the person seeking appointment is a national of a country which shares land border with India, necessary security clearance from the Ministry of Home Affairs, Government of India, shall also be attached along with the consent."

Further, in Form DIR-2, the directors are also required to declare whether they are required to obtain security clearance

from the Ministry of Home Affairs before seeking appointment as Director.

(ii) Allotment of Director Identification Number (DIN)

Any individual who is in the process of being appointed as a director of an Indian company must first obtain a DIN. Through this amendment after the proviso to Rule 10, the following proviso has been inserted

"Provided that no application number shall be generated in case of the person applying for Director Identification Number is a national of a country which shares land border with India, unless necessary security clearance from the Ministry of Home Affairs, Government of India has been attached along with application for Director Identification Number."

Further, in Form DIR-3, under the heading verification, an individual applying for DIN must declare whether they are required to obtain security clearance from the Ministry of Home Affairs or not.

As clear from the above, the nationals of a country sharing land border with India would be required to obtain prior approval from MHA before seeking appointment as Director in Indian Companies.

The proposed amendment is in line with Press Note No. 3 (2020 Series) dated April 17, 2020 issued by Department for Promotion of Industry and Internal Trade (DPITT) under Ministry of Commerce & Industry. Through this press note, prior approval of government was made mandatory for making investment in India by an entity which shared land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country.

The current amendment seeks to regulate the directorship positions in Indian companies by nationals sharing land border with India besides restricting foreign direct investment from such countries.

Conclusion

Though the amendments may cause additional compliance burden on the foreign nationals belonging to neighbouring countries who intend to or already hold directorship of Indian companies, however, Indian government has issued the said amendments keeping in view the national interest and in order to thwart opportunistic takeover bids

from neighbouring countries. It becomes imperative for the Indian companies having foreign directorship or investments to critically examine their position and ensure that they are compliant with the recent enactments and amendments to regulatory framework governing their functioning. Further, it is also critical for such companies to scrutinise their overall India compliances to ensure that they are within the four walls of laws.

