

The Companies (Amendment) Ordinance, 2018

The recommendation of the Union Cabinet for promulgation of the Companies (Amendment) Ordinance, 2018 has been assented to by the President of India – Shri Ram Nath Kovind on November 02, 2018. The Ordinance is based on the recommendations of the Committee appointed by the Government to review offences under the Companies Act, 2013.

➤ INTRODUCTION

The Centre has promulgated the Companies (Amendment) Ordinance, 2018 to promote ease of doing business with better corporate compliance. The President of India has promulgated an Ordinance to further amend the Companies Act, 2013 in exercise of the powers conferred by clause (1) of article 123 of the Constitution named as Companies (Amendment) Ordinance, 2018 (“Ordinance”).

➤ KEY HIGHLIGHTS OF THE ORDINANCE The key highlights of the Ordinance are as follows:

1. Section 2(41) – Definition of “financial year”

In case where a company or body corporate which is a holding company or a subsidiary or associate of a company incorporated outside India and is required to follow a different financial year for consolidation of accounts outside India, such a company can, by making an application to the Central Government apply for the change in the financial year. The Ordinance gives the power to the Central Government to change the financial year and allow any period as its financial year, whether or not that period is a year.

Further, the existing applications pending before the Tribunal before November 02, 2018 shall be disposed off by the Tribunal in accordance with the provisions applicable to it before such commencement.

2. Section 10(A) – Insertion of a new Section 10A– Commencement of a business, etc.

After Section 10 of the Companies Act, 2013 – effect of Memorandum and Articles, a new Section 10A is inserted pertaining to Commencement of business, etc which states that a Company having a share capital shall not commence any business or exercise any borrowing power unless -

- a) *a declaration* is filed by a Director within a period of **180 days** of the date of incorporation of the Company with the Registrar in such form as is prescribed that every subscriber to the memorandum has paid the value of the shares as agreed form.

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b) The Company has filed with the ROC, *a verification* of its registered office in e-Form INC-22, as provided in Section 12(2).

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 during which such default continues but not exceeding an amount if *Rs. 1,00,000/-*.

Where no declaration is filed within a period of 180 days of the date of incorporation of the Company, and the ROC has reasonable cause to believe that the Company is not carrying on any business or operations, he may, without prejudice to the provisions of Section 10(A) sub section (2) initiate action for removal of the name of the company from the register of companies.

3. Section 12 – Registered Office of the Company

In Section 12 of the Companies Act, 2013, after sub-section (8), a new sub-section (9) shall be inserted which states as follows:

“If the 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 in such manner as may be prescribed and if any default is found to be made in complying with the requirements of sub-section (1), he may without prejudice to the provisions of sub-section (8), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII”

4. Section 14 – Alteration of Articles

In section 14 of the principal Act,-

(i) in sub-section (1), for the second proviso, the following provisos shall be substituted, namely:-

"Provided further that any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made in such form and manner as may be prescribed:

Provided also that any application pending before the Tribunal, as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.";

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(ii) in sub-section (2), for the word "Tribunal", the words "Central Government" shall be substituted.

As per Section 14(1) of the Companies Act, 2013, for conversion of Public Company into Private Limited Company approval of *Tribunal* is required.

By the Ordinance, the power of Tribunal shall be transferred to *Central Government*. Therefore, after Ordinance, Public Company can be converted into Private Company with approval of Central Government.

Further, the existing applications are however, are required to be disposed off by the Tribunal in accordance with existing applicable provisions.

5. Section 53 – Prohibition on Issue of Shares at Discount

In Section 53 of the Companies Act, 2013, sub-section (3) shall be substituted, stating as follows:

Where any Company fails to comply with the provisions of this section, such company and every officer who is 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. 5,00,000* whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent per annum from the date of issue of such shares to the persons to whom such shares have been issued.

6. Section 64- Notice to be given to Registrar for alteration of Share capital

In Section 64 of the Companies Act 2013, sub-section (2) shall be substituted. Accordingly, where any company fails to file notice with the Registrar within 30 days of alteration or increase or redemption of Share capital as per sub-section (1) of Section 64, such Company and every officer who is in default shall be liable to a penalty of *Rs. 1,000* for each day during which such default continues, or *Rs. 5,00,000* whichever is less.

7. Section 77- Duty to register charges, etc.

In Section 77 of the Companies Act, 2013, in sub-section (1) for the first and second provisos following shall be substituted:

a. Charges created before commencement of Ordinance

As per Section 77(1) Company is required to register Charge within *30 days* of its creation with the Registrar. However, Registrar may on an application by the Company allow delay in registering the Charge till *300 days* of creation with additional fees. If Company fails to file within 300 days, it can file form for registration for Charge as per Section 87 by seeking condonation from Regional Director.

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b. Charges created after commencement of Ordinance

Now, in case of charge created after the commencement of Ordinance, 2018, then Registrar shall allow such registration “within period of **60 days** of such creation”.

If Company fails to file within 60 days of creation, ROC may allow such registration to be made within a further period of 60 days after payment of such ad valorem fees as may be prescribed”

8. Section 86 – Punishment for contravention

Section 86 of the Companies Act, 2013, shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:
If any person willfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77, he shall be liable for action under Section 447.

9. Section 87 - Rectification by Central Government in Register of charges

Section 87 of the Companies Act, 2013 shall be substituted namely:

The Central Government on being satisfied that —

(a) the omission to give intimation to the Registrar of the payment or satisfaction of a charge, within the time required under this Chapter; or

(b) the omission or misstatement of any particulars with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance of Section 82 or Section 83,

was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company, it may, on the application of the company or any person interested and on such terms and conditions as the Central Government deems just and expedient, direct that the time for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or misstatement shall be rectified.

10. Section 90- Register of significant beneficial owners in a company

Section 90(9) of the Companies Act, 2013 shall be substituted as follows:

a. The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed under sub-section (8), within a period of 1 year from the date of such order

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b. Provided that if no such application has been filed within a period of 1 year from the date of the order under sub-section (8), such shares shall be transferred to the authority constituted under sub-section (5) of Section 125, in such manner as may be prescribed.

11. Section 92 - Annual Return

In Section 92 of the Companies Act 2013, for sub-section (5), the following sub-section shall be substituted.

As per existing provisions, every officer-in-default shall be prosecuted with an imprisonment for term of 6 months and penalty if company fails to file the annual return before the specified period.

If any company fails to file Annual Return before expiry of 60 days from the date of its Annual General Meeting, such company and its officer who is 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 which such failure continues, subject to a maximum of Rs. 5,00,000.

The Ordinance removes the imprisonment provision against all directors of the company in default for non-filing of copy of financials to RoC.

12. Section 102- Statement to be annexed to notice

In Section 102 of the Companies Act 2013, for sub-section (5), the following sub-section shall be substituted as follows:

Without prejudice to the provisions of sub-section (4), if any default is made in complying with the provisions of this section, 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.

13. Section 105 – Proxies

In section 105 of the Companies Act 2013, in sub-section (3), for the words “punishable with fine which may extend to five thousand rupees”, the words “*liable to a penalty of Rs. 5,000*” shall be substituted.

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.

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14. Section 117 - Resolutions and agreements to be filed

In section 117 of the principal Act, for sub-section (2), the following sub-section shall be substituted.

If any company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein, such company shall be liable to a **penalty of Rs. 1,00,000** 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. 25,00,000** and every officer of the company who is in default including liquidator of the company, if any, 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. 5,00,000**.

15. Section 121- Report on Annual General Meeting

In section 121 of the principal Act, for sub-section (3), Amendment of the following sub-section shall be substituted, namely:

If the company fails to file the report under sub-section (2) before the expiry of the period specified therein, such company shall be liable to a penalty of **Rs. 1,00,000** 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. 5,00,000** and every officer of the company 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 five hundred rupees for each day after the first during which such failure continues, subject to a maximum of **Rs.1,00,000**.

16. Section – 137- Filing of Financial Statements

In Section 137 of the principal Act, in sub-section (3), for the words “***punishable with fine***”, the words “***liable to a penalty***” shall be substituted;

The erstwhile provisions of Section 137 provided that if a Company fails to file financial statements with the Registrar it shall be punishable with fine and the officers of the Company shall be prosecuted.

The Ordinance has categorized such default as a ‘civil default’ by substituting fine with penalty.

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17. Section – 140 – Resignation of Auditor

In section 140 of the Companies Act 2013, for sub-section (3), the following sub-section shall be substituted.

If an auditor fails to file *e-Form ADT-3 within 30 days* of his resignation he shall be liable for a penalty of **Rs. 50,000** or his/her remuneration whichever is lower, with an everyday penalty of Rs. 5000 if the failure continues, subject to a maximum of **Rs. 5,00,000**.

18. Section 157 - Intimation of DIN

In section 157 of the Companies Act 2013, for sub-section (2), the following sub-section shall be substituted.

The fine under section 157 for not furnishing DIN to the Registrar shall be substituted with penalty of **Rs. 25,000**.

However, the sub-section now specifically provides that if the default continues a further penalty of **Rs. 100** shall be levied every day.

19. Section 159 – Punishment for contravention of sections 152, 155 and 156

For Section 159 of the Companies Act 2013, the following Section shall be substituted:

If any individual or director of a company makes any default in complying with any of the provisions of Section 152, Section 155 and Section 156, such individual or director of the company shall be liable to a penalty which may extend to **Rs. 50,000/-** and where the default is a continuing one, with a further penalty which may extend to **Rs.500/-** for each day after the first during which such default continues.

Section 152, 155 and 156 of the Act list down the provisions for appointment of Director, allotment of DIN and intimation of DIN. The penalty for contravention of these sections has been shifted to civil liability.

20. Section 164 –Disqualification of Director

In Section 164(1) a new sub-clause (i) shall be inserted.

If a director does not comply with the number of directorships i.e. maximum 10 public companies and maximum 20 in other companies he/she shall be disqualified under Section 164 of the Act.

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21. Section 165 - Number of Directorships

In Section 165 of the Companies Act, in sub-section (6), for the portion beginning with “punishable with fine” and ending with “contravention continues”, the words “*liable to a penalty of five thousand rupees for each day after the first during which such contravention continues*” shall be substituted.

22. Section 191- Payment to director for loss of office

In Section 191 of the principal Act, for sub-section (5), the following sub-section shall be substituted.

If a director of the Company makes any default in complying with the provisions of this Section, such Director shall be liable to a penalty of **Rs. 1,00,000/-**

The punishment for default under this Section has been shifted to civil liability.

23. Section 197 - Overall maximum managerial remuneration in case of inadequacy of profits

In section 197 of the Companies Act, 2013—

(a) sub-section (7) has been omitted;

(b) for sub-section (15), the following sub-section has been substituted, namely:

“(15) If any person makes any default in complying with the provisions of this section, he shall be liable to a penalty of **Rs. 1,00,000** and where any default has been made by a company, the company shall be liable to a penalty of **Rs. 5,00,000.**”

Pursuant to the amendment introduced in the Ordinance the whole sub-section (7) shall be omitted. Therefore, now the Independent Directors can be entitled to stock options.

24. Section 203 – Appointment of Key Managerial Personnel

In section 203 of the Companies Act, for sub-section (5), the following sub-section shall be substituted.

If any company makes any default in complying with the provisions of this section, such 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.

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

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in levy of penalty of **Rs. 1,00,000 to Rs. 5,00,000** on the company and up to **Rs. 50,000** on every officer-in-default. The Ordinance now levies an absolute penalty of **Rs. 5,00,000** 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. 5,00,000**.

25. Section 238 - Registration of offer of schemes involving transfer of shares

In section 238 of the Companies Act, 2013, in sub-section (3), for the words “punishable with fine which shall not be less than **Rs. 25,000** but which may extend to **Rs. 5,00,000**”, the words “liable to a penalty of **Rs. 1,00,000**” shall be substituted.

26. Section 248 – Power of the Registrar to remove the name of the company

The Ordinance has introduced two new clauses for removal of name of the Company as follows:

(a) in clause (c), for the word and figures “section 455,”, the words and figures “section 455; or” shall be substituted;

(b) after clause (c) and before the long line, the following clauses shall be inserted, namely:

“(d) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under subsection (1) of section 10A; or

(e) the company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.”.

27. Section 441 - Compounding of Offence

In Section 441, of the Companies Act, following shall be substituted:

a) The pecuniary jurisdiction of RD for compounding of offence under section 441(1)(b) has been from **Rs.5,00,000** to **Rs. 25,00,000**. Considering the major bulk of cases handled by NCLT at present and the significance of the report of RoC, it is rightfully justified to give greater jurisdiction to RD.

b) Ordinance has provided clarification that offences which are punishable with imprisonment only or with imprisonment and fine shall not be compoundable.

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28. Section 446B- Lesser penalties for One Person Companies (OPC) or small companies

In section 446B of the Companies Act 2013, for the portion beginning with “punishable with fine” and ending with “specified in such sections”, the words “*liable to a penalty which shall not be more than one half of the penalty specified in such sections*” shall be substituted.

The penal provision for any default in the annual return of an OPC or small company has been shifted from fine to penalty.

29. Section 447- Punishment for Fraud

In Section 447 of the Companies Act, 2013, in the second proviso, for the words “**Rs. 25,00,000**”, the words “**Rs. 5,00,000**” shall be substituted.

30. Section 454 - Adjudication of penalties

In Section 454 of the Companies Act 2013, —(i) for sub-section (3), the following sub-section shall be substituted, namely:

The adjudicating officer may, by an order-

- (a) impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of this Act; and
- (b) direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.”;

In Section 454 of the Companies Act 2013, in sub-section (8),

- (a) in clause (i), for the words “does not pay the penalty imposed by the adjudicating officer or the Regional Director”, the words, brackets and figures “fails to comply with the order made under sub-section (3) or sub-section (7), as the case may be,” shall be substituted;
- (b) in clause (ii), for the words “does not pay the penalty”, the words, brackets and figures “fails to comply with the order made under sub-section (3) or sub-section (7), as the case may be,” shall be substituted.

31. Section 454A- Penalty for repeated default

After Section 454 of the Companies Act, 2013 a new section 454A shall be inserted.

Where a company or an officer of a company or any other person having already been subjected to penalty for default under any provisions of this Act, again commits such default within a period of three years from the date of order imposing such penalty passed by the adjudicating officer or the Regional Director, as the case may be, it or he shall be liable for the second or subsequent defaults for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of this Act.”

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➤ **CONCLUSION**

To sum up, the Companies (Amendment) Ordinance 2018, is based on the Report of Committee constituted by MCA for 'Review of Penal Provisions of Companies Act 2013', which included several recommendations relating to corporate compliance/ governance, restructuring of Corporate Offences to relieve Special Courts from adjudicating routine offences, De-clogging the NCLT, etc.

In short, the major amendments proposed in the Companies Amendment Ordinance 2018, increase the power of Registrar of Companies and Regional Director. As at many places the word Tribunal has been replaced by Central Government, Compounding threshold for going to NCLT to be revised, again introduction of Certificate of Commencement of Business, Stricter norms for Independent Directors, alteration in relation to time period for charge registration and satisfaction and new ground for strike off of Company has been given to ROC.
