



MCA further amends Companies Act, 2013 through an ordinance

28 November 2018

First Notes on

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Disclosures

Sector

All

Banking and insurance

Information, communication, entertainment

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Relevant to

All

Audit committee

CFO

Others

Transition

Immediately

Within the next three months

Post three months but within six months

Post six months

Forthcoming requirement

Background

The Government of India constituted a committee¹ to review the existing framework dealing with offences under the Companies Act, 2013 (2013 Act) and related matters. The committee was required to make recommendations to promote better corporate compliance.

The committee submitted its report on 27 August 2018.

New development

On 2 November 2018, the Ministry of Law and Justice issued the Companies (Amendment) Ordinance, 2018 (ordinance) and amended the 2013 Act based on the recommendations of the committee.

The ordinance is effective from 2 November 2018.

This issue of First Notes provides an overview of the key amendments made by the ordinance to the provisions of the 2013 Act.

The amendments have been categorised as following:

Topic	Key amendments
Changes in main provisions of the 2013 Act	<ul style="list-style-type: none"> Power vested with the CG (instead of Tribunal) to approve changes to the financial year and alteration of articles pursuant to conversion of public companies into private companies An additional disqualification has been added that would prevent a person to be appointed as a director Additional events added which can lead to removal of name of a company from the register of companies Revised timeline prescribed for registration of a charge by companies.
Changes in penal provisions	<ul style="list-style-type: none"> Non-compliance with provisions relating to issue of shares at discount would amount only to a penalty, instead of imposition of fine, imprisonment or both Furnishing false/incorrect information at the time of creating charge would be liable to action under Section 447 of the 2013 Act (i.e. fraud) Failure to file an annual return would result in a penalty instead of a fine or imprisonment.

¹The committee was formed on 13 July 2018 under the chairmanship of Mr. Injeti Srinivas, Secretary, Ministry of Corporate Affairs (MCA).

Overview of the key amendments

Changes in main provisions of the 2013 Act

Section	Overview of the amendment
Definition	
Financial year (Section 2(41))	<p>Currently, the term ‘financial year’ in relation to any company or body corporate has been defined as the period ending on the 31st day of March every year. Where the company/body corporate has been incorporated on or after the 1st day of January of a year, financial year would constitute the period ending on the 31st day of March of the following year, in respect of financial statements of the company/body corporate.</p> <p>However, the Tribunal on an application made by a company/body corporate can allow any period as its financial year (whether or not that period is a year) if such company/body corporate is:</p> <ol style="list-style-type: none"> a) A holding company, subsidiary or associate company of a company incorporated outside India and b) Required to follow a different financial year for consolidation of its accounts outside India. <p><i>Amendment</i></p> <p>The aforementioned application to change a financial year would now be made to the Central Government (CG) instead of the Tribunal.</p> <p>Any application pending before the Tribunal as on the date of commencement of the ordinance, would be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.</p> <p><i>(Emphasis added to highlight the change)</i></p>
Appointment and qualifications of directors	
Disqualification for appointment of a director (Section 164)	<p>Currently, Section 164 of the 2013 Act outlines the disqualifications that would prevent a person to be appointed as a director of a company. These, <i>inter alia</i>, include the following:</p> <ol style="list-style-type: none"> a) The person is of unsound mind b) He/she is an undischarged insolvent and c) An order disqualifying him/her for appointment as a director has been passed by a court or Tribunal and the order is in force. <p>Further, Section 165 of the 2013 Act provides that a person is not permitted to hold office as a director including alternate directorship, in more than 20 companies at the same time and of which the maximum number of public companies in which a person can be appointed as a director could be up to 10.</p> <p><i>Amendment</i></p> <p>The ordinance has inserted one additional disqualification that would prevent a person to be appointed as a director. As per the ordinance, if the person holds office as a director, including any alternate directorship, in more than 20 companies (public companies to be 10) at the same time, that person would be ineligible to be appointed as a director of a company.</p>

Section	Overview of the amendment (cont.)
Appointment and remuneration of managerial personnel	
Managerial remuneration (Section 197)	<p>There are two sections in the 2013 Act that discuss remuneration of an independent director. They are Section 149(9) and 197(7).</p> <p>Section 149(9) of the 2013 Act provides that an independent director may receive remuneration by way of fees for attending meetings of the board or committee, reimbursement of expenses for participation in the board and other meetings and profit related commission as may be approved by the members. Stock options are specifically prohibited to be issued to them.</p> <p>Additionally, Section 197(7) of the 2013 Act mentioned that ‘notwithstanding anything contained in any other provision of the 2013 Act but subject to the provisions of Section 197, an independent director should not be entitled to any stock option and may receive remuneration by way of fees, reimbursement of expenses for participation in the board and other meetings and profit related commission as may be approved by the members.’</p> <p><i>Amendment</i></p> <p>The ordinance has omitted Section 197(7). The 2013 Act still retains the provision in Section 149(9) of the 2013 Act.</p> <p>Additionally, the ordinance clarified that if any person fails to comply with the requirements of Section 197, then such a person would be liable to a penalty (earlier fine) of INR1 lakh. In case the company has made any default, then it would be liable to a penalty (earlier fine) of INR5 lakh.</p>
Management and administration	
Register of significant beneficial owners in a company (Section 90)	<p>Currently, a company or a person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions made by it on the shares held by beneficial owners.</p> <p><i>Amendment</i></p> <p>As per the amendment, the above mentioned application can now be made within one year from the date of Tribunal’s order. If an application is not made within one year, then the shares would be transferred to the authority created for it under Section 125(5) of the 2013 Act.</p>
Incorporation of company and matters incidental thereto	
Commencement of business, etc. (Section 10A)	<p>Currently, Section 10 of the 2013 Act deals with the effect of memorandum and articles of the company upon registration with the ROC.</p> <p><i>Amendment</i></p> <p>The ordinance has inserted a new sub-section to Section 10 i.e. Section 10A which provides that a company incorporated after the commencement of the ordinance (i.e. after 2 November 2018) (with a share capital) would not commence any business or exercise any borrowing powers unless it complies with the following requirements:</p> <ol style="list-style-type: none"> a) A declaration has been filed by a director within a period of 180 days of the date of incorporation of the company with the ROC. The declaration should state that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him/her on the date of making such declaration. b) The company has filed with the ROC a verification of its registered office as provided in Section 12(2) of the 2013 Act.

Section	Overview of the amendment (cont.)
Incorporation of company and matters incidental thereto (cont.)	
Commencement of business, etc. (cont.) (Section 10A)	<p>In case the company fails to file a declaration within 180 days and the ROC has reasonable cause to believe that the company is not carrying on any business or operations, then ROC can initiate an action for removal of the name of the company from the register of companies under Chapter XVIII of the 2013 Act.</p> <p>Additional penal provisions have been prescribed in case of default with the above requirements.</p>
Registered office of a company (Section 12(9))	<p>Currently, every company is required to operate a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it, within 30 days of its incorporation.</p> <p><i>Amendment</i></p> <p>The ordinance has inserted a new sub-section to Section 12 i.e. Section 12(9) which provides that if ROC has reasonable cause to believe that the company is not carrying on any business or operations and a default has been made with the provision relating to registered office, then ROC may cause a physical verification of the registered office of the company. Additionally, ROC can initiate an action for the removal of the name of the company from the register of companies under Chapter XVIII of the 2013 Act.</p>
Alteration of articles (Section 14)	<p>Currently, any alteration in the articles of the company that has an effect of conversion of a public company into a private company cannot be initiated except with the approval of the Tribunal.</p> <p><i>Amendment</i></p> <p>As per the amendment, any alteration to the articles that has the effect of conversion of a public company into a private company would not be valid unless it is approved by an order of the CG. The company would need to make an application made in the form and manner, as may be prescribed.</p> <p>Further, any application pending before the Tribunal, as on the date of commencement of the ordinance, would be disposed of by the Tribunal in accordance with the provisions applicable to it before the commencement of this ordinance.</p> <p><i>(Emphasis added to highlight the change)</i></p>
Removal of names of companies from the register of companies	
Power of registrar to remove name of company from register of companies (Section 248)	<p>Currently, the ROC can send the notice to the company of its intention to remove the name of the company from the register of companies in case the company:</p> <ol style="list-style-type: none"> a) Fails to commence its business within one year of its incorporation or b) Is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under Section 455 of the 2013 Act. <p><i>Amendment</i></p> <p>The ordinance added two additional events on which the ROC can send a notice to the company of its intention to remove the name of the company from the register of companies. Those events are as follows:</p> <ol style="list-style-type: none"> a) The subscribers to the memorandum have not paid the subscription amount which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed by the company with the ROC within 180 days of its incorporation or b) The company is not carrying on any business or operations as revealed after the physical verification carried out under Section 12(9) of the 2013 Act.

Section	Overview of the amendment (cont.)
Registration of charges	
Duty to register charges, etc. (Section 77)	<p>Currently, every company that creates a charge on its property, assets or any of its undertakings, within or outside India is required to register such a charge with ROC within 30 days of its creation. The period to register this charge can be extended maximum to 300 days on an application to the ROC.</p> <p><i>Amendment</i></p> <p>As per the amendment:</p> <ul style="list-style-type: none"> • <i>Created before commencement of the ordinance:</i> The charges created before commencement of the ordinance should be registered within 300 days of creation; if not made within 300 days then within six months of commencement of the ordinance on payment of additional fees. • <i>Created after commencement of the ordinance:</i> The charges created after commencement of the ordinance should be registered within 60 days of creation; if not made within 60 days then within further 60 days after payment of <i>advalorem</i> fees.

Changes in penal provisions

The ordinance has also revised certain penal provisions. The key changes have been highlighted in the table below:

Section	Existing provision	Revised provision
Prohibition on issue of shares at a discount (Section 53)	<p>Currently, a company is not allowed to issue any share at a discount (except shares issued to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme).</p> <p>In case of default with the above requirements:</p> <ol style="list-style-type: none"> The company would be punishable with a fine which should not be less than INR1 lakh but which may extend to INR5 lakh. Every officer who is in default would be punishable with imprisonment for a term which may extend to six months or with a fine which should not be less than INR1 lakh but which may extend to INR5 lakh, or with both. 	<p>As per the revised norms, in case of default, following are the consequences:</p> <ol style="list-style-type: none"> The company and the officer would be liable to a penalty which could extend to an amount equal to the amount raised through the issue of shares at a discount or INR5 lakh, whichever is less. Additionally, the company would be liable to refund all the monies received with interest at the rate of 12 per cent per annum from the date of issue of such shares to the persons to whom they have been issued.
Penalty for contravention with registration of charges (Section 86)	<p>Currently, if any company contravenes with the provisions relating to registration of charges under the 2013 Act, then:</p> <ol style="list-style-type: none"> The company would be punishable with a fine of INR1 lakh which could extend to INR10 lakh and Every officer of the company who is in default would be punishable with imprisonment for a term which could extend to six months or with a fine of INR25,000 which could extend to INR1 lakh, or with both. 	<p>In addition to the present provision, the ordinance provides that while registering the charge created, if any person willfully furnishes any false/incorrect information, then the person would be liable for action under Section 447 of the 2013 Act (i.e. punishment for fraud).</p>

Section	Existing provision	Revised provision
Annual return (Section 92)	<p>Currently, every company is required to file its annual return within 60 days from the date on which the Annual General Meeting (AGM) is held. Where an AGM is not held in any year, then it should file its annual return within 60 days from the date on which the AGM should have been held together with the statement specifying the reasons for not holding the AGM.</p> <p>In case of default with the above requirement:</p> <p>a) The company would be punishable with a minimum fine of INR50,000 which could extend to INR5 lakh</p> <p>b) Every officer of the company who is in default would be punishable with an imprisonment for a minimum term of six months or with minimum fine of INR50,000 which could extend to INR5 lakh, or with both.</p>	<p>As per the revised norms, if any company fails to file its annual return within the stipulated period, then:</p> <p>a) The company and its every officer who is in default would be liable to a penalty of INR50,000.</p> <p>b) In case of continuing failure, a further penalty of INR100 for each day during which such failure continues, subject to a maximum of INR5 lakh.</p> <p>The officers would not be punishable with imprisonment for the failure to file the annual return.</p> <p><i>(Emphasis added to highlight the change)</i></p>
Copy of financial statement to be filed with registrar (Section 137)	<p>Currently, a company is required to file a copy of the financial statements (including consolidated financial statements) with the ROC within 30 days of the date of AGM.</p> <p>In case the company fails to comply with the above requirement, then:</p> <p>a) The company would be punishable with a fine of INR1,000 for every day during which the failure continues which should not be more than INR10 lakh.</p> <p>b) The Managing Director (MD) and the Chief Financial Officer (CFO), if any, any other director entrusted with the responsibility of complying with the provisions of Section 137 (in the absence of MD and CFO), or all directors (in the absence of any such director) would be punishable with imprisonment for a term which could extend to six months or with a minimum fine of INR1 lakh which could extend to INR5 lakh or with both.</p>	<p>As per the revised norms, in case the company fails to file the financial statements with the ROC:</p> <p>a) The company would be liable to a penalty of INR1,000 for every day during which the failure continues which would not be more than INR10 lakh.</p> <p>b) The MD and the CFO, if any, any other director entrusted with the responsibility of complying with the provisions of Section 137 (in the absence of MD and CFO), or all directors (in the absence of any such director) would be liable to a penalty of INR1 lakh and in case of continuing failure, with further penalty of INR100 for each day after the first during which such failure continues, subject to a maximum of INR5 lakh.</p> <p><i>(Emphasis added to highlight the change)</i></p>
Company to inform Director Identification Number (DIN) to registrar (Section 157)	<p>Currently, every company is required to furnish the DIN of all its directors to the ROC or any other officer/authority as may be specified by the CG within 15 days from the receipt of intimation from its directors.</p> <p>In case the company fails to comply with the above requirement, then:</p> <p>a) The company would be punishable with a minimum fine of INR25,000 which could extend to INR1 lakh</p>	<p>As per the revised norms, if any company fails to furnish DIN of its directors, then:</p> <p>a) The company would be liable to a penalty of INR25,000. In case of continuing failure, with further penalty of INR100 for each day after the first during which such failure continues, subject to a maximum of INR1 lakh.</p>

Section	Existing provision	Revised provision
Company to inform Director Identification Number (DIN) to registrar (cont.) (Section 157)	b) Every officer of the company who is in default would be punishable with a minimum fine of INR25,000 which could extend to INR1 lakh.	b) Every officer of the company who is in default would be liable to a penalty of INR25,000. In case of continuing failure, with further penalty of INR100 for each day after the first during which such failure continues , subject to a maximum of INR1 lakh. <i>(Emphasis added to highlight the change)</i>
Punishment for contravention with provisions relating to appointment of directors and intimation of DIN (Section 159)	Currently, if any individual or director of a company, defaults in the provisions prescribed under the 2013 Act relating to: <ul style="list-style-type: none"> a) Appointment of directors (Section 152) b) Prohibition to obtain more than one DIN (Section 155) c) Director to intimate DIN (Section 156) then such an individual or director would be punishable with an imprisonment for a minimum term of six months or with fine which could extend to INR50,000. Where the contravention is a continuing one, they would be punishable with a further fine of INR500 for every day after the first during which the contravention continues.	As per the revised norms, in case the individual or director defaults in the prescribed provisions (i.e. Section 152, 155 and 156), then such an individual or a director would be liable to a penalty which may extend to INR50,000 . Where the default is a continuing one, they would be liable to a further penalty which could extend to INR500 for each day after the first during which such default continues. <i>(Emphasis added to highlight the change)</i>
Number of directorships (Section 165)	Currently, a person is not permitted to hold an office as a director including alternate directorship, in more than 20 companies at the same time and of which the maximum number of public companies in which a person can be appointed as a director could be up to 10. In case a person accepts an appointment as a director in contravention of the above provision, then he/she would be punishable with a minimum fine of INR5,000 which could extend to INR25,000 for every day after the first during which the contravention continues.	As per the revised norms, in case the person accepts an appointment as a director in contravention of Section 165, then he/she would be liable to a penalty of INR5,000 for each day after the first during which such contravention continues. <i>(Emphasis added to highlight the change)</i>
Appointment of Key Managerial Personnel (KMP) (Section 203)	Currently, if any company fails to comply with the provisions relating to appointment of KMP as envisaged under Section 203 of the 2013 Act, then: <ul style="list-style-type: none"> a) The company would be punishable with a minimum fine of INR1 lakh which could extend to INR5 lakh and b) Every director and KMP of the company who is in default would be punishable with fine which could extend to INR50,000. Where the contravention is a continuing one, they would be punishable with a further fine which could extend to INR1,000 for every day after the first during which the contravention continues. 	As per the revised norms, in case the company fails to comply with the provisions relating to appointment of KMP, then, following are the consequences: <ul style="list-style-type: none"> a) The company would be liable to a penalty of INR5 lakh and b) Every director and KMP of the company who is in default would be liable to a penalty of INR50,000. Where the default is a continuing one, they would be further liable to a penalty of INR1,000 for each day after the first during which such default continues but not exceeding INR5 lakh. <i>(Emphasis added to highlight the change)</i>

Section	Existing provision	Revised provision
Punishment for fraud (Section 447)	Currently, frauds which involve an amount less than INR10 lakh or one per cent of the turnover of the company (whichever is lower) and do not involve public interest, would be punishable with: a) An imprisonment for a term which could extend to five years b) A fine which could extend to INR20 lakh or c) Both.	As per the revised norms, frauds which involve an amount of INR10 lakh or more or one per cent of the turnover of the company, whichever is lower, would be punishable with: a) An imprisonment for a term which could extend to five years b) A fine which could extend to INR50 lakh or c) Both. <i>(Emphasis added to highlight the change)</i>
Adjudication of penalties (Section 454)	Currently, the CG may appoint adjudicating officers for adjudging penalty under the provisions of the 2013 Act. Such an adjudicating officer could, by an order, impose the penalty on the company and the officer who is in default stating any non-compliance or default under the relevant provision of the 2013 Act.	In addition to imposing penalty, such an adjudicating officer would be able to direct such a company, officer who is in default, or any other person, to rectify the default, wherever he/she considers fit.
Penalty for repeated default (Section 454A)	The ordinance has inserted a new sub-section to Section 454 i.e. Section 454A. As per Section 454A, if a company, an officer or any other person having subjected to penalty for default under any provisions of the 2013 Act, commits such default again within a period of three years from the date of order imposing such penalty passed by the adjudicating officer or the regional director, then such person would 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 the 2013 Act.	
Others	The ordinance has also amended the penal provisions in the following sections: <ul style="list-style-type: none"> • Section 64: Notice to be given to ROC for alteration of share capital • Section 102: Statement to be annexed to the notice • Section 105: Proxies • Section 117: Resolutions and agreements to be filed • Section 121: Report on AGM • Section 140: Removal, resignation of auditor and giving of special notice • Section 191: Payment to director for loss of office, etc. in connection with transfer of undertaking, property or shares • Section 238: Registration of offer of schemes involving transfer of shares • Section 441: Compounding of certain offences • Section 446B: Lesser penalties for one person companies and small companies. 	

(Source: KPMG in India's analysis, 2018 based on the amendments made by the Companies (Amendment) Ordinance, 2018)

Our comments

The amendments made by the ordinance seek to promote ease of doing business along with better corporate governance. Companies should take cognisance of the amendments and ensure compliance so as to avoid any consequential penal provisions.

The key amendments which should be considered are as follows:

- **Declogging of the Tribunal:** In place of the Tribunal, the CG has been vested with the power to approve:
 - a) Alteration in the financial year of a company and
 - b) Cases of conversion of public companies into private companies.
- **Revised eligibility criteria for appointment of a director:** A person would not be eligible to be appointed as a director of a company if he/she holds office as a director (including any alternate directorship) in more than 20 companies at the same time (of which directorship in public companies should not exceed 10).
- **Revised penalty for fraud:** Frauds which involve an amount of INR10 lakh or more or one per cent of the turnover of the company, whichever is lower, and do not involve public interest, then in addition to imprisonment, any person guilty of such fraud would be punishable with a fine of INR50 lakh (earlier INR20 lakh).
- **Replacement of fine with penalty in certain cases:** Certain amendments to the penal provisions have replaced fines with penalties. The procedure of imposing and responding to a fine is different from that of a penalty.

It is to be noted that if a company or an officer in default fails to comply with the order passed by the adjudicating officer/regional director imposing penalty within a period of 90 days from the date of receipt of order, then the company or an officer in default would be punishable with a fine as per the provisions of Section 454 of the 2013 Act.

Additionally, newly inserted Section 454A of the 2013 Act provides penalty for repeated defaults. As per the requirements of the section, where a penalty in relation to default has been imposed on the company/an officer/any other person under the provisions of the 2013 Act and the company/an officer/any other person commits the same default again within a period of three years from the date of order imposing such penalty passed by the adjudicating officer or the regional director, then, for the second or subsequent defaults, such a person would be liable for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of the 2013 Act. This is expected to serve as a strong deterrent from committing defaults.

The bottom line

The MCA has once again looked at some of the implementation issues that companies are facing on the 2013 Act. Keeping in line with their earlier stand of removing difficulties and enhancing transparency and corporate governance, the MCA has come up with this ordinance as well as certain other recommendations (please refer to KPMG in India's First Notes on 'MCA proposes amendments to the Companies Act, 2013' dated 21 November 2018).



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MCA issued Ind AS presentation format (Schedule III) for NBFCs

26 October 2018

On 11 October 2018, MCA through its notification has amended Schedule III to the 2013 Act. The amendments, inter alia, have incorporated a new division to Schedule III i.e. Division III which provides general instructions for presentation of financial statements of an NBFC.

The amendments to Schedule III are applicable from 11 October 2018.

This issue of IFRS Notes provides an overview of the key changes made to Division I and II and also highlights the key requirements of Division III (applicable to NBFCs) to Schedule III of the 2013 Act.

Missed an issue of Accounting and Auditing Update or First Notes



Issue no. 27 – October 2018

The topics covered in this issue are:

- Ind AS 115 – What does it mean for consumer market and retail sectors?
- Revision in auditing of accounting estimates
- Measurement of investments under separate financial statements
- Regulatory updates.



MCA proposes amendments to the Companies Act, 2013

21 November 2018

The Ministry of Corporate Affairs (MCA) considered certain amendments to the Companies Act, 2013 (2013 Act) while deliberating the recommendations made by the Report of the Committee to review Offences under the Companies Act, 2013.

The proposals are in respect with the following provisions:

- Appointment and qualification of directors
- Prevention of oppression and mismanagement
- Accounts of companies
- Others.

This issue of First Notes provides an overview of key amendments proposed by MCA.



Voices on Reporting

KPMG in India is pleased to present **Voices on Reporting** – a series of knowledge sharing calls to discuss current and emerging issues relating to financial reporting.

In a special session held on 19 November 2018, we discussed significant impact areas of Ind AS 103, *Business Combinations* and Ind AS 115, *Revenue from Contracts with Customers* on technology sector.

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