

Key takeaways from Companies (Amendment) Act, 2019

Background

The Parliament has enacted the Companies (Amendment) Act, 2019 which has also been published Gazette on 31st July 2019. The Amendment Act seeks to

- a) incorporate the amendments brought in earlier through Companies (Amendment) Ordinance, 2018 which was subsequently extended through Companies (Amendment) Ordinance, 2019 and the Companies (Amendment) Second Ordinance, 2019 respectively. These provisions shall be deemed to be effective from 2nd November 2018.
- b) incorporate certain additional amendments w.r.t simplifying procedural aspects and enhancing corporate governance. These additional amendments are yet to be notified and the Central Government (CG) may notify different dates for applicability of different amendments, just as was done in the case of Companies' (Amendment) Act, 2017.

The significant amendments brought in through Companies (Amendment) Ordinance, 2018 were summarised in our earlier alert which has been included as Annexure 1 to this alert. This alert seeks to summarise the additional amendments which were not part of the Companies (Amendment) Second Ordinance, 2019.

1. Prospectus to be filed with the Registrar (Section 26, 35, 398)

The requirement for Registration of prospectus has been done away with and is now substituted with filing of prospectus with the Registrar. Consequential amendments in Section 35 pertaining to civil liability for misstatements in prospectus and Section 398 w.r.t filing of applications and registration by registrar in electronic form has also been modified.

2. Offer of securities in dematerialised form (Section 29)

The CG would now prescribe the class of companies (not restricted to public companies), which would be mandatorily required to issue securities only in dematerialised form. Further such (to be) prescribed class of unlisted companies shall issue/hold or transfer securities in accordance with the procedures laid down under Depositories Act, 1996.

3. Identification of Significant Beneficial Owner (SBO) (Section 90)

Provisions of Section 90 have been amended to cast a responsibility on the Company to take necessary steps to identify an individual who is an SBO, the failure of which shall be punishable with fine in the range of Rs. 10 lakhs to Rs. 50 lakhs and where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 per day. The CG has been empowered to make rules for the purpose of this section. In this regard, it may be noted that the CG had earlier notified Companies (Significant Beneficial Ownership) Rules, 2018 duly amended in February 2019.

However, the provisions related to imprisonment of the individual for failure to make declaration as provided by the Companies (Amendment) Second Ordinance 2019 has been dropped in Companies (Amendment) Act, 2019.

4. Constitution of National Financial Reporting Authority (NFRA) (Section 132)

The provisions related to constitution and discharge of functions by NFRA have been amended to provide that NFRA shall perform its functions through such divisions as may be prescribed by the CG and each of such division shall be presided by the Chairperson or a full-time member authorised by the Chairperson. Executive body of NFRA shall consist of the Chairperson and full-time Members for efficient discharge of its certain functions.

The earlier provision empowering NFRA to debar the member or firm from engaging in practice under Chartered Accountants' Act in case of proven professional or other misconduct has now been marginally restricted such that NFRA would be able to debar any member or firm from being appointed as an auditor or internal auditor etc. or performing any valuation under section 247 of any company or body corporate. Additionally, the power to impose penalty on the member or the firm, has been retained.

5. Corporate Social Responsibility (CSR) (Section 135)

In relation to Corporate Social Responsibility (CSR) expenditure, the following amendments have been done:-

- ✓ in respect of an ongoing project, the unspent portion of prescribed CSR expenditure shall be transferred to a separate bank account and ensure relevant spend within a period of 3 years. Any unspent amount at the end of 3 years shall subsequently be transferred to a Fund specified in Schedule VII. Such fund as prescribed in Schedule VII shall include Prime Ministers' National Relief Fund, Swachh Bharat Kosh, Clean Ganga Fund etc.
- ✓ in other cases, transfer the unspent portion of prescribed CSR expenditure to a fund specified in Schedule VII within 6 months of the end of the financial year.

Further certain companies' in existence for less than 3 years were taking a position that they were not required to incur CSR expenditure since the law prescribes a computational mechanism of 2% of average net profits of past 3 years. The Act has been amended to provide that such companies , satisfying the relevant applicability threshold in the previous financial year, would be required to spend an amount of 2% of the average net profits of the preceding financial years after incorporation without waiting for completion of period of 3 financial years post incorporation

Further penal provisions for non-compliance with CSR provisions have now been inserted as under:

- ✓ The company shall be punishable with fine in the range of Rs. 50,000 to Rs. 25 lakhs.
- ✓ Every officer of such company which is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine in the range of Rs. 50,000 to Rs. 5 lakh, or with both.

The CG has been empowered to issue general or special directions to a company or class of companies as it considers necessary to ensure compliance under of this section.

6. Investigation by Serious Fraud Investigation Office (SFIO) (Section 212)

W.r.t investigation into the affairs of the Company by SFIO under Section 212, it has been provided that any officer not below the rank of Assistant Director of SFIO may arrest any person in accordance with the provisions of this section, if so authorised.

The person so arrested may be taken to a Special Court or Judicial Magistrate or Metropolitan Magistrate within 24 hours of his arrest.

Where an investigation report submitted by SFIO states that a fraud has taken place and any director, Key Managerial Personnel (KMP) or officer has taken undue advantage or benefit, then the CG may file an application before the Tribunal with regard to disgorgement and such director, KMP or officer may be held personally liable without any limitation of liability.

7. Application to Tribunal for inquiry on conduct (Section 241/242 and 243)

The CG may now prescribe such company or class of companies in which, applications made w.r.t affairs of the company being conducted in prejudice to public interest, shall be made only before the Principal Bench of NCLT and shall be dealt with by such Bench.

In certain circumstances, the CG may refer the matter and request the Tribunal to inquire into the case and record a decision as to whether the person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company. The Tribunal shall record its decision suitably. The person who is unfit in accordance with the decision of the tribunal shall not hold office for 5 years as director or any other office connected with conduct and management of affairs **of any company**. The CG, may, with the leave of tribunal, permit such person to hold the office before the expiry of term of 5 years. The person so removed shall not be entitled to, or be paid, any compensation for the loss or termination of office.

8. Power of Registrar to present petition for winding up– Section 272)

The registrar may now present a petition of winding up to the Tribunal on the ground that it is just and equitable to do so.

M2K Remarks

The CG, by virtue of constant amendments either through Act/Ordinance or through Rules, is striving to consistently keep the Act dynamic and adaptable to changing circumstances. The move to amend provisions related to CSR spend after a period of 5 years of introducing the same through Companies' Act 2013 (being made effective from 1 April 2014) also reflects the intent of the Government to provide a settling and cooling off period and a stability in policy making w.r.t significant matters impacting the business/finances and cash flows of a company. The move to strengthen provisions related to investigation is a welcome one in light of the emerging corporate frauds and imminent need to strengthen the prosecution mechanism. However, on a flip side, such constant amendments also increase the compliance costs for corporates and pressure on practising professionals to keep themselves updated and relevant.

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Annexure 1 – M2K Alert on Companies (Amendment) Ordinance, 2018 (November 2018)

Background

The Ministry of Law and Justice has, vide Gazette notification dated 2 November 2018, enacted the Companies (Amendment) Ordinance, 2018 incorporating 32 amendments to the Companies Act, 2013. The Ordinance has been implemented based on the Report of Committee constituted to review penalty and prosecution for offences under Companies Act, 2013 and to suggest Corporate governance reforms.

The key takeaways have been discussed hereunder under two categories:- a) Changes in procedural aspects, b) Changes in Penalty and Prosecution proceedings related provisions

A. Changes in procedural aspects

1. Central Govt. gets the power to change the financial Year and approve conversion of public company into private company

Currently if Companies are required to change the Financial Year, they have to file an application with the NCLT. Now, the Central Govt. has the power to entertain the applications from a company, being a holding/ subsidiary/ associate company of a company incorporated outside India, to follow a different financial year for the purpose of consolidation of its accounts with the Company incorporated outside India. Further the power to approve the conversion of public company into a private company has been vested with the Central Government, which may delegate the same to any other authority; Earlier the said power was with NCLT.

2. Receipt of Share Capital and Verification of Address must to obtain certificate of commencement

Companies with share capital, which are incorporated after the date on which this ordinance comes into force, can't start the business unless a declaration is filed by a director with the Registrar of Companies within 180 days of incorporation, that every subscriber to the Memorandum has paid the value of the shares and details of its registered office has been filed in Form INC-22 within 30 days of incorporation. Any failure in filing such declaration would be one of the additional grounds to strike off the name of the companies' u/s 248

This requirement was previously mandated at the time of introduction of Companies Act, 2013 but later omitted by the Government by Companies Amendment Act, 2015.

3. Physical verification of registered office

Sub-section (9) is inserted under Section 12 which states that a Registrar may physically verify the registered office of the company and if any default is found in complying with the requirement of maintenance of registered office, he may initiate action for the removal of name of the company from the register of companies u/s 248

4. Reduced Time Limit for registration and modification of charges

Section 77 has been amended to reduce the maximum time period for registration and modification of charge with the RoC from existing 300 days to 60 days from date of creation/ modification. Additionally, extension of time period for another 60 days can be availed by way of an application to the Registrar on payment of such advalorem fees as may be prescribed. After 120 days, creation/ modification of charge shall not be registered.

5. Punishment for Contravention of provisions of registration of Charge

Section 86 has been amended to provided that if any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77 (Registration of Charge), he shall be liable for action under section 447.

6. Power of Central Government to condone delay in registration of charge removed

The power of the Central Government to condone delay in respect of registration of charge has been omitted. Section 87 now retains the power of Central Government to condone delay only w.r.t delay/omission for satisfaction of charge as required under Section 82 and Section 83.

7. Identification of Significant Beneficial Owner (SBO) (Section 90)

The Company or person aggrieved by the order restricting the transfer of shares/suspending the rights related to the shares, can make an application to the Tribunal for relaxation or lifting of the restrictions placed, within a period of one year from the date of such order, failing which the shares shall be transferred to Investor Education and Protection fund without any restrictions. Further an individual who fails to make declaration would be punishable with an imprisonment upto a period of one year or a fine in the range of Rs. 1 lakh to Rs. 10 lakh or with both.

8. Additional ground for disqualification of director

As per Section 165, No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. Breach in Maximum no of Directorships has now been added as a ground for disqualification u/s 164.

9. Adjudication of penalties

In addition to levying penalty in case of default, Section 454 now empowers the Adjudicating officer to direct rectification of the default.

B. Changes in penalty & prosecution proceedings related provisions

The provisions relating to initiation of prosecution proceedings have been omitted in majority of the sections. Further in certain sections where a range of penalty had been given, the amount of penalty has now been made specific and definitive.

Particulars	Before Ordinance	After Ordinance
Prohibition on issue of shares at discount u/s 53	Company: Fine of Rs 1 lakh to Rs 5 lakhs ; and Officer in default: Imprisonment: Up to 6 months; or Fine: Rs 1 lakh to Rs 5 lakhs; or with both	Company and Officer in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or Rs 5 lakhs, whichever is less and the company shall also be liable to refund all monies received with interest @ 12% per annum from the date of issue of such shares to the persons to whom such shares have been issued.
Notice to be given to Registrar for alteration of share capital u/s 64	Fine of Up to Rs 1,000 for each day during which such default continues, or Rs 5 lakhs, whichever is less	Company and Officer in default shall be liable to a penalty of Rs 1,000 for each day during which such default continues, or Rs 5 lakhs, whichever is less.
Annual return u/s 92	Company: Fine of Rs 50,000 to Rs 5 lakhs ; and Officer in default: Imprisonment: Up to 6 months; or Fine: Rs 50,000 to Rs 5 lakhs; or with both	Company and Officer in default shall be liable to a penalty of Rs 50,000 and in case of continuing failure, with further penalty of Rs 100 for each day during such failure continues, subject to a maximum of Rs 5 lakhs
Statement to be annexed to notice of AGM u/s 102	Every promoter, director, manager or other KMP who is in default: Fine: Up to Rs 50,000 or five times the amount of benefit accruing to the promoter, director, manager or other KMP or any of his relatives, whichever is more.	Every promoter, director, manager or other KMP who is in default shall be liable to a penalty of Rs 50,000 or five times the amount of benefit accruing to the promoter, director, manager or other KMP or any of his relatives, whichever is higher.

Particulars	Before Ordinance	After Ordinance
Penalty for failure to issue statement along with notice about voting by proxy u/s 105	Section 105(2) requires every company (with share capital), or where Article of Association provides for voting by proxy, to provide a statement along with notice for calling general meeting that a member is entitled to attend and vote or to appoint a proxy. Any failure to comply with this requirement results in levy of penalty of up to Rs. 5,000.	The Ordinance levies the absolute penalty of Rs. 5,000 for such non-compliance.
Resolutions and agreements to be filed u/s 117	Company - Fine of Rs 1 lakh to Rs 25 lakhs ; and Officer in default including liquidator: Fine: Rs 50,000 to Rs 5 lakhs	Company shall be liable to a penalty of Rs 1 lakh and in case of continuing failure, with further penalty of Rs 500 for each day after the first during which such failure continues, subject to a maximum of Rs 25 lakhs; Officer who is in default including liquidator shall be liable to a penalty of Rs.50,000 and in case of continuing failure, with further penalty of Rs 500 for each day after the first during which such failure continues, subject to a maximum of Rs 5 lakhs.
Failure to file MGT-15 (Report on AGM) by listed public companies u/s 121	Company: Fine of Rs 1 lakh to Rs 25 lakhs; and Officer in default: Fine: Rs 25,000 to Rs one lakh.	Company shall be liable to a penalty of Rs one lakh and in case of continuing failure, with further penalty of Rs 500 for each day after the first during which such failure continues, subject to a maximum of Rs 5 lakhs; and Officer who is in default shall be liable to a penalty which shall not be less than Rs 25,000 and in case of continuing failure, with further penalty of Rs 500 for each day after the first during which such failure continues, subject to a maximum of Rs one lakh.
Copy of financial statement to be filed with Registrar u/s 137	Company: Fine: Rs 1,000 for every day during which the failure continues but which shall not be more than Rs 10 lakhs; and MD and CFO of defaulting company or any other director: Imprisonment: up to 6 months ; or Fine: Rs 1 lakh to Rs 5 lakhs ; or with both	Company shall be liable to a penalty of Rs.1,000 for every day during which the failure continues but which shall not be more than Rs 10 lakhs; and MD and CFO of defaulting company or any other director shall be liable to a penalty of Rs.100 for each day after the first during which such failure continues, subject to a maximum of Rs 5 lakhs
Removal, resignation of auditor and giving of special notice u/s 140	Auditor in default: Fine not less than Rs 50,000 or the remuneration of the auditor, whichever is less but which may extend to Rs 5 lakhs.	Auditor in default shall be liable to a penalty of Rs 50,000 or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with further penalty of Rs 500 for each day after the first during which such failure continues, subject to a maximum of Rs 5 lakhs.
Company to inform Director Identification Number to Registrar u/s 157	Company: Fine: Rs 25,000 to Rs 1 Lakh ; and Officer in default: Fine: Rs 25,000 to Rs 1 Lakh.	Company shall be liable to a penalty of Rs. 25,000 and in case of continuing failure, with further penalty of Rs 100 for each day after the first during which such failure continues, subject to a maximum of Rs one lakh; and Officer who is in default shall be liable to a penalty of not less than Rs 25,000 and in case of continuing failure, with further penalty of Rs 1,000 for each day after the first during which such failure continues, subject to a maximum of Rs one lakh

Particulars	Before Ordinance	After Ordinance
Punishment for contravention in respect of DIN u/s 159	Noncompliance with Section 152 (Appointment of Directors), Section 155 (Prohibition to obtain more than one DIN), Section 156 (Director to intimate DIN), was punishable with fine which may extend to Rs. 50,000 and Rs. 500 per day in case of continuing default or with imprisonment which may extend to 6 months.	Penalty which may extend to Rs. 50,000 and in case of continuing default, an amount of Rs. 500 per day.
Number of directorships u/s 165	Fine: Rs 5,000 to Rs 25,000 for every day after the first during which the contravention continues	Person in default shall be liable to a penalty of Rs 5,000 for each day after the first during which the contravention continues.
Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares u/s 191	Director in default: Fine: Rs 25,000 to Rs 1 lakh.	Director in default shall be liable to a penalty of Rs 1 lakh.
Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits u/s 197	Person in default: Fine: Rs 1 lakh to Rs 5 lakhs.	Person in default shall be liable to a penalty of Rs one lakh and where any default has been made by a company, the company shall be liable to a penalty of Rs 5 lakhs.
Increase in penalty for not appointing Key Managerial Personnel u/s 203	It is mandatory for specified companies to appoint Key Managerial Personnel (i.e., CEO, CFO and CS) under Section 203. Currently, any failure in appointing the KMP would result in levy of penalty of Rs. 1 Lakh to Rs. 5 Lakhs on the company and up to Rs. 50,000 on every officer-in-default.	The Ordinance now levies an absolute penalty of Rs. 5 lakhs on the company and penalty of Rs. 50,000 on every Officer-in-default. In case of continuous default there would be an additional penalty of Rs. 1,000 per day for each day subject to maximum of Rs. 5 Lakhs.
Registration of the offer of scheme involving transfer of shares u/s 238	Fine in the range of Rs. 25,000 to Rs. 5 lakh	Penalty of Rs. 1 lakh
Punishment for fraud u/s 447	The fine prescribed was Rs. 20 lakhs.	The maximum fine has been increased from Rs 20 lakhs to Rs 50 lakhs.

Penalty for repeated default (new section)

A new section 454A has been inserted to provide that where a penalty in relation to a default has been imposed on a person under the Act, and the person commits the same default within a period of 3 years from the date of order imposing such penalty, passing by the adjudicating officer or RD, as the case may be, it or he shall be 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 the Act.

Increase in pecuniary jurisdiction of RD (Regional Director) for compounding of offences

The pecuniary jurisdiction of RD (Regional Director) for compounding of offences has been enhanced to Rs 25 lakhs from Rs 5 lakhs, which will reduce the number of compounding applications filed with NCLT. Section 441(6)(a), which requires the permission of the Special Court for compounding of offences, has been omitted. Offence punishable either with a) imprisonment only or b) imprisonment and fine shall not be compoundable.

In other words, RD and NCLT shall be able to compound offences which are punishable either with imprisonment or fine or both.

Penalty on small companies and One-person Company (OPC)

Section 446B has been amended to restrict the penalty for non-compliance with filing of annual return u/s 92, filing of resolution u/s 117 and filing of annual financial statements u/s 137 to half the amount prescribed under the relevant sections (as stated above) for small companies and OPC's.

M2K Remarks

The move of MCA to remove prosecution provisions for procedural lapses as well to quantify a specific penalty instead of a range to remove ambiguities and discretionary powers of the adjudicating authorities is welcome. Further majority of technical/procedural lapses have been brought within the ambit of inhouse adjudication under RoC/RD or the Central government which hitherto were categorised as "offences" and hence were required to be dealt with by Trial courts/special courts leading to pendency of cases and enormous administrative burden.

In addition to the changes brought about by way of enactment of Ordinance, the MCA has also released a list of suggested amendments based on the report of the High-level committee for comments from stakeholders. Upon finalisation of such amendments, the amendment of the Act would be taken up in the Parliament.

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