

M2K Alert – Company Law Update Series (Part I)

Companies’ (Amendment) Bill, 2020

BACKGROUND

The Companies (Amendment) Bill, 2020 (hereinafter referred to as “the Bill”) was tabled in the Lok Sabha in the Budget session of the Parliament on 17th March 2020. However, it is yet to be enacted. This Bill proposes to further amend the Companies’ Act, 2013 (hereinafter referred to as “the Act”) broadly in the following areas: -

- a) Changes to substantive provisions of the law such as overseas listing of entities, relaxation to certain entities currently qualifying as listed entities because of debt-listing, exemption from beneficial ownership declaration under section 89, setting up benches of NCLAT, etc
- b) Introduction of a new chapter w.r.t Producer Companies similar to the 1956 Act
- c) Relaxations to certain CSR provisions
- d) Decriminalise certain offences under the Act in case of defaults which lack any element of fraud or do not involve larger public interest

The Central Government was keen to get the Parliament nod for the Bill in the same session. However due to premature adjournment of the session on account of spread of COVID-19 pandemic, the said bill could not be taken up for discussion and enactment. Majority of the proposed amendments are based on the Report submitted in November 2019 by the CLC constituted by the CG.

Additionally, to benefit corporates during the unprecedented situation created due to spread of COVID-19, the MCA has introduced Companies’ Fresh Start Scheme (CFSS-2020) which allows companies’ to complete pending statutory filings with RoC without being subject to a higher additional fees/penalty on account of any delay. CFSS-2020 is not forming part of the Bill but has been notified separately on 30th March 2020.

Accordingly, our discussions as part of this Company Law Update series is split into 3 parts as follows:-

Part	Particulars
I	Key takeaways from the changes to substantive provisions of law proposed by the Bill
II	Rationalisation/ Relaxations of the Penal Provisions proposed by the Bill
III	Nuances of Companies’ Fresh Start Scheme

This Alert deals with **Part I** i.e. changes to substantive provisions of the law and summarises, the existing provisions, rationale/ background of the proposed amendment and the follow through action required after the proposed amendments are enacted (such as notifying / amending relevant rules) in this regard. As may be noted from the below discussions, majority of the changes proposed are being introduced to enable / empower the CG to prescribe rules for the relevant matter. Accordingly, until the rules are prescribed / amended by the CG in this regard, the exact class / categories of companies’ which would be impacted through such amendments would not be known.

The glossary of key terms used has been provided at the end of this article.

KEY TAKEAWAYS FROM THE CHANGES TO SUBSTANTIVE PROVISIONS OF LAW

1. Enabling provision for CG to remove the status of certain class of companies from listed

The private placement under the 2013 Act read with the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("Debt Listing Regulations") indicate that not merely public companies, but even certain private companies, are permitted to list debt securities on a recognised stock exchange. The definition of listed company under the Act also includes private companies whose debt securities are listed which resulted in stringent regulations / compliance requirements to be followed even by such private companies such as those related to filing of annual returns, maintenance of records, rotation of auditors, appointment of independent directors & woman director, constitution of board committees, filing reports of annual general meetings etc making the compliance disproportionately burdensome. This was dis-incentivising the private companies from seeking listing of their debt securities, even though this was in interest of the company and the security (debenture) holder.

However, to avoid any unintended consequences of directly excluding such companies, an enabling provision has been introduced in the Bill to allow CG to remove certain class of companies from the status of listed companies to 'unlisted' in consultation with SEBI. The details of class of companies would be prescribed in the rules after detailed consultations between MCA, SEBI and other stakeholders. By virtue of this amendment, the provisions applicable to other listed companies' as per the Act would cease to be applicable for such listed private companies. However, the provisions as applicable to such debt-listed companies' as per SEBI regulations, such as submission of half yearly results, key ratios etc. would continue to be applicable unless relaxed by SEBI in this regard.

2. Reduction in timeline for change of name of the company based on the order of RD

Upon application by a registered proprietor of brand or trademark alleging similarity with that of the name of a Company, the RD was empowered to issue an order directing the Company to change the name. Such Company was required to change the name within a period of 6 months from the date of issue of direction by RD. Such time limit is now proposed to be reduced to 3 months.

Further the Act contains provisions for invoking fine for failure to comply with the order of RD in this regard. The penal provisions are proposed to be dropped and a new provision is proposed to be introduced empowering the CG to allot autogenerated neutral name and issue a fresh certificate of incorporation for failure to comply with order of RD. The Company shall be bound to use such name, until it changes its name through due process as per the provisions of the Act

3. Enabling foreign listing

A new provision is proposed to be introduced to empower CG for allowing prescribed class of public companies to list permitted securities on stock exchange in permissible foreign jurisdictions (i.e listing in foreign countries). Further provision enabling CG to exempt such foreign listed companies from provisions of Chapter III (Prospectus / Allotment of Securities / Private placement), Chapter IV- Share Capital and Debentures, Section 89 (Declaration in respect of beneficial interest in share), Section 90 (Significant beneficial ownership), Section 127 (Punishment for failure to distribute dividends) is also proposed to be introduced. The details of class of companies would be prescribed in the rules after detailed consultations between MCA, RBI, SEBI and other stakeholders.

4. Further issue of shares

A rights issue is an option exercisable by existing shareholders of a company to purchase further share capital in proportion to their current holding, which is exercisable for a specified period governed by Section 62 of the Act. In the current scheme of rights issue, a minimum time of 15 days and a maximum of 30 days is required to be given to the existing shareholder to accept the offer. The CLC felt in view of the market practices and the SEBI discussion paper on reviewing the process of rights issue, there was a requirement to review and reduce the number of "minimum 15 days". Accordingly, an enabling

provision empowering the CG to reduce the number of days from existing 15 days has been introduced. However, the exact quantum of reduction would be effected through the rules to be prescribed in this regard.

5. Exemption from declaring beneficial interest u/s 89

While Section 90(1) allows the Central Government to exempt application of the provision related to significant beneficial ownership, a similar power has not been provided under Section 89 resulting in a disparity. A requirement for relaxation of this provision for Indian companies operating in IFSC and raising GDR's was felt. Accordingly, an enabling provision is proposed to be introduced to empower the CG to issue notification exempting any class or class of persons from compliance with the provisions of Section 89 which requires registered owner and beneficial owner to give declaration in Form MGT-4 and MGT-5 respectively and such Company to file a e-form in MGT-6 with the RoC.

6. Exemption from filing certain resolutions by NBFCs

In terms of Section 117(3)(g) read with Section 179(3)(f) of the Act, companies are required to file copies of resolutions passed to grant loans or give guarantees or provide security in respect of loans in Form MGT-14. Vide CAA 2017 exemption was provided to banking company. However, NBFCs and Housing Finance Company were not provided such exemption even though many of the NBFC's are engaging in lending related activities in regular course of business similar to Banking companies' and accordingly compliance was burdensome and also affecting confidentiality.

Accordingly, a provision allowing exemption from the requirement of filing resolution with respect to grant of loans or provide guarantee/security in respect of loan is now being proposed to be extended to

- a) NBFC's registered under Chapter III-B of RBI Act, 1934 and
- b) Housing finance company registered under National Housing Act, 1967.

Such exemption shall be provided by the CG by way of Rules to be prescribed after suitable consultation with respective regulators i.e RBI and NHB.

7. Unlisted companies to publish periodic financial results

Currently, equity listed companies are required to furnish quarterly results to the stock exchanges under SEBI LODR regulations in addition to annual financial statements to be furnished under the Act to the stock exchanges, shareholders and RoC. Unlisted companies are required to furnish only annual financial statements under Section 129 to the shareholders and RoC. However, considering the spate of banking scams w.r.t loans availed by various companies including unlisted companies' and various governance lapses and financial woes noted in such large unlisted companies, an imminent need was felt to introduce governance and regulatory measures considering the risk and exposure to public money at large.

A new Section 129A is proposed to be included to empower CG to prescribe rules for selected class of unlisted companies -

- a) To prepare (interim) financial results based on prescribed periodicity and format
- b) To obtain approval of Board and complete audit / limited review in prescribed manner.
- c) File a copy of the same with RoC within a period of 30 days from the end of relevant period as may be prescribed.

Only large unlisted companies who have availed loans above a threshold (to be specified) from banks and financial institutions are expected to be covered in the rules to be released in this regard.

8. Amendment to CSR provisions

In accordance with the recommendations of the High-Level Committee on CSR released in August 2019, Section 135 is proposed to be amended to

- a) Allow companies to carry forward any excess amount spent in a particular financial year (over and above the required amount of 2% of average net profits of prior 3 financial years) to subsequent years. This is to motivate Companies to spend on large projects which helps achieve sustainable development goals and require huge outlay, time and efforts in a particular financial year exceeding the mandatory minimum spend requirement and therefore such excess can be set off with the CSR obligations of subsequent years. However, the quantum of carry forward, number of years it can be carried forward and the mode of set-off with subsequent years CSR spend requirement shall be separately prescribed by way of Rules.
- b) To reduce compliance and operational cost, the requirement for constituting CSR committee is proposed to be dispensed away, where the amount required to be spent does not exceed Rs. 50 lakhs. In such cases, the functions of CSR committee would be discharged by the Board of Directors.
- c) CSR is a means to partner with corporates for social development and the penal provisions including imprisonment are not in harmony with the spirit of CSR. Accordingly, the provisions related to imprisonment for not spending the prescribed amount of 2% which was enacted through CAA, 2019 (but was never notified), is now proposed to be dropped. The relaxation / rationalisation of all penal provisions, including the one related to CSR is further elaborated in Part II of this Series.

9. Remuneration to non-executive directors in case of inadequate profits

Section 197 of the Act read along with the Schedule V to the Act provides for computation mechanism of remuneration payable to managerial personnel (i.e MD, WTD or manager) in case of inadequate profits. However, the law does not provide for any mechanism of remuneration to Non-executive directors (NED) [including Independent Directors (ID)] except for sitting fees, in case of inadequate profits

Inconsistency in legal provisions allowing payment of remuneration in case of inadequate profits or losses to executive directors vis-à-vis NED (who bring objectivity into the functioning of the Board and improve its effectiveness), was perceived as dis-incentivising such NED (including ID). Hence based on recommendation of CLC, Section 197 is proposed to be amended to enable NED including ID to draw remuneration in accordance with Schedule V.

Post this, Schedule V which currently carries limits of remuneration only for MD / WTD etc in case of inadequate profits, would be amended through notification to include commensurate limits for NED / ID as well.

10. Provisions related to NCLAT

The NCLAT in addition to the matters under the Act is also empowered to hear matters under Competition Act, 2002 and IBC 2016. Considering the far-reaching nature of the appellate jurisdiction of the NCLAT and to enable smoother functioning, access for litigants and parties to litigation, the following have been proposed: -

- a) The maximum cap on number of members in NCLAT being 11 (overall), imposed by Section 410 of the Act is proposed to be dropped.

- b) While the Act, bestows the power to notify new benches of the NCLT with the CG, a similar power has not been provided in relation to NCLAT. Hence the Bill proposes to bestow similar power on CG to constitute benches of NCLAT in consultation with Chairperson of the NCLAT

11. Introduction of new chapter w.r.t Producer company

A producer company is a body corporate comprising of farmers and agriculturists who work in cooperation with each other to promote better standards of living and gain easier access to credit, technology, market etc. Section 465 of the Act provided that though the 1956 Act was repealed, Part IXA of the 1956 Act related to producer companies would continue to be applicable till such time a new law is enacted for the same. Based on the recommendations of the Committee, a new chapter has now been introduced in the Act itself with certain modifications to the corresponding provisions of the 1956 Act. Post enactment of the Bill, Part IXA of the 1956 will cease to be operative and the new chapter will become operative. The details of the newly introduced Chapter XXIA is not being dealt with in detail in this series.

12. Exemption related to Foreign Companies'

To promote ease of business and attract investment, the CLC was of the view that companies incorporated outside India and engaged in business in IFSC should be exempted from the provisions of Chapter XXII (Companies Incorporated outside India). Currently, any class of foreign companies can be exempted by CG only from certain provisions of Chapter XXII, i.e Section 380 to 386, 392 and 393 by virtue of proviso under Section 379. The said proviso is proposed to be omitted and a new Section 393A is proposed to be included to empower the CG to exempt any class of foreign companies from the entire Chapter XXII. The exact class of foreign companies having place of business in India would be notified through Rules to be prescribed in this regard.

M2K REMARKS

The CG, by virtue of constant amendments either through Act / Ordinance or through Rules, is striving to consistently keep the Law dynamic and adaptable to changing circumstances. By virtue of accepting almost all the recommendations of the CLC, the Government has also clearly signalled its approach of collective decision making through participation of all stakeholders including representatives from Ministry, industry chambers, professional institutes and legal fraternity. However, on the flip side, such constant amendments also increase the compliance costs for corporates and pressure on practising professionals to keep themselves updated and relevant.

LIST OF DEFINED TERMS

Adjudicating Officers	AOs
Central Government	CG
Company Liquidator	CL
Code of Criminal Procedure, 1973	CrPC
Companies Act, 1956	1956 Act
Companies Act, 2013	The Act
Companies (Amendment) Act, 2017	CAA 2017
Companies (Amendment) Act, 2019	CAA 2019
Company Law Committee	CLC
Corporate Social Responsibility	CSR
Global depository receipts	GDR
Insolvency and Bankruptcy Code, 2016	IBC
Independent director	ID
International Financial Services Centre	IFSC
Managing Director	MD
Ministry of Corporate Affairs	MCA
Non-Banking Financial Companies	NBFCs
National Company Law Tribunal	NCLT
National Company Law Appellate Tribunal	NCLAT
Non-Executive Directors	NED
National Financial Reporting Authority	NFRA
National Housing Bank	NHB
Registrar of Companies	RoC
Regional Director	RD
Reserve Bank of India	RBI
Securities and Exchange Board of India	SEBI
SEBI (Listing Obligations and Disclosure requirements) Regulations, 2015	SEBI LODR
Whole time Director	WTD

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