

RECENT CHANGES AND CRITICAL ANALYSIS OF COMPANIES ACT, 2013

By:

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COVERAGE

The **Companies Amendment Act, 2017** which received the President's assent on Jan 3, 2018.

Almost all the sections of the Companies (Amendment) Act, 2017 have been notified to be in effect, except for;

- Amendments made U/S 92 (1) & (3) (Annual Return),
- Second and third proviso to S 403(1) (Fees for filings etc.) and
- Section 406 (power to modify act in its application to Nidhis).

The **Companies (Amendment) Ordinance, 2018** promulgated by the President under Article 123(1) of the Constitution notified and made effective on and from November 2, 2018 was re-notified **as The Companies (Amendment) Ordinance, 2019 on Jan 12, 2019** with retrospective effect from November 2, 2018 as Companies (Amendment) Bill, 2019 could not be passed in the Rajya Sabha.

Only provisions that have notified and made effective have been dealt with in this presentation.

- ❖ Removal of ambiguity, inconsistencies and ratifying the omissions and errors.
- ❖ Addressing difficulties concerning strict compliances.
- ❖ To facilitate ease of doing business by a) rationalizing the provisions including incorporation process and b) decriminalizing host of compoundable offences to acts carrying civil liabilities.
- ❖ Step towards good and better governance.
- ❖ Harmonizing and synchronizing provisions with accounting standards and other legislation (SEBI, RBI).
- ❖ More accountability of stakeholders by firming up the penal provisions and ensuring compliances of the defaults and making provisions for stiffer penalties in case of repeated defaults.
- ❖ Identifying 16 sections where penalty can be adjudicated by the Registrar of Companies as against by the Special Courts.
- ❖ De-clogging NCLT.

De-clogging of NCLT: How?

- ▶ Enlarging the jurisdiction of the Regional Director with enhanced pecuniary limits for compounding of offences under section 441 of the Companies Act, 2013 from the current Rs. 5 lacs to Rs. 25 lacs)
- ▶ Vesting in the Central Government the power to approve the alteration in the financial year of a company under section 2(41)

and

conversion of public companies into private companies under section 14 of the Act.

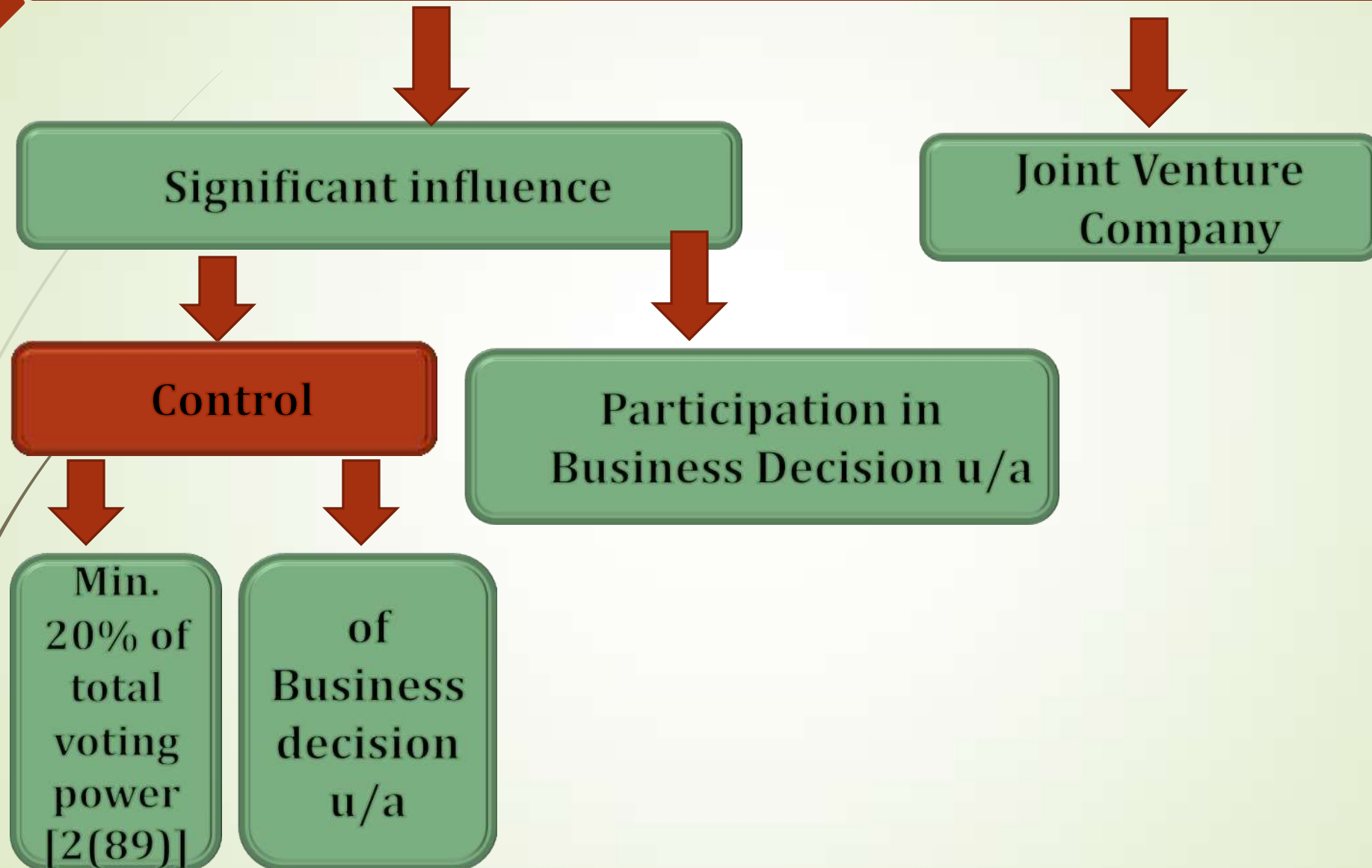
DEFINITIONS

ASSOCIATE COMPANY (Section 2(6):

- ❖ The **meaning** of the expression **“Significant Influence”** has been **enlarged**.
- ❖ The expression **“Joint venture”** is **defined**.
- ❖ Definition crucial as term referred at many places including consolidation of accounts [section 129(3)], Related Party Transactions.

Associate Company Section 2(6)

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FINANCIAL YEAR: [Section 2(41)]

- ❖ Under Amendment Act 2017 an Associate Company of a company incorporated outside India was permitted to apply to the NCLT to adopt a different financial year.
- ❖ CAO, 19 now vests this power on to the CG which will be exercisable by the RD vide notification dated 18/12/18.

- ❖ **Food for Thought?**

Can the concept of Associate Company be understood to be extending to a Company incorporated outside India in view of the fact that the definition of the term '**Associate Company**' does not refer to the term '**Body Corporate**'?

HOLDING COMPANY: [Section 2 (46)]

The term **“Body Corporate”** stands referred in the definition **(Explanation inserted)**.

Ambiguity removed: A company incorporated outside India or an LLP can be a Holding company.

- ❖ The **definition** has been **omitted** as it was otherwise of “no use”.
- ❖ The term was only referred under Section 174(3) and for its purpose, linkage was assigned to its meaning under Section 184(2).

KEY MANAGERIAL PERSONNEL [Section 2(51)]

- ❖ **Scope** of the term '**Broadened**'.
- ❖ **"Officer"** one level below the Directors in whole time employment who is designated as KMP by the Board is brought within the purview of this definition.

NET WORTH [Section 2(57)]

Amended - **Debit or Credit balance** of profit and loss account is to be added while computing NET WORTH.

RELATED PARTY [Section 2(76) (viii)]

- ❖ Scope enlarged by substituting the term “Company” with “Body Corporate”.
- ❖ “Investing Company” or “Venturer of the Company” resulting in Company becoming their Associate Company.

Food for thought?

In the context of a Body Corporate, would it be correct to refer to ‘Associate Company’ since the term ‘Associate Company’ does not refer to ‘Body Corporate’?

SMALL COMPANIES [Section 2(85)]

- ❖ Monetary threshold limit of paid-up capital increased from Rs. 5 Cr. to Rs. 10 Cr.
- ❖ Turnover as per profit & loss account for the immediately preceding financial year (*earlier last profit & loss account*)
- ❖ Threshold limit for turnover increased from Rs. 20 Cr. to Rs. 100 Cr.

SUBSIDIARY COMPANY [Section 2(87)]

- ❖ Exercise or Control of more than one-half of the “total voting power” (*earlier total share capital*) shall be the other criteria for identifying the subsidiary relationship.
- ❖ Insertion of expression “total voting power” has narrowed the play as shares with differential voting rights or convertible preference shares would ordinarily not be factored in.

- ❖ New Definition in substitution.
- ❖ Ambiguity removed as now Gross amount of revenue shall be the guiding factor.
- ❖ Indirect taxes such as excise duty, GST shall be included for computing Turnover.
- ❖ The amendment have implications concerning “small companies”, requirements of certification in form MGT-8 (turnover of 50 Cr. or more), determination of turnover by unlisted public companies for appointment of women director etc., applicability of section 135 (CSR- 1,000 Cr. turnover or more), appointment of internal auditor by unlisted public companies (200 Cr. or more) or private companies (200 Cr. or more), secretarial audit for listed and public co. (250 Cr. or more) etc.

INCORPORATION

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- ❖ New provision Inserted - Section 3A.
- ❖ Concept of liability of member(s) introduced under the Section.
- ❖ Applicability – if number of members is reduced below the prescribed limit and the Company carries on business with the reduced numbers for more than 6 months period.
- ❖ Every person who is a member during such period and has the knowledge/awareness of the factum.
- ❖ Such member(s) shall be severally liable for the payment of the whole debts of the Company contracted during that period and may also be severally sued.

- ❖ Form INC-1 replaced with new e-form **RUN** (Reserve Unique Name).
- ❖ Name can be applied for reservation without digital signatures and DIN and with minimum possible information and documentation.

ISSUES with e-RUN:

- One opportunity of re-submission is granted as against none when this was introduced.
- Fresh filing mandate paying up Rs. 1K/- again.
- Two proposed names (as against only one earlier) may be applied for. Earlier there was an option to propose 6 names in order of preference.
- Name reserved only for 20 days (for new companies) and 60 days for existing companies for change of name.

SPICe FORM, PROBABLE ALTERNATIVE TO RUN

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- ❖ File **SPICe** form.
- ❖ **Two opportunities** for re-submission.
- ❖ **Zero MCA fee** payable should the Company is being registered with an authorized share capital upto Rs. 10 Lacs. Stamp duty being a State subject shall however be payable.
- ❖ Form INC-9 in the form of declaration, in lieu of Affidavit as earlier (notified w.e.f. July 27, 2018).

Commencement of Business

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- New Section **10A** inserted.
- Any company incorporated on or after November 2, 2018 (being the date of commencement of the Ordinance) shall NOT;
 - Commence any business OR
 - Exercise any borrowing powers.

Unless;

- **Declaration** is filed within 180 days of incorporation in Form 20A (not yet available at MCA portal) of the subscriber shares have been fully paid for AND **verification** of Registered office address is also filed.
- Non-payment of subscription money and non-filing of declaration is now a ground for the Registrar to initiate action for removal of the name of the Company from the Register of Companies (Newly inserted sub-clause (d) of **Section 248(1)**)

Default – Company liable to penalty of 50K.

Every Officer in default – Penalty of Rs. 1,000/- for each day of default upto max of 1 lakh.

REGISTERED OFFICE

Section 12 (Amendment)

- ❖ A newly incorporated Company to have Registered office **on and from 30th day of incorporation** (earlier it was 15 days).
- ❖ Notice of change in the Registered office situation to be given within **30 days** (earlier it was 15 days).

► Sub-clause (9) inserted:

Registrar empowered to have registered office address verified if he has reasonable cause to believe that company is not carrying on any business or operation and where the Company does not have registered office address as the said address then the Registrar may initiate action for removal of name from the Register.

- Registrar is also vested with the power under Sub-section (9) to remove the name of the Company if he has reasonable cause to believe that the company is not carrying on business or operations. {Ground for the Registrar to initiate process under newly inserted sub-clause (e) under Section 248(1)}

CONVERSION OF PUBLIC COMPANY INTO PRIVATE COMPANY

- **Section 14 (Second Proviso to (1)):** Alteration in articles that has the effect of conversion of a public company into a Pvt. Company shall now be approved by the CG (authority with RD) on and from Dec 18, 2018 as against NCLT.
- NCLT shall however continue to deal with applications filed upto November 2, 2018, the date on which Companies (Amendment) Ordinance 2019 came into force.

AUTHENTICATION OF DOCUMENTS (Section 21)

- ❖ **An employee** of the Company authorized by the Board can authenticate the documents, contracts etc. of the Company. **Previously, KMP, Officer** of the Company authorized by the Board were the only category.
- ❖ The term employee is not defined under the Act for distinguishing with the term "Officer" which is defined.

Substituted in entirety w.e.f August 7, 2018.

- ❖ **Simplification** of private placement process and procedures but disclosure requirements have increased in the private placement offer cum application form.
- ❖ Private placement only to a **select group of persons** who are **identified by the Board of Directors**.

Changes:

- ❖ **No separate private placement offer letter** is required to be issued.
- ❖ **Private placement offer cum application form** without any renunciation right to be floated.
- ❖ *Requirement of separately filing form PAS-4 and PAS-5 with the Registrar has been done away with. The documents are now being filed as an attachment to form PAS-3.*
- ❖ *Private placement offer cum application letter only to be issued post filing of special resolution or board resolution with the Registrar.*

- ❖ Different kind of securities (i.e. equity shares, preference shares and debentures) can be issued concurrently to a class of identified persons (*as against completion of one kind of security issue*) subject however to the maximum number of identified persons not more than 200 in the aggregate in a financial year.
- ❖ e-form **PAS-3 to be filed within 15 days** (*earlier 30 days*).
- ❖ Default in filing will invite penal consequences on Company, its promoters and Directors @Rs 1,000/- per day of default upto a maximum of Rs. 25 Lacs. *Earlier there was no specific penalty for default in filing form PAS-3 except for the additional fees.*

- ❖ Money raised through private placement shall not be utilized ~~unless~~ allotment is made and return of allotment is filed.
- ❖ Private Placement not made in compliance with section 42 shall be deemed to be a “public offer”.
- ❖ The penalty provisions for raising of capital U/s has been rationalized by linking it to the amount involved in the issue (the amount involved or Rs. 2 Cr. whichever is lower).
- ❖ Provision of penal interest @12% per annum on the amount to be refunded.

ISSUE OF SHARES AT DISCOUNT

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- ❖ Shares cannot be issued at a discount.
- ❖ Shares can now be issued at a discount to the creditors when debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme as specified by RBI under RBI Act or Banking regulation Act.
- ❖ The offence under this section shall not be an offence punishable with imprisonment.
- ❖ Revised Penalty: For company and every officer in default: amount equivalent to the quantum of issue of shares or Rs. 5 Lakh, whichever is less; additionally Company to refund all money received with interest @12% p.a computed from the date of issue of shares.

ISSUE OF SWEAT EQUITY SHARES

Sweat equity shares can now be issued at any time after registration of the Company. Earlier, it could be issued after one year from the date of commencement of business by the company.

- ❖ Earlier, Rule 13(1) of the Companies (Share Capital and Debentures) Rules, 2014 mandated that the compliance of conditions specified in Section 42 shall be in addition to the conditions prescribed in the section.
- ❖ With the amendment, however, compliance with provisions of chapter III as applicable for issuing shares on preferential basis are now incorporated within the main Section 62(1)(c) itself. Compliances broadened.
- ❖ Valuation for issue of shares on preferential basis can be done by an authorized persons (merchant banker + CA with 10 yrs exp.) other than a registered valuer upto January 31, 2019 in terms of MCA notification dated September 25, 2018.

- ❖ Not less than **20%** (earlier 15%) of the amount maturing during the following financial year, (earlier it was during a financial year and the financial year, next following) to be deposited in a separate bank account to be called '**deposit repayment reserve account**' **on or before 30th day of April each year**. (earlier no such time frame was prescribed).
- ❖ Requirement of providing **deposit insurance** is **OMITTED**.
- ❖ **Condition relaxed**: now a company can accept deposits if defaults in repayment of deposit(s) or payment of interest **is made good** and the period of 5 years has elapsed from the date of making such default good. (earlier the company was not eligible to accept deposit if there was such default any time in the past)

- ❖ Deposits raised under CA, 1956 to be re-paid **within 3 years*** (earlier 1 year) from the commencement of Companies Act, 2013 or before expiry of the period for which the deposits were accepted. *[section 74(1)(b)] * The period of 3 years from commencement (01-04-2014) has already lapsed. NCLT empowered to extend this period further.*
- ❖ Renewal of any deposits to be done per Chapter V and Rules framed thereunder. *[new proviso added to section 74(1)(b)].*

- ❖ For Company's in default minimum monetary punishment rationalized. It shall not be less than Rs. 1 Cr. or twice the amount of deposits accepted by the company, whichever is lower (earlier it was minimum Rs. 1 Cr.).
- ❖ Punishment for every officer of the company who is in default is, imprisonment upto 7 years and fine not less than 25 Lacs extending to Rs. 2 Cr. (earlier imprisonment upto 7 years or fine not less than Rs. 25 Lacs extending to Rs. 2 Cr. or with both) *offence no longer compoundable.*

Sec. 77

- ❖ As this section mandates every company to register the particulars of the charge, so created, with the ROC within 30 days of creation, **a new (fourth) proviso is inserted** after the third proviso to section 77(1), in terms of which, **section 77 shall not apply to such charges**, as may be prescribed in consultation with RBI.
- ❖ Registrar's power to allow registration of charges beyond the ordinary period rationalized as under;
 - Charges that are created before November 2, 2018: Within maximum 300 days of the creation on additional fee payment and thereafter within additional 6 months period from Nov 2, 2018 on additional fee payment. (First and Second Proviso to 77(1))
 - Charges that are created after Nov 2, 2018: Within a maximum of 60 days of such creation on payment of additional fees and thereafter within a further period of 60 days after payment of fees as prescribed. (First and Second Proviso to 77(1)) advalorem.

- ❖ It is clarified that a charge holder can now apply to the Registrar if the Company fails to register the charge within the period of 30 days referred to in sub-section (1) of section 77 (earlier it was within the period specified in section 77 i.e. 30+270 with additional fee on application made by Company to the Registrar of companies).

- ❖ In terms of this section, a company is obligated to give intimation to the ROC, of the payment or satisfaction in full of any charge registered under Chapter VI within a period of thirty days from the date of such payment or satisfaction **and the provisions of sub-section (1) of section 77 were to, as far as may be, apply to an intimation given under this section. [Section 82(1)]**
- ❖ The latter portion of *Section 82(1)* i.e. “**and the provisions of sub-section (1) of section 77 shall, as far as may be, apply to an intimation given under this section**” is **OMITTED**.
- ❖ **New proviso to Section 82(1) inserted** wherein the ROC is given the power, on filing of application by the company, to allow such intimation to be made within a period of 300 days of such payment or satisfaction, on payment of such additional fee as may be prescribed.

➤ Newly Inserted Section 86(2):

Person willfully furnishing false or incorrect information or knowingly suppresses any material information that is required to be registered in terms of Section 77 shall be liable for action under FRAUD (**Section 447**).

Rectification by Central Government in the Register of Charges:

New Section 87 introduced in substitution:

- CG may now only allow ratification in Register of charges in the following scenarios:
 - A. Where omission in giving intimation to the ROC regarding satisfaction of charge within the prescribed time or
 - B. Omission or misstatement of any particulars w.r.t. any such charge or modification of charge or w.r.t any memorandum of satisfaction or other entry made u/s 82 or 83,

was **accidental** or **inadvertently made** or **is not prejudicial** of the creditors or shareholders of the Company.

CG may direct for extension of for filing intimation concerning the payment or satisfaction of charge or for rectification of the misstatement or omission made.

- ❖ Concept of **Significant Beneficial Owner** (SBO): *{Substituted Section 90}*
- ❖ Only in the context of an individual (who may or may not be a member) acting alone or with persons or trust and persons resident outside India and hold beneficial interests;
 - of not less than 25% (or such other%) in shares of a Company OR;
 - Holds right to exercise or actually exercises significant influence or control {2(27)}
- ❖ SBO to make declaration to the Company.

A company is obligated to:

- maintain register of interest so declared by SBO and keep such register open to inspection by any member.
- file a return of SBO with Registrar.
- Give notice to any person (even non-member) who is not registered as SBO if Company knows or has reasonable believe a) of the person being SBO; b) or knows or likely to know the identity of a SBO c) who was a SBO at any time during the three years immediately preceding the date of such notice and such person to give information within 30 days of the date of the notice, failing which or where the information is not satisfactory, the Company shall within 15 days thereafter apply to NCLT for directions on restrictions on shares
 - transfer of interest;
 - suspension of rights and
 - other manner as is prescribed.
- NCLT to determine the application in a time bound manner (60 days of receipt) after giving opportunity to the parties concerned.

- ❖ Failure to make declaration by SBO: **With imprisonment for a term which may extend to one year or** Minimum fine of Rs. 1 lakh and upto Rs. 10 lakh **or with both** AND continuing failure, a fine of Rs. 1K per day.
- ❖ **Company's failure or breach:** The Company and every officer of the Company in default liable to minimum fine of Rs. 10 lakh and upto Rs. 50 Lakh and in case of continuing failure, a fine of Rs. 1K every day.
- ❖ The limitation period of 1 year has been prescribed for the aggrieved party to make an application to the Tribunal against an order passed by the Tribunal restricting the rights attached to the relevant shares to relax or lift of such restrictions. In case of failure to file the application within such timeline, then such shares shall mandatorily be transferred to IEPF.

- Revised form BEN-1 yet to be deployed by the Ministry of Corporate Affairs and the revised due date yet to be notified in terms of General circular no. 8/2018 dated September 10, 2018.
- Return in Form BEN -2 shall now be filed within 30 days from the date of deployment of the e-form at the web-portal of the Ministry of Corporate Affairs [General Circular No. 7/2018 dated September 6, 2018.

Annual Return – Sec 92

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- Time limit of 270 days earlier specified with reference to section 403 has been done away with. Company may file anytime with additional fees. (Section 92(4) On and from May 7, 2018)

Non Filing Penalty - Revised:

- **Earlier:**
- **Company:** Minimum Fine of Rs. 50,000 and Maximum Fine of Rs. 5 Lakh.
- **Officer in default:** Imprisonment upto 6 months or Minimum Fine of Rs. 50,000 & Maximum Fine of Rs. 5 lakh.

Now: Company & Officer in default:

- Minimum Penalty of Rs. 50,000 & Maximum Penalty of Rs. 5 Lakh
- In case of continuing default - Further Penalty of Rs. 100 per day

Penalty Vs. Fine Controversy – Why?

Both the terms are not defined under the Companies Act. The distinction on account of the dictionary meanings of the two terms is of no consequence in any case.

- In our view, the reference to the two terms have been made in the Ordinance of 2019 and the re-categorization has been done so that offences of “technical nature” or “procedural nature” (16 as of now) could be dealt with by authorized adjudicating officers (The Registrar of Companies) U/S 454 as against by the Special Court (defined under Section 435), which shall continue to adjudicate the remaining 65 compoundable offences.
- Idea is to relieve the Special Courts from adjudicating routine offences.
- The adjudicating process U/S 454 read with the Companies (Adjudication of Penalties) Rules 2014.

Following are the 16 sections that are amended by the Ordinance wherein the punishment for non-compliance of certain offences under CA, 2013 is re-categorized from **“FINE”** to **“PENALTY”**:

- 53(3) - Prohibition of Issue of shares at a discount
- 64(2) - Notice to be given to Registrar for alteration of share capital
- 92(5) - Annual Return
- 102(5) - Statement to be annexed to Notice
- 105 – Proxies
- 117(2) - Resolutions and Agreements to be filed
- 121(3) - Report on annual general meeting
- 137(3) - Copy of financial statement to be filed with Registrar

- 140(3) - Removal, resignation of auditor and giving of special notice
- 157(2) - Company to inform Director Identification Number to Registrar
- 159 - Punishment for Contravention in respect of DIN
- 165(6) - Number of Directorships
- 191(5) - Payment to Director for Loss of Office
- 197(15) - Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits
- 203(5) - Appointment of Key Managerial Personnel
- 238(3) - Registration of the offer of scheme involving transfer of shares

Sr. No.	Section	Nature of Default	Earlier provision	As per Ordinance
1.	Section 10A- Commencement of Business, etc	Failure to furnish declaration under the section	No provision	Company: Rs. 50,000/- Officer in default: Rs. 1,000/- for each day up to maximum of Rs. 1 lakh
2.	Section 53 - Prohibition of issue of shares at Discount	Issue of shares at a discount	Company: Rs. 1 Lakh to Rs. 5 Lakh Officer in Default: Imprisonment upto six months or Fine from Rs. 1 Lakh to Rs. 5 Lakh or Both.	Company & Officer in Default: Penalty (earlier Fine) upto the Amount raised or Rs. 5 Lakh, whichever is Less. Company Shall also be required to refund the money raised through such issue alongwith interest at a rate of 12% p.a. from the date of issue of shares
3.	Section 64- Notice for alteration of share capital	Non-filing of notice with RoC for alteration of share capital of the Company	Company & Officer in default: Fine Rs. 1,000/- per day or Rs. 5 Lakh, whichever is Less.	Company & Officer in default: Minimum Penalty (earlier Fine) of Rs. 1,000/- per day or Rs. 5 Lakh, whichever is less
4.	Section 92- Annual Return	Non-filing of Annual Return	Company: From Rs. 50,000/- to Rs. 5 Lakh Officer in default: Imprisonment upto 6 months Or Fine from Rs. 50,000/- upto Rs. 5 Lakh or Both	Company & Officer in default: Minimum Penalty (earlier Fine) of Rs. 50,000/-. In case of continuing default, further Penalty of Rs. 100/- per day upto a maximum Penalty (earlier Fine) of Rs. 5 Lakh

Sr. No.	Section	Nature of Default	Earlier penal provision	As per Ordinance
5.	Section 102- Statement to be annexed to the Notice	Mis-statement in Explanatory statement	Every Promoter, Director, Manager or other KMP who is in default shall be punishable with Fine which may extend to Rs. 50,000 or 5 times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.	Every Promoter, Director, Manager or other KMP who is in default shall be punishable with Penalty (earlier Fine) which may extend to Rs. 50,000 or 5 times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.
6.	Section 105- Proxies	Notice of General Meeting to contain clause for proxies	Company and Officer in Default: Fine of Rs. 5,000/-	Company and Officer in Default: Penalty (earlier Fine) of Rs. 5,000/-
7.	Section 117- Resolutions and agreements to be filed	Non-filing of MGT-14	Company: Fine of Rs. 1 Lakh upto maximum of Rs. 25 Lakh Officer in default: Minimum Fine of Rs. 50,000 upto maximum of Rs. 5 Lakh	Company: Minimum Penalty (earlier Fine) of Rs. 1 Lakh, in case of continuing default, further Penalty of Rs. 500 everyday Upto a Maximum Penalty (earlier Fine) of Rs. 25 Lakh Officer in default: Minimum Penalty (earlier Fine) of Rs. 50,000, in case of continuing default, further Penalty of Rs. 500 per day upto Maximum Penalty (earlier Fine) of Rs. 5 Lakh

Sr. No.	Section	Nature of Default	Earlier penal provision	As per Ordinance
8.	Section 121- Report on Annual General Meeting	Non-filing of MGT-15	Company: Minimum Fine of Rs. 1 Lakh Maximum Fine of Rs. 5 Lakh Officer in default: Minimum Fine of Rs. 25000 Maximum Fine of Rs. 1 Lakh	Company: Minimum Penalty (earlier Fine) of Rs. 1 Lakh, in case of continuing default, a further Penalty of Rs. 500 per day. Upto a Maximum Penalty (earlier Fine) of Rs. 5 Lakh Officer in default: Minimum Penalty (earlier Fine) of Rs. 25000, in case of continuing default, A further Penalty of Rs. 500 per day upto a Maximum Penalty (earlier Fine) of Rs. 1 Lakh.
9.	Section-137-Filing of Financial Statements	Failure in filing financial statements with the Registrar	Company: Fine of Rs. 1000 everyday upto Maximum Fine of Rs. 10 Lakh Officer in Default: Imprisonment of term of 6 months or Minimum Fine – Rs. 1 Lakh, Maximum Fine – Rs. 5 Lakh or Both	Company: Penalty (earlier Fine) of Rs. 1000 everyday. Uptp a maximum of Penalty of Rs. 10 Lakh Officer in Default: Minimum Penalty (earlier Fine) - Rs. 1 Lakh, in case of continuing default, further Penalty- Rs 100 per day upto Maximum Penalty (earlier Fine) - Rs. 5 Lakh
10.	Section- 140- Resignation of Auditor	Non-filing of e-Form ADT-3	Auditor: Minimum Fine of Rs. 50,000 or amount equal to remuneration of auditor, whichever is less upto Maximum Fine of Rs. 5 Lakh	Auditor: Minimum Penalty (earlier Fine) of Rs. 50,000 or amount equal to remuneration, in case of continuing default, further Penalty of Rs. 500 every day uptp Maximum Penalty (earlier Fine) of Rs. 5 Lakh

Sr. No.	Section	Nature of Default	Earlier penal provision	As per Ordinance
11.	Section 157(2) – Intimation of DIN	Failure to intimate DIN of directors to the Registrar	Company: Minimum Fine of Rs. 25,000 Maximum Fine of Rs. 1 Lakh Officer in default: Minimum Fine of Rs. 25,000 Maximum Fine of Rs. 1 Lakh	Company: Minimum Penalty (earlier Fine) of Rs. 25,000, in case of continuing default, a further Penalty of Rs. 100 per day, upto Maximum Penalty (earlier Fine) of Rs. 1 Lakh Officer in default: Minimum Penalty (earlier Fine) of Rs. 25,000, in case of continuing default, a further Penalty of Rs. 100 per day, upto Maximum Penalty (earlier Fine) of Rs. 1 Lakh
12.	Section 159- Punishment for contravention of sections 152, 155, and 156	Punishment for contravention of sections 152, 155, and 156	Individual or Director: Imprisonment upto 6 months Or Minimum Fine of Rs. 50,000, in case of continuing default, further Fine of Rs. 500 per day	Individual or Director: Minimum Penalty (earlier Fine) of Rs. 50,000, in case of continuing default, further Penalty (earlier Fine) of Rs. 500 per day.
13.	Section 165- Number of directorships	Non-compliance of permissible number of directorship by director	Director: Minimum Fine of Rs. 5000 Maximum Fine of Rs. 25,000 per day	Director: Penalty (earlier Fine) of Rs. 5000 per day
14.	Section 191- Payment to Director for loss of office	Contravention of the section	Director: Minimum Fine of Rs. 25,000 Maximum Fine of Rs. 1 Lakh	Director: Penalty (Earlier fine) of Rs. 1 Lakh.

Sr. No.	Section	Nature of Default	Earlier penal provision	As per Ordinance
15.	Section 197- Overall maximum managerial remuneration in case of inadequacy of profits	Non-compliance of the provisions of the section	Any person: Minimum Fine of Rs. 1 Lakh Maximum Fine of Rs. 5 Lakh	Any person: Minimum Penalty (earlier Fine) of Rs. 1 Lakh Maximum Penalty (earlier Fine) of Rs. 5 Lakh
16.	Section 203- Appointment of KMP	Default in appointment of Key Managerial Personnel	Company: Minimum Fine of Rs. 1 Lakh Maximum Fine of Rs. 5 Lakh Director and KMP in default: Minimum Fine of Rs. 50,000, in case of continuing default, a further Fine of Rs. 1000 everyday	Company: Penalty (earlier Fine) of Rs. 5 Lakh Director and KMP in default: Minimum Penalty (earlier Fine) of Rs. 50,000, in case of continuing default, a further Penalty (earlier Fine) of Rs. 1000 everyday upto Maximum Penalty of Rs. 5 Lakh
17.	Section 238 - Registration of offer of schemes involving transfer of shares	Contravention of this section	Director: Minimum Fine of Rs. 25,000 Maximum Fine of Rs. 5 Lakh	Director: Penalty (earlier Fine) of Rs. 1 Lakh
18.	Section 446B- Application of Fines	Default in filing of annual return by OPC and small company	Half of Fine specified in section 92(5) 117(2) and 137(3)	Half of Fine specified in section 92(5) 117(2) and 137(3)
19.	Section 447- Punishment for fraud	Penal provisions for fraud involving Rs. 10 lakh or 1% of turnover and does not involve public interest	Any person guilty: Imprisonment upto 5 years Or Fine of Rs. 25 Lakh	Any person guilty: Imprisonment upto 5 years Or Fine of Rs. 50 Lakhs

DIRECTORS IDENTIFICATION NUMBER (DIN)

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- ❖ Form DIR-3 applicable for obtaining DIN before appointment only in an existing company. Professional certification not required. Applicant+ designated officials of company can sign.
- ❖ Individuals upto 3 in numbers, who are intending to form a new Company and do not have DIN, will be allotted DIN through SPICe form.
- ❖ CG may prescribe any other identification number which will be treated as DIN for purpose of the Act and a person holding such identification number can be appointed on the Board of a Company. Sections 152 and 153 are amended accordingly.
- ❖ DIR-3(KYC) to be done on annual basis by DIN holders as on March 31 of financial year on or before April 30. (Made effective 10/07/18)

- ❖ At least one Director must have **stayed** in India for at least **182 days**.
- ❖ Now “**stay in India**” is related to **financial year** (earlier it was **previous calendar year**).
- ❖ The requirement to apply proportionately for a newly incorporated company. *Substituted Section 149(3).*

Criteria for **“the incumbent”** – Limited relaxations granted. Pecuniary relationship criteria has been qualified to exclude only the following transactions: *(Section 149(6)(c))*

- ❖ Amount received by way of remuneration as such Director; OR
- ❖ Entering into transaction not exceeding 10% of the total income of the incumbent; OR Such sum as may be prescribed.

Pecuniary relationship - With whom?

The Company, Holding, Subsidiary or Associate Company or their promoters, Directors during two immediately preceding financial years or during the current financial year.

Pecuniary interest of any “Relative” of the incumbent:

The following transactions are now excluded (Section 149(6)(d)):

- ❖ Holding of any Security or interest in the Company of face value not exceeding 50 lakh or upto 2% of the paid-up capital of the Company, its holding, subsidiary or associate company during the two immediately preceding FYs or during the current FY.
- ❖ Indebtedness to the Company, its holding, subsidiary or associate company or their promoters or directors not in excess of the amount as may be prescribed (Rs. 50 lacs) during the two immediately preceding FYs or during the current FY.

- ❖ Has given a guarantee or provided any security in connection with the indebtedness of any third person to the Company or its holding, subsidiary or associate company or their promoters or directors of holding company not in excess of the amount as may be prescribed (Rs. 50 lacs) during the two immediately preceding FYs or during the current FY.
- ❖ Any other pecuniary transaction or relationship with the Company, its holding, subsidiary or associate company amounting to less than 2% of its gross turnover or total income singly or in combination with the above transactions.
- ❖ Relative of the incumbent who is not a KMP in the Company but only an employee in the Company, its holding, subsidiary or associate company in any of the three immediately preceding financial years. **The prescribed criteria under 149(6)(e)(i) will not apply.**

The requirement of deposit of Rs. 100K in terms of Section 160(1) will not apply in case of the following:

- a) Independent Director.
- b) Director recommended by the nomination and remuneration committee.
- c) Director recommended by the Board of Directors, where no such committee.

(Insertion – Proviso to Section 160(1))

ALTERNATE DIRECTOR – concerning

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An existing Director cannot be appointed as an Alternate Director in the same company. *Amendment - Section 161(2).*

CASUAL VACANCY IN THE OFFICE OF A DIRECTOR:

Now in the case of **ANY company** (*earlier its application was to public company only*) if casual vacancy arises in respect of a Director who was appointed in General meeting, the Board can fill the vacancy and such appointment is to be approved by the members at the General meeting held immediately following such appointment. *Amendment Section 161(4)*

- ❖ A person (**not already a disqualified director**) who is appointed as a Director of a Company which is in default in filing its financial statements or Annual Returns for any continuous period of three financial years or has failed to repay deposit etc. shall not incur any disqualification for a period of 6 months from the date of his appointment. **Insertion – proviso to Section 164(2).**
- ❖ Disqualifications (on account of conviction for any offence and sentenced to imprisonment for not less than 6 months) order of disqualification passed by court or Tribunal being in force, conviction for offence under section 188) to continue even where petition/appeal is filed against such conviction or disqualification.

❖ “Dormant Companies” and “Section 8 Companies” to be excluded for computing the limit of 20 directorships. *(Inserted – Explanation II to Section 165(1)).*

❖ A director incurring disqualification on account of default under 164(2) shall vacate office in all companies, except for the company which is in such default *(Insertion – Proviso to Section 167(1)(a)).*

❖ A Director who is disqualified by the Courts or Tribunals order OR is convicted for an offence with imprisonment of 6 months or more, then even though he remains disqualified, such Director shall not vacate his office only in the following three situations that have now been prescribed:-

- a) For 30 days from date of conviction or order of disqualification;
- b) Where appeal or petition is preferred within 30 days, until the expiry of seven days of the disposal;
- c) where any further appeal or petition is preferred within 7 days, until such appeal or petition is disposed of. *(substitution – U/S 167(1)(f))*

Filing of **DIR – 11** is optional now on the part of a resigning Director. *[Amendment proviso to 168(1)]*

Food for thought:

What happens if company defaults in filing DIR-12 form and DIR-11 is not opted by the resigning director?

APPOINTMENT OF MANAGING DIRECTOR, WHOLE -TIME DIRECTOR OR MANAGER (Section 196)

Board can apply to CG for appointing any person as MD/WTD or Manager who is of 70 yrs. in age and above if SR is not passed by the members but votes in favor are more than against, and CG is satisfied that it would be beneficial to appoint him. **Earlier, there was no such option and the appointment could not be made if SR was not passed.**

OVERALL MAXIMUM MANAGERIAL REMUNERATION AND MANAGERIAL REMUNERATION IN
CASE OF ABSENCE OR INADEQUACY OF PROFITS (*Section 197*)

- ❖ **CG approval** for payment of managerial remuneration by a public company exceeding 11% of its net profits is **done away with**. **Only Schedule V has to be complied with.** [*Sub. S (1)*]
- ❖ **SR (earlier ordinary resolution)** is required to pay remuneration:
 - ✓ **>5%** of the net profits of the company to **One MD/WTD/Mgr.**
 - ✓ **>10%** of the net profits of the company **to all such MD/WTD/Mgr. together.**
 - ✓ **>1%** of the net profits of the company **to the directors who are not MD/WTD/Mgr.** if there is any MD/WTD/Mgr.
 - ✓ **> 3%** of the net profits of the company **to the directors who are not MD/WTD/Mgr., in other cases.**

- ❖ **Third proviso is inserted in Sub. S. (1)**, mandating prior approval of the bank or public financial institution concerned or the non-convertible debenture holder or other secured creditor, as the case may be, before obtaining approval in the general meeting under **First and/or Second proviso to Section 196(1)**, in case the company has defaulted in payment of dues to any such entity.
- ❖ **Compliance of the provisions of schedule V made mandatory.** Resorting to obtain CG approval is done away with where the company is not able to comply with schedule V. *[Sub. S (3)]*
- ❖ *Sub. S. 7 (prohibiting independent directors from stock options etc. have been deleted). No impact though as similar prohibition is contained under Section 149(9).*
- ❖ Timeframe of **two years or such lesser period as may be allowed** by the company is prescribed **for the Director to refund the money received by him in contravention** of the provisions of the Act. *[Sub. S (9)]*

- ❖ For the company to waive the recovery of any such sums from the director, SR has to be passed within two years from the date the sum becomes refundable. CG approval is done away with. *(time frame fixed) [Sub. S (10)]*
- ❖ Waiver by the company requires prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, in case the company has defaulted in payment of dues to any such entity. *(new proviso inserted)*
- ❖ Resorting to CG approval route is done away with where the company is not able to comply with schedule V. Thus compliance of Sch. V is made mandatory. *[Sub. S (11)]*

- ❖ Auditor to specify in his audit report under section 143, whether the remuneration payment to its Directors conforms to the requirements of this Section, is in excess of what has been prescribed and give other details as may be prescribed. *[New ss. (16) Inserted]*
- ❖ All existing applications made to CG under this section stands abated upon commencement of this Amendment Act and the Company to obtain approval in accordance with the amended section within 1 year of the commencement hereof. *[New ss. (17) inserted]*

- ❖ No annual ratification is required.
- ❖ Failure to file resignation to be punishable with minimum fine of Rs. 50,000/- or remuneration received, whichever is lower and in case of continuing failure, Penalty of Rs. 500 per day, upto maximum of Rs. 5 Lakh. {Amendment - Section 140(3)}

Disqualifications of Auditor- stands firmed up:

Any person who directly or indirectly provides any services specified under Section 144 (viz., internal audit, book keeping and accounting services, internal audit etc.) to Company, its holding and subsidiary is **NOT** eligible for appointment as an auditor. {Section 141(3)(i)}

POWERS AND DUTIES – Scope enlarged

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Auditors of the holding company to have the right to access records of all its associates companies, in addition to the subsidiaries, for the purposes of consolidation of accounts of the holding company (*Amendment – proviso to Section 143(1)*).

INTERNAL FINANCIAL CONTROLS-Ambit and Scope stands limited

Auditors to report on the Internal Financial Control with reference to Financial Statements only. Earlier, the scope was broad as they had to report on internal financial control systems. {*Amendment - Section 143(3)(i)*}

MEETINGS OF BOARD (SECTION 173)

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Certain matters (viz. approval of annual financial statements, board report, prospectus, matters relating to amalgamation, merger, etc. considering recommendation of audit committee meetings on financial statements) which were not permitted to be transacted in a Board meeting held via video conferencing or other audio-visual means **CAN NOW BE TRANSACTED** in a Board meeting convened and held through such medium, if quorum, constituting of Directors who are physically attending the meeting is present. (*Insertion - 2nd proviso U/S 173(2)*)

GENERAL MEETINGS

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Annual General Meeting (Section 96)

Unlisted Company may hold its AGM anywhere in India, if consented by all members in writing or in electronic mode obtained in advance. For other companies, the requirement remains the same.

Extra Ordinary General Meeting (Section 100)

The amendment clarifies that an extra ordinary general meeting of a Company, other than of a WOS of a Company incorporated outside India, shall be held at a place within India.

- ❖ After the amendment the concern gets addressed as the term — associate companies (which inter-alia includes a joint venture Company) is inserted in addition to the subsidiaries.
- ❖ The consolidated financial statement of the company, its subsidiaries and associates should be in accordance with the applicable accounting standards and be laid before the Annual General Meeting.

FINANCIAL STATEMENTS

- ❖ Chief Executive Officer whether appointed as director or not shall sign the financial statement.
- ❖ since the appointment of a managing director is not mandatory for all companies, insertion of the words —if any, after the words —managing director.

BOARD REPORT

- ❖ The Requirement of having extract of Annual return (Form MGT-9) has been done away with by placing the copy of annual return on website of the company (if any) and the web address/ link disclosed in the Board's Report.
- ❖ Alignment of provisions of sections 134 (3)(p), 178(2) and schedule IV with respect to performance evaluation of directors.
- ❖ Abridged Board's Report for One Person Company and Small Company stands prescribed. *[Rule 8A of Companies (Accounts) Rules, 2014]*

- ❖ The words —**any financial year** have been replaced by the words **immediately preceding financial year**.
- ❖ Earlier - MCA clarification dated June 18, 2014, had clarified that any financial year to imply any of the three preceding financial years.
- ❖ Composition of CSR committee permissible with two or more directors in case the company is not required to appoint an Independent Director under section 149(4).
- ❖ Explanation below Section 135(5) replaced with the words — net profit, to bring harmony in the Act and CSR Rules as CSR rules define the term “net profit”.

- ❖ The requirement of constituting an Audit Committee now stands limited. Applicable only for **listed public companies** (earlier it was applicable for every listed company) and other public companies fulfilling the prescribed criteria. (*Substitution of Section 177(1)*)
- ❖ New Provisos to Section 177(4)(iv) inserted.

- ❖ Constitution scope curtailed.
- ❖ Applicable only for **listed public companies** (*earlier, every listed company*) **and other public companies** fulfilling the prescribed criteria. (*Substitution of Section 178(1)*).

Change in scope of functioning:-

- ❖ Now instead of carrying out the evaluation of every Director's performance, the committee is to specify the manner of effective evaluation of performance of the Board, its committees and individual Director;
- ❖ the evaluation is to be carried out either by the Board, by nomination and remuneration committee or by an independent external agency;

- ❖ Committee to review its implementation and compliance.
[Amendment Section 178(2)]
- ❖ Instead of disclosing the remuneration policy in the Board's report, it is now permitted to place such policy on Company's website, if any. Only the salient features of the policy and changes therein, if any, along with web-link to be disclosed in the Board Report *(insertion in 178(3)(c))*.
- ❖ As against the "non-consideration" of resolution of any grievance by the stakeholder relationship committee, its inability to resolve or consider any grievance shall not be considered a contravention of section 178. *{Amendment – Proviso to Section 178(8)}*

DISCLOSURE OF INTEREST BY DIRECTOR *(Section 184)*

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- ❖ No minimum fine.
- ❖ Upper limit of Rs. 100K remains the same. *(Change – (4))*
- ❖ The exemption clause (Clause 5) has been broadened to factor in “bodies corporate” *(Substitution – (5)(b))*. Accordingly, any contracts/arrangements between one or more companies **AND** one or more bodies corporate in which director(s) do not hold more than 2% of the paid up share capital in the company or the body corporate. Such contracts or arrangements stand excluded.

LOAN TO DIRECTORS, ETC. (Section 185)

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- ❖ **Substituted** in its entirety.
- ❖ **INTENT:** Rationalization and introduction of enabling provisions:
- ❖ **General prohibition on a Company:** No advancing of loan/giving guarantee/providing security in connection with any loan to its Director (or the Director of the holding Co.)/ Such Director's Partner, the Relative or Such Director's or his relative's Firm. (1)
- ❖ 4 exceptions to the general prohibition retained. (3)

- ❖ Enabling provision: The list under the expression “Any person in whom any of the director of the company is interested” stands pruned.. a “Private Company and certain Body Corporate only to whom loan etc. can be extended subject to **two conditions (a) SR + disclosures (b) borrowing company to use loan for its principal business activity.** (2)
- ❖ Scope and ambit of the penal provision enlarged to now include **“every officer of the Company who is in default”** and equating the penalty to that applicable to Director or other person to whom any loan is advanced....(4)

INTENT: Removal of ambiguity and introducing enabling provisions.

- ❖ Loan by a Company to a person who is in the employment of the Company is excluded from computing the prescribed limits. *(Insertion of Explanation to (2))*
- ❖ Requirement of obtaining members authorization by way of SR for exceeding the prescribed limits is done away with only in respect of the following transactions subject to disclosures in the financial statements: *{Substituted (3)}*
- ✓ Loan advances, guarantee given or security provided to a WOS or a JV Company.
- ✓ Acquisition (as against investment) by a holding Company of the securities of its WOS.

- ❖ The usage of the terms “Acquisition” and “Investment” that was sort of being used inter-changeably in the section earlier has been corrected in line with the purpose and intent. Acquisition may not necessarily be from an investment perspective but investment is always from the perspective of deriving income and/or appreciation. *Substitution - (11)(b)*
- ❖ The definition of the term “Investment Company” is further clarified by introducing a deeming provision with respect to its principal business, which is relatable to its assets base (asset in form of investments in securities not being less than 50% of its total assets) and income base (income derived from investment not less than 50% of its gross income).

INTENT: Enabling provision & clarity:

- ❖ Where 90% or more members in number in a Company are relatives of the promoters or are related persons, such members, even though related, are now not restricted from voting on any resolution seeking to approve any contract or arrangement of the Company with a related party. (*Insertion – new proviso #3*)
- ❖ Non approved contracts/arrangements with related parties will be voidable at the option of the Board or as the case may be of the shareholders. (*Change – (3)*)

❖ Definition of “**Beneficial Interest in share**” Inserted (Sub-Section 10)

CLARITY:

- ❖ An inclusive definition which is broader in scope and ambit as it refers to “**direct or indirect**”.
- ❖ Refers to a Person alone or together with any other person;
- ❖ who has the right or entitlement to;
 - exercise any rights attached to such share;
 - participate in distributions (including dividend) in respect of the share.

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- ❖ While computing profits for the purpose of declaration of dividend, apart from depreciation, the following to be excluded (*Inserted proviso to Section 123(1)(a)*):
 - Unrealized gains;
 - notional gains; or
 - revaluation of assets; and
 - change in carrying amount (book value) of assets or liability measured at their fair value.
- ❖ In a situation of inadequacy or absence of profits in any financial year, only amount transferred from accumulated profits to **free** reserves can be used for declaration of dividend. {*Amendment to 2nd proviso to Section 123(1)*}

- ❖ Can also be declared even after the closure of FY till holding of the annual general meeting, out of;
 - Surplus in the P&L A/c; or
 - Profits of the relevant FY; or
 - Profits generated in the current FY till the quarter preceding the date of declaration of the interim divided. If there is loss scenario during this quarter period, then interim dividend rate cannot exceed the average dividend declared during the immediately preceding three financial years.

FEE FOR FILING (*SECTION 403*)

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- Requirement of filing forms and returns within 270 days from the date by which the return should have been submitted has been done away with. Further, reference of section 403 has been removed from section 89, section 92, section 117 section 137 etc.

- Additional fees for delayed filing will vary depending on number of defaults and nature of document to be filed.

In case of non filing of financial statement & Annual Return within prescribed period, additional fees not less than Rs. 100/- per day may be levied and different amount may be specified for different classes of companies.

In case of returns other than annual return and financial statements –additional fees as may be prescribed may be levied.

In case of defaults on two or more occasions, such higher additional fees may be prescribed which shall be not less than twice the additional fees as referred above.

Without prejudice to the liability for Payment of fees and additional fees as may be prescribed, The Company and its officers in default shall remain liable to the penalty or punishment provided in the relevant section or under the Act as the case may be.

COMPOUNDING OF OFFENCES

Earlier

- Fine only

Post
amendment

- Offences not punishable with imprisonment only.
- Offences not punishable with imprisonment and also with fine.

PUNISHMENT FOR FRAUD (*section 447*)

Any person found guilty of any fraud involving an amount of atleast Rs. 10 Lacs or one percent of the turnover of the Company, whichever is lower, shall be punishable with:

- with imprisonment for a minimum period of 6 months and maximum period upto 10 years; and
- Fine not less than the amount involved in fraud but which may extend to 3 times of the amount involved in the fraud.

In case of fraud which involves public interest, minimum term of imprisonment is 3 years

Any person found guilty of any fraud involving an amount less than Rs. 10 Lacs or one percent of the turnover of the Company, whichever is lower and does not involve public interest shall be punishable with:

- With imprisonment which may extend to 5 years or
- With fine which may extend to Rs. **50** Lacs or
- With both

- **Substituted S 454(3)** - The adjudicating officer shall also give the direction of making good of the default at the time of levying penalty.
- Substituted: 454(8) - Default would occur when the company or the officer in default fails to comply with the order of the adjudicating officer or RD, as the case may be.
- **454A** - 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, 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 CA 2013.

THANK YOU

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January 18, 2019

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