

THE COMPANIES (AMENDMENT) ORDINANCE, 2019

Companies Amendment Ordinance 2018 ("**Ordinance 2018**") issued on November 2, 2018 by the Ministry of Law and Justice brought about significant changes to 31 provisions of the Companies Act, 2013 ("**Act**"). While Ordinance 2018 got approval from Lok Sabha, it could not be taken up by the Rajya Sabha due to other exigent matters. In an attempt to keep alive, the amendments introduced by Ordinance 2018, which was due to expire on January 21, 2019; it was re-promulgated by another ordinance namely Companies Amendment Ordinance 2019 ("**Ordinance 2019**") on January 12, 2019 with effect from November 2, 2018. Ordinance 2019 is reflective of the Ministry of Corporate Affairs' intention to bring about more transparency and enhance corporate governance.

The Companies (Amendment) Ordinance, 2019 shall be in force on the 2nd day of November, 2018.

The main reforms undertaken through the Ordinance include the following:

- Re-categorising of offences which are in the category of compoundable offences to an in-house adjudication framework. However, no change has been made in respect of any of the non-compoundable offences.
- Ensuring compliance of the default and prescribing stiffer penalties in case of repeated defaults.
- De-clogging the NCLT by:
 - enlarging the jurisdiction of Regional Director ("RD") by enhancing the pecuniary limits up to which they can compound offences under section 441 of the Act.
 - vesting in the Central Government the power to approve the alteration in the financial year of a company under section 2(41); and
 - vesting the Central Government the power to approve cases of conversion of public companies into private companies.
- Other corporate governance related reforms include re-introduction of declaration of commencement of business provision; greater accountability with respect to filing documents related to creation, modification and satisfaction of charges; non-maintenance of registered office to trigger de-registration process; holding of directorships beyond permissible limits to trigger disqualification of such directors.

(A) Re-categorising of offences:

| S. No. | Section | Nature of default | Post ordinance |
|--------|----------------|---|---|
| 1. | Section 53(3) | Prohibition of issue of shares at a discount | Every company and officer in default shall be liable to penalty which is equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent. |
| 2. | Section 64(2) | Failure/delay in filing notice for alteration of share capital | Every company and any officer in default shall be to a penalty , one thousand rupees for each day during which such default continues, or five lakh rupees whichever is less. |
| 3. | Section 86 | False or incorrect information or knowingly suppresses any material information in registering charges as required under 77 | Penalty as per amended Section 447 given below in S.NO 20 |
| 4. | Section 90 | Failure to give significant beneficial ownership information or where the information is not satisfactory | Restriction with regard to transfer and suspension of all rights attached to shares. Further if any person fails to give information shall be punishable with imprisonment for a term which may extend to one year or with minimum fine of one lakh which may extend to 10 lakh or both and incase of continuous default further fine of Rs 1000 for every day. |
| 5. | Section 92(5) | Failure/delay in filing annual return | Every Company and its every officer who is in default shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of five lakh rupees. |
| 6. | Section 102(5) | Attachment of a statement of special business in a notice calling for general meeting | Every promoter, director, manager or other key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is higher |

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| 7. | Section 105(3) | Default in providing a declaration regarding appointment of proxy in a notice calling for general meeting | Every officer in default being liable to a penalty , instead of being punishable with fine. liable to penalty of five thousand rupees |
| 8. | Section 117(2) | Failure/Delay in filing Certain resolutions and Agreements | Such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day, subject to a maximum of twenty-five lakh rupees and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day, subject to a maximum of five lakh rupees. |
| 9. | Section 121(3) | Failure/Delay in filing Report on AGM by Public Listed Company | Such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day, subject to a maximum of five lakh rupees and every officer of the company who is in default shall be liable to a penalty which shall not be less than twenty-five thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day, subject to a maximum of one lakh rupees |
| 10. | Section 137(3) | Failure/Delay in filing financial statement | Company shall be liable to a penalty of one thousand rupees everyday maximum to Rs 10 lakhs lakh rupees, and in the case of Managing Director, CFO and in their absence Director shall be liable to penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees. |
| 11. | Section 140(3) | Failure/Delay in filing statement by auditor after resignation | Auditor shall be liable to a penalty of fifty thousand rupees or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees. |

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| 12. | Section 157(2) | Failure/Delay by company in informing DIN of director to Registrar | Company shall be liable to a penalty of twenty-five thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees, and every officer of the company who is in default shall be liable to a penalty of not less than twenty-five thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees. |
| 13. | Section 159 | Contraventions related to DIN Non-compliance with Section 152 (Appointment of directors), Section 155 (Prohibition to obtain more than one Director Identification Number) and Section 156 (Director to intimate Director Identification Number) | Individual or director of the company shall be liable to a penalty which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues |
| 14. | Section 165(6) | Accepting directorships beyond specified limits | Liable to a penalty of five thousand rupees for each day after the first during which such contravention continues |
| 15. | Section 191(5) | Payment to director not to be made on loss of office | Director shall be liable to a penalty of one lakh rupees |
| 16. | 197(15) | Managerial remuneration | If any person makes any default in complying with the provisions of this section, he shall be liable to a penalty of one lakh rupees and where any default has been made by a company, the company shall be liable to a penalty of five lakh rupees |
| 17. | 203(5) | Appointment of KMPs in certain class of companies | Company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees. |

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| 18. | 238(3) | Registration of the offer of scheme involving transfer of shares | Liable to a penalty, of Rs one lakh rupees |
| 19. | 446 B | Lesser Penalties for One Person Companies or Small Companies | Fails to comply with provisions of Section 92(5), Section 117(2) (c), Section 137 (3) shall be liable to pay penalty which shall not be more than one half of the penalty specified in such section. |
| 20. | 447 | Punishment for fraud | <p>Any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud: Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.</p> <p>Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.</p> |

(B) Ensuring compliance of the default and prescribing stiffer penalties in case of repeated defaults.

To achieve the said reform, the Ordinance has modified sub-section (3) and (8) of section 454 and also introduced a new section 454A as follows:

| S. No. | Section | Title | Post ordinance Impact |
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| 1. | 454(3) | Adjudication of Penalties | The adjudicating officer shall also give the direction of making good of the default at the time of levying penalty. |

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| 2. | 454(8) | <p>Adjudication of Penalties</p> <p>Default would occur when the company or the officer in default would fail to comply with the order of the adjudicating officer or RD as the case may be. within a period of ninety days from the date of the receipt of the copy of the order,</p> | <p>The Company shall be punishable with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees. company or any other person who is in default - officer shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.</p> |
| 3. | 454A | <p>Penalty for repeated default</p> <p>A new section has been inserted to provide where a penalty in relation to a default has been imposed on a person under the provisions of CA 2013, and the person commits the same default within a period of three years from the date of order imposing such penalty, passed by the adjudicating officer or RD as the case may be</p> | <p>Liable for the second and every subsequent defaults for an amount equal to twice the amount provided for such default under the relevant provision of CA 2013.</p> |

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(C) De-clogging the NCLT

Enlarging the jurisdiction of Regional Director (“RD”) by enhancing the pecuniary limits up to which they can compound offences under section 441 of the act.

| S. No. | Section | Title | Post ordinance Impact |
|--------|-----------|---------------------------------|---|
| 1. | 441(1)(b) | Compounding of Certain Offences | Power of Regional Director to compound offence punishable increased upto Rs. 25,00,000/- from existing 5,00,000/- |
| 2. | 441(6)(a) | Compounding of Certain Offences | Any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable. Earlier Section 441(6)(a), required the permission of the Special Court for compounding of offences, being redundant provision, is omitted. |

(D) Powers Of Central Government

1) Vesting in the Central Government the power to approve the alteration in the financial year of a company under section 2(41)

As per Companies Act, in case of Indian company having Holding/ subsidiary/ Associate Company situated outside India, it is allowed the change the financial year as per such company with the approval of Tribunal.

Through this Ordinance, Power of Tribunal has been transferred from Tribunal to Central Government, therefore, financial year of Company can be changed with approval of Central Government.

2) Vesting the Central Government the power to approve cases of conversion of public companies into private companies

In terms of Section 14(1), for Conversion of Public Company into Private Limited Company, the power to approve is shifted from Tribunal to Central Government.

(E) Other corporate governance related reforms:

| S. No. | Section | Title | Post ordinance Impact |
|--------|---------|--|---|
| 1. | 10A | Insertion of new section 10A Commencement of business, etc. | Re-introduction of section 11 omitted under the Companies (Amendment) Act, 2015 (after doing away with the requirements of minimum paid up capital) to provide for a declaration by a company having share capital before it commences its business or exercises borrowing power. Non-compliance of section 11 by an officer in default shall result in liability to a penalty instead of fine. |
| 2. | 12 | Registered Office of Company | If Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, cause a physical verification of the registered office of the company and if any default is found in complying with the requirements of sub-section (1), initiate action for the removal of the name of the company from the register of companies |
| 3. | 77 | Duty to Register Charges | The timelines relating to filing charge documents with the Registrar have been reduced as follows: (i) In case of charges created before the commencement of the Ordinance, the Registrar shall register charges within 300 days from the date of creation of charge. In case the charge is not registered within this period, then the registration of such charge shall be made within 6 months from date of commencement of the Ordinance on payment of additional fees . (ii) In case of charges created after the commencement of the Ordinance, the Registrar shall register charges within 60 days of creation of charge or within a period of additional 60 days on payment of ad-valorem fees. |
| 4. | 87 | Rectification by Central Government in Register of Charges | Omission to satisfy or register the charges accidentally or by inadvertence or in a manner not prejudicial to creditors or shareholders, Central Government may grant extension or rectify the omission or mis-statement. |

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| 5. | 90 | Register of significant beneficial owners in a company. | Considering the importance of the disclosures under section 90, the punishment for violation of section 90(1) prescribed under section 90(10) is enhanced to the effect that the contravention is punishable with fine or imprisonment or both, instead of being punishable with only fine. |
| 6. | 164 | Disqualifications from appointment of directors | A new clause (i) after clause (h) in section 164(1) inserted, whereby a person shall be subject to disqualification if he accepts directorships exceeding the maximum number of directorships provided in section 165. |
| 7. | 248 | Power of removal of name by ROC | the ROC may remove the name of a company from the register of companies <ul style="list-style-type: none"> • a company has failed to commence its business within one year of its incorporation • a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455, • Subscribers to MOA has not paid money which they at the time of incorporation agreed to within 180 days |

Repeal and Savings

The Companies (Amendment) Ordinance, 2018 is hereby repealed.

Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Ordinance.

Conclusion

The major reform under the Ordinance is the re-categorization of offences under the Act enabling technical/procedural lapses to be treated as civil liabilities, the shift to an in-house adjudication mechanism and de-clogging the NCLT. This is expected to drastically reduce the load of NCLT enabling it to concentrate on more pressing and technical matters than mere procedural cases.

Ordinance 2019 has also enhanced the penalty for various instance of corporate non-compliance by the companies in an attempt to bring about more vigilance and accountability.

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