

COMPANIES (AMENDMENT) ACT 2019: FOR BETTER CORPORATE COMPLIANCE AND GOVERNANCE IN INDIA

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Abstract

The Companies Act 2013 was passed by replacing “The Companies Act 1956” partially leading to many changes by introduction of Corporate Social Responsibility, One Person Company, etc. The main objective to changes the Companies Act 1956 was to create a flexible and simple formation and maintenance of companies. The corporate governance and increasing transparency was also given significance and weight age. The Companies (Amendment) Act 2019 which came after the “Committee on Review of Offences of Companies Act” Report and further recommendations received by the Ministry of Corporate Affairs sought to additionally amend the Act to ensure better accountability and enforcement to strengthen the governance norms and to deal with the minor offences being tried in judicial prosecution which can be dealt by an in-house adjudicatory mechanism. This comment discusses the various changes made in the Act in 2019 to bring Companies in India at par with the global compliance standards.

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I. Introduction

INDIA HAS seen an immense industrial growth in the recent growth, making the laws for corporate compliance to be in place for ensuring efficiency in the economic growth of the country. The Companies Act 1956 was the primary legislation which was incorporated when the companies in India were in the growing stage after independence. Many changes have taken place since that time in the national as well as the international economic environment. The expansion and the growth of the Indian economy have generated an interest in the international investors as well. This has led to the additional responsibility on the legislation to cater to the different needs of the business. The well-built statutory and the regulatory framework in a nation helps in building enterprises which are stable and progressive.

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The rapid changes in technology and increasing options of investments have time and again led to various amendments in the Companies Act 1956, some major changes took place in 1960, 1962, 1963, 1964, 1965, 1966, 1967, 1974, 1977, 1985, 1988, 1991, 1996, 1999, 2002, 2005 and the major amendments being made in 2013.

Companies Act 2013 has brought about the changes in the Act to provide more opportunities for new entrepreneurs and enabling wide application of information technology in the conduct of affairs by the corporate world. This Act was also brought in place to bring Indian companies at par with global level and meet the progressive and futuristic needs of the economic environment.

The introduction of Companies Act 2013, led to many changes, however there were a lot of procedural and technical glitches which were needed to be tweaked. The main feature of the Companies (Amendment) Act 2019 was to replace the ongoing system of the prosecution in the courts by a departmental system of the penalty imposition, which may increase the monetary pressure on the companies, but will save the employees of the company from facing a stigma of going to the courts and facing criminal proceedings. The other reason was to declog the National Company Law Tribunal by giving regional director power of taking decisions. Corporate Social Responsibility as made mandatory in Companies Act 2013, it was being implemented in the strict sense despite being a statutory mandate for each and every company, thus The Companies Act 2019 provides for a change in the spending of the CSR fund and incorporates penalty in case of violation of the provision. The new Act provides for transparency, efficiency and greater corporate compliances.

The Companies (Amendment) Act 2019 was passed by Lok Sabha on July 26, 2019 and has received the assent of the President on July 31, 2019. This Act has been passed to amend the Companies Act 2013. The Act was preceded by the Companies (Amendment) Ordinance 2018; first and second, Companies (Amendment) Ordinance, 2019 and the Companies (Amendment) Second Ordinance, 2019 on January 12, 2019 and February 21, 2019 respectively.

II. Suggestions of the Committee to Review Offences under the Companies Act 2013

The main reason for promulgating an ordinance was the report¹ dated August 14, 2018 of the Committee “The Committee to review offences under The Companies Act, 2013” which was

¹ Government of India, “Committee to Review Offences under the Companies Act, 2013”, Ministry of Corporate Affairs, August 2018; *available at*: <https://sgco.co.in/Files/updates/391->

made under Ministry of Corporate Affairs with Secretary of Ministry as its Chairperson, along with ten other eminent members by the Government of India in July 2018 and its report was submitted in August 2018. The prime aim of this Committee Report was to suggest the “*re-categorisation of certain ‘acts’ punishable offences as compoundable offences to ‘acts’ carrying civil liabilities, improvements to be made in the in-house adjudication mechanism etc.*”²

The members of the committee had various meetings to discuss the objective review of the regulatory framework of the Companies Act 2013. The main objective to create this committee was to study the corporate compliance and to make a regulatory framework which is workable. The other objectives included to declog the National Company Law Tribunal (NCLT) by providing suitable amendments which also included significant reduction in compounding cases before the Tribunal.

The main observations of the Committee were:-

- 1) **Restructuring of the Offences:** There was a re-categorizing of 16 offences out of the 81 offences, which were compoundable offences, they would now be subjected to an in-house settlement framework wherein the defaults would be subjected to a penalty levied by an adjudicating officer. On the other hand the non-compoundable offences which related to serious offences were to be in the status quo.
- 2) **Introduction of E-adjudication system:** There were also recommendations to institute a transparent and technology driven in-house adjudication mechanism which would augment transparency by minimizing physical interface, this would include conducting of proceedings on an online platform and publication of the orders on the website.
- 3) **Reducing the Burden on 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. Thereby it will have the effect of reducing the burden on NCLT.
- 4) **Augmenting the Power with Central Government:** The committee recommended giving the power to the Central Government to approve the cases of conversion of public companies into private companies and also to approve the alteration in the financial year of a company.

Report%20of%20the%20Committee%20to%20review%20offences%20under%20the%20Companies%20Act%202013.pdf, (last visited on 15 September 2019).

² *Ibid.*

5) **Corporate Compliances and Recommendations for better management:** There were many other changes which were suggested such as:

- Re-introduction of declaration of commencement of business by the companies, this would reduce menace of 'shell companies';
- Protection of public deposits through greater disclosures;
- Greater accountability with respect to filing documents related to creation, modification and satisfaction of charges;
- Holding of directorships beyond permissible limits will trigger the disqualification of such directors;
- There is an imposition of a cap on maximum remuneration to independent directors to ensure that there donot exist material pecuniary relationship between the independent director and the promoter group that can impair his independence.

III. Changes in The Companies (Amendment) Act 2019

The Companies (Amendment) Act 2019 has amended 42 sections in total, whereas the 31 sections were brought into action through the Companies (Amendment) Ordinance 2019 on November 2, 2018. 11 new sections were added in the Act through the Companies Amendment Act 2019.

The few provisions of the amendments can be discussed as follows:

Decloging National Company Law Tribunal (NCLT)

These provisions which are amended in the Companies (Amendment) Act 2019 have been included in the Act keeping in mind the additional burden on NCLT, and thus the procedural matters are being handed over to the Regional Director (Central Government). This amendment was needed in the wake of NCLT being burdened by the winding up and insolvency provisions.

- Section 2 of the Companies (Amendment) Act 2019 corresponding to Section 2 (41): The Definition of “Financial Statement” is amended. The first proviso which provided the Tribunal on an application to prescribe the period to be considered for financial statement is replaced by the Central Government. Hence Central Government will after the commencement of the Act shall have such power and applications pending before the Tribunal shall be disposed of in the manner of provisions applicable to it

before such commencement. The effective date for this section is 2 Nov, 2018, as it was a part of the Companies (Amendment) Bill 2018.

- Section 5 of the Companies (Amendment) Act 2019 amends the Section 14 of the Companies Act 2013 relating to the alteration of the Articles. The first proviso which stated that the approval of the Tribunal is necessary to approve the conversion of a public company into a private company has been substituted by giving the Central Government the power to do so. This section was also a part of Companies Amendment Bill 2018, thereby being effective from November 2, 2018.
- Section 33 of the Companies (Amendment) Act 2019 has amended sec 241 of the Companies Act 2013 by giving Central Government the power in cases of oppression. The Central Government may prescribe such company or class of companies which may be heard before the Principal Bench of NCLT and shall be dealt with by such Bench. The amendment also provides for “Insertion of Sub-section 3” which refers to the power of the Central Government to refer the matter to the Tribunal to inquire into the case and record a decision about the person if fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.
- Section 39 of the Companies (Amendment) Act 2019 has altered the section 441 of the Companies Act 2013, by enhancing the pecuniary jurisdiction for compounding of offences of the Tribunal from 5 lakhs rupee to 25 lakh rupees. Thus now both Central Government and NCLT, as applicable according to the pecuniary jurisdiction may be able to compound offences which are punishable with imprisonment or fine or both, or with fine or imprisonment.(441(6))

Legal Provisions for corporate compliance added or modified in The Companies (Amendment) Act 2019

The ever growing level of shell companies and bogus companies in India, has led to the re-emergence of commencement of business certificate in a new form. This has been substantiated with the penalty provision for the companies which fail to adhere to the legal provision. This provision has been further strengthened by the fact that now physical verification of the registered office of the company is to be done by the registrar, in case it is found to be fraud, he has the power to strike off the company's name. These provisions provide stringency to the procedure of the registrar.

- Section 3 of The Companies (Amendment) Act 2019 inserted section 10A after section 10 which has re-introduced the concept of Commencement of the Business in the form of a declaration which will be filed by a director to the Registrar that every subscriber to memorandum has paid the value of the shares which was agreed to be taken by him on the date of making of declaration; and it is also mandated that the company has filed with the registrar the verification of the registered office under section 12. Penalty provision has been provided in case there is a default, the company shall be liable to a penalty of Rs 50,000 and every officer who is in default shall be liable to a penalty of Rs 1,000 for each day but not exceeding Rs. one lakh. In case the company fails to file the declaration within 180 days of the date of incorporation of the company and Registrar believes that the company is not carrying on any business or operations under section 248 then he may order Removal of the name of the company from the register.
- Section 4 of The Companies (Amendment) Act 2019 amended section 12 of the Companies Act 2013. It provides that the Registrar has been given the power to cause a physical verification of the registered office of the company, and in case he believes that the Company is not carrying into business/ operation, he may initiate an action to strike off the name of the Company.
- Section 26 of the Companies Act 2013 has been amended by section 6 of the Companies (Amendment) Act 2019; it says that the requirement of registration of prospectus has been substituted with the requirement of filing of prospectus with the Registrar. It has been notified on August, 15 2019.
- Section 29 of the Companies Act 2013 has been amended by the section 7 of the Companies (Amendment) Act 2019. It has omitted the word “public” which has enlarged the scope of the section of Public offer of securities to be in dematerialised form to include private companies in its ambit. The Central Government can thus prescribe any class of unlisted companies including private companies for issuance, holding or transferring of securities in dematerialised form.
- Section 11 of the Companies (Amendment) Act 2019 has changed section 77 of the Companies Act 2013 which deals with registration of charges. The changes in this section has modified the period of registration of charge of 300 days for creation and modification of charge has been reduced to 60 days in total with a 30 days of normal filing period and 30 days with additional fees. It also says that Registrar may if he

receives an application; allow any registration to be made within a further period of 60 days after the payment of such *advalorem* fees.

- Section 14 of the Companies (Amendment) Act 2019 has changed section 90 of the Companies Act 2013 that deals with the register of beneficial owner in a company. The company, according to the new amendment has to take necessary steps to trace the beneficial owner. In case the company fails to take necessary steps, it shall be punishable. The provision with respect to punishment with imprisonment originally included in the Ordinance has been omitted in the Amendment Act.
- Section 20 of the Companies (Amendment) Act 2019 has amended section 132 of the Companies Act 2013 which constitutes “The National Financing Reporting Authority”.
- Section 21 of the Companies (Amendment) Act 2019 has added new dimensions to the Section 135 of the Companies Act 2013. The Amendment to Corporate Social Responsibility is one of the major amendments. The section now provides, inter alia for: i) Any unspent amount of CSR of previous year will be carried to a special account to be spent within the next three financial years and transfer to the Fund specified in Schedule VII in case there is an ongoing project; and ii) Transfer of the fund which is unspent to the Fund specified under Schedule VII, in other cases. iii) Penalty provision has been added in case of contraventions of this section. This was not present in the Act before amendment. The punishment will be inclusive of fine as well as imprisonment for defaulting officer. This section is yet to be notified by the government.
- Section 26 of the Companies (Amendment) Act 2019 has added new disqualification of the Director under section 164 of the Companies Act 2013; it says it shall be the ground of disqualification of the Director when he has not complied with the maximum directorships provision under sec 165.
- Section 31 of the Companies (Amendment) Act 2019 has amended section 212 of the Companies Act 2013. Earlier, only Director, Additional Director or Assistant Director of Serious Fraud Investigation Office, if so authorized, was empowered to arrest a person proved guilty under this Section. With this amendment, any officer not below the rank of Assistant Director may arrest any person in accordance with the provisions of this section. In addition to the Judicial Magistrate, the person so arrested, can also now be taken to a Special Court, within 24 hours of his arrest. Where an investigation

report submitted by SFIO states that a fraud has taken place and any director, KMP or officer has taken undue advantage or benefit, then the Central Government 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.

Re-Categorising of compoundable offences to an In-House Adjudication Framework and its Penal Provisions

This amendment as advised by the Committee, has led to changing the way the compoundable offences are dealt. These offences are referred to an in-house adjudication framework rather than taking them to criminal courts. This amendment has caused the businessmen and the defaulting employees to not face embarrassment of the courts for white collar crimes.

The Companies Amendment Act 2019 has brought about a change by making certain compoundable offences to be treated by an in-house adjudication framework; this means that the burden of going to the court by the officers of the company has been alleviated to an extent. In the certain sections, the word fine is replaced by “penalty” and the amount of “penalty” for certain offences has increased. These sections to name a few are Section 53, 64, 92,102, 165, 197, 238 of Companies Act 2013.³

There has also been a change in adjudication of penalty section 454 of the Companies Act 2013, the adjudicating officer, apart from levying penalty on the company or the officer in default, may also directly sought to rectify the default of the company. Section 454A has also been added which is a new addition, dealing with default which is repeated within a period of three years by the company or defaulting officer, in such cases the penalty would be twice the amount of penalty provided in such an offence. The fine in case of fraud under section 447 of the Companies Act has been also increased from Rs 20 lakhs to Rs 50 lakhs.

IV. Analysis of the Amendments under The Companies (Amendment) Act 2019

The Companies (Amendment) Act 2019 has been amended in the light of the suggestions provided by the Committee to Review Offences under the Companies Act 2013 and the recommendations received by the Ministry of Corporate Affairs, Government of India.

³ Penalty Provisions has been changed for Sections 53, 64,92, 102, 105, 117, 121,137, 140,157,159,165,191,197,203, 238 Companies Act 2013.

The provision of section 135, which deals with Corporate Social Responsibility (CSR), which was also known as a “toothless” provision has been now after the Company Amendment Act 2019, provided with the penalty provision which will push the Companies to invest in CSR activities, and to transfer the unspent fund into a special account will prevent the misuse of the CSR fund of the companies. The contravention of this section will now attract a penalty for the company as well as the officer in default. This move of the Government has been met with a lot of criticism, but Government has yet to notify this section. The High Level Committee Report on Corporate Social Responsibility was presented to the Union Finance Minister in August 2019 which considered the provisions of CSR and their impact on the corporate. The recommendations include developing a CSR exchange portal to connect contributors, beneficiaries and agencies, allowing CSR in social benefit bonds, promoting social impact companies, and third-party assessment of major CSR projects.

As recommended by the Report of the “Committee to Review Offences under the Companies Act, 2013” the several suggestions to amend the provisions to hand over the power to the Regional Director (Central Government) is a good move, which will transfer the stress of the tribunal in handling the extra burden. As per the new amendments the authority to grant orders under Section 2(41) and Section 14 of the Act has been shifted from Tribunal to the Central Government. The amendment gives the power to the Central Government to alter the financial year of a company under section 2(41).

The certain offences have augmented the fine amount and a penalty is being applied for such defaults. There has also been removal of imprisonment as a penalty from certain offences, which has provided a huge relief to the businessmen. The amendments also provide for stricter punishment in case of the repeated offender. The penalty under the newly added section would be double the original penalty if the offence is committed again within the period of 3 years.

The power of the Regional Director has been enlarged as he has the power of compounding of offences up to 25 lakh rupees as opposed to Rs 5 Lakh rupees in the Companies Act 2013. There has been an insertion of the sec 10 A in which the signatories of the Memorandum of Association(MoA) have to file a declaration that they have paid the money for the shares they had subscribed for, within 180 days of the company's incorporation. This will ensure that the signatories of the MoA pay-up the money in time. This provision has been introduced as it

was observed that the directors did not pay up for the amount they signed up for commencing their business.

V. Conclusion

In conclusion the amendments have brought the ambit of The Companies Act 2019 at par with that of International standards of corporate compliance. These amendments have shifted the objective of ease of business to better standards and measure of protection afforded to the companies. The pressure on National Company Law Tribunal will be eased by the changes brought in to empower the Regional Director for compounding of offences and for the approval of conversion of a public company to a private company. The Corporate social responsibility on the other hand will bring (if notified) the necessary overhauling of the companies to spend the CSR fund in the rightful manner. In the end the commencement of business declaration which has been re-inserted will be able to solve the problems of the shell companies, which are at rise in India. The Companies (Amendment) Act 2019 will be able to achieve the purpose which was intended to be achieved and will ease the mechanisms of the corporate compliance and governance in India.