The Companies (Amendment) Act, 2019 received Presidential assent

16 August 2019

First Notes on

Financial reporting

Corporate law updates

Regulatory and other information

Disclosures

Sector

All

Banking and insurance

Information, communication, entertainment

Consumer and industrial markets

Infrastructure and government

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

On 2 November 2018, the Ministry of Law and Justice issued the Companies (Amendment) Ordinance, 2018 (ordinance) and made certain amendments to the provisions of the Companies Act, 2013 (2013 Act) on the basis of the report of the committee[1] formed to review the framework dealing with offences under the 2013 Act.

The amendments of the ordinance were made effective from 2 November 2018.

The key amendments made by the ordinance are as follows:

Topic	Key amendments
Changes in main provisions of the 2013 Act	• Power vested with the Central Government (CG) (instead of Tribunal) to approve changes to the Financial Year (FY) and alteration of articles pursuant to conversion of public companies into private companies • An additional disqualification was added that would prevent a person to be appointed as a director • Additional events added which could lead to removal of name of a company from the register of companies • Revised timeline was prescribed for registration of a charge by companies.
Changes in penal provisions	• 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) • Penalty for 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' has been increased to INR50 lakh from INR20 lakh

[1]The committee was formed on 13 July 2018 under the chairmanship of Mr. Injeti Srinivas, Secretary, Ministry of Corporate Affairs. The committee submitted its report on 27 August 2018.

Topic	Key amendments
Changes in penal provisions (cont.)	• Penalty for second or subsequent default under the provisions of the 2013 Act has been prescribed as an amount equal to twice the amount of penalty provided for such default under the relevant provisions of the 2013 Act • Failure to file an annual return would result in a penalty instead of a fine or imprisonment.

(Source: KPMG in India's analysis, 2019 based on the amendments made by the ordinance)

(For a detailed read, please refer to KPMG in India's First Notes on 'MCA further amends the Companies Act, 2013 through an ordinance' dated 28 November 2018.)

To replace the above ordinance, the government proposed the Companies (Amendment) Bill, 2018 which was passed in the Lok Sabha on 4 January 2019 but could not be taken up for consideration in the Rajya Sabha.

Therefore, in order to continue with the amendments made by the ordinance, on 12 January 2019, the President of India promulgated the Companies (Amendment) Ordinance, 2019 and the Companies (Amendment) Second Ordinance, 2019 (second ordinance) on 21 February 2019.

On 25 July 2019, the Companies (Amendment) Bill, 2019 was presented in the Lok Sabha to replace the second ordinance.

New development

After much deliberations, on 26 July 2019, Lok Sabha passed the Companies (Amendment) Bill, 2019 and on 27 July 2019 it was passed by the Rajya Sabha. On 31 July 2019, the Companies (Amendment) Act, 2019 (the Act) received the assent of the President of India. Accordingly, the second ordinance stands repealed.

The Act incorporates most of the amendments made by the second ordinance and incorporates certain other amendments to the 2013 Act.

Some of the key amendments made by the Act are as follows:

Accounts of companies	
Constitution of National Financial Reporting Authority (NFRA) **(Section 132)** 	The MCA has notified the constitution of NFRA with effect from 1 October 2018 to provide for matters relating to accounting and auditing standards under the 2013 Act. Currently, if a professional or other misconduct is proved on the part of the member or the firm of Chartered Accountants (CAs), then NFRA may impose penalty and also has the power to make order for debarring the member or the firm **from engaging himself/herself or itself from practice as a member of the Institute of Chartered Accountants of India (ICAI).** The period of debar could be a minimum period of six months or higher period not exceeding 10 years as may be decided by the NFRA. *Amendment* The Act provides that the NFRA should perform its functions through such divisions as may be prescribed. Additionally, in case a professional or other misconduct is proved on the part of any member or firm of CAs, then the NFRA will have the power to make order for debarring the member or the firm from: **a) Being appointed as an auditor, internal auditor, undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate or** **b) Performing any valuation as provided under Section 247 of the 2013 Act.** The order to debar would be for a minimum period of six months or a higher period not exceeding 10 years, as may be determined by the NFRA. *(Emphasis added to highlight the change)*

Accounts of companies (cont.)

Corporate Social Responsibility (CSR)

(Section 135)

Currently, Board of Directors (BoD) of every company that falls within the specified threshold[2] is required to ensure that in every FY, the company spends at least two per cent of the average net profits of the company made during the **three immediately preceding FYs**, as per its CSR policy.

If the company fails to spend such amount, then the BoD should specify the reasons for not spending the amount in its report.

Amendment

- **Company with less than three FYs since its incorporation:** In case the company has not completed the period of three FYs since its incorporation, then the BoD would be required to ensure that the company spends at least two per cent of the average net profits of the company **during such immediately preceding FYs.**

- **Unspent amount of CSR on ongoing CSR projects:** In case the CSR amount remains unspent pursuant to any ongoing CSR project undertaken by a company as per its CSR policy, then the company should transfer such unspent amount to a special account within a period of 30 days from the end of the FY.

  The special account should be opened by the company in any scheduled bank for the specific FY and would be called the 'unspent CSR account'.

  The company should spend the amount transferred to the unspent CSR account within a period of three FYs from the date of such transfer as per its obligation towards the CSR policy.

  In case it fails to spend the amount within the specified period, it would be required to transfer the same to a fund specified in Schedule VII of the 2013 Act, within a period of 30 days from the date of completion of the third FY.

  Schedule VII of the 2013 Act prescribes the activities which could be undertaken by a company in its CSR policy. Such activities, *inter alia*, include contribution to the:

  a) Clean Ganga Fund set-up by the CG for rejuvenation of river Ganga

  b) Prime minister's national relief fund or any other fund set up by the CG for socio-economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women

  c) Funds provided to technology incubators located within academic institutions which are approved by the CG.

- **Unspent amount on CSR activities:** In other cases, the unspent amount should be transferred to a fund specified in Schedule VII of the 2013 Act within a period of six months from the expiry of the FY.

- **Punishment:** In case of any contravention with the above provisions:

  a) A company would be punishable with a fine which should not be less than INR50,000 but which may extend to INR25 lakh and

  b) Every officer of the company who is in default would be punishable with imprisonment for a term which may extend to three years or with fine which should not be less than INR50,000 but which may extend to INR5 lakh, or with both.

- **Others:** Additionally, the CG could give general or special directions to a company or class of companies as it considers necessary to ensure compliance with the provisions of CSR as provided under Section 135 of the 2013 Act. Accordingly, such a company or class of companies would be required to comply with such directions.

(Emphasis added to highlight the change)

[2]A company which meets any of the given threshold in the immediately preceding FY is required to comply with the CSR norms:

a) Net worth of INR500 crore or more

b) Turnover of INR1,000 crore or more or

c) Net profit of INR5 crore or more.

Inspection, inquiry and investigation

Investigation into affairs of a company by Serious Fraud Investigation Office (SFIO)

(Section 212)

Amendment

If the SFIO in its report to the CG states that a fraud has taken place in a company and due to this fraud an undue advantage or benefit, whether in the form of any asset, property, cash or in any other manner has been taken by any director, Key Managerial Personnel (KMP), other officer of the company or any other person or entity, then in such a case, the CG may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property or cash and also for holding such director, KMP, other officer or any other person liable personally without any limitation of liability.

Prevention of oppression and mismanagement

Application to Tribunal for relief in cases of oppression, etc.

(Section 241)

Powers of Tribunal

(Section 242)

Consequences of termination or modification of certain agreements

(Section 243)

Currently, the CG is authorised to apply directly to the Tribunal when it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to the public interest.

Amendment

The Act additionally provides that the CG may initiate a case against a person in specified scenarios and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision (under Section 242(4A) of the 2013 Act) as to whether or not such person is a fit and proper person to hold the office of a director or any other office connected with the conduct and management of any company. The specified scenarios are as follows:

a) Any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his/her obligations and functions under the law or of breach of trust

b) The business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices

c) A company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains or

d) The business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest. (Section 241)

The Act further provides that such a person (not fit and proper pursuant to Tribunal's decision under Section 242(4A)) would not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision. However, CG may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.

Additionally, such person would not be entitled to any compensation for the loss or termination of office. (Section 243)

Effective date

The amendments incorporated from the second ordinance will be effective from 2 November 2018. All other amendments (except those in relation to CSR) have been made effective from 15 August 2019.

Our comments

The amendments made by the Act seek to strengthen the corporate governance norms in India. The Act incorporates most of the amendments made by the second ordinance. Also it includes certain other amendments.

Some of the key amendments which should be considered are as follows:

- **Mandatory CSR spend and penal provision for non-compliance:** Currently, the 2013 Act requires BoD of every company with a net worth of INR500 crore or more, turnover of INR1,000 crore or more or a net profit of INR5 crore or more during the immediately preceding FY to ensure that the company spends, in every FY, at least two per cent of the average net profits of the company made during the three immediately preceding FYs, in pursuance of its CSR policy. In case the company fails to spend such an amount, then the BoD would be required to disclose the reasons for not spending the amount in the board's report.

  Now post amendment, a company would be mandatorily required to utilise the unspent amount earmarked for CSR activities, failing which it would be transferred to the funds specified in the Schedule VII of the 2013 Act. This is a significant change and is expected to tighten the CSR spending norms of the 2013 Act.

  The amendment also seeks to bring clarity in cases where companies were not able to spend the entire amount designated for CSR. Such companies can now spend the amount within three years from the date of transfer to an unspent CSR bank account. In case it fails to utilise the amount in three years then, it will be required to deposit the unspent amount to a fund specified by CG.

  Additionally, the Act prescribes penal provisions in case a company contravenes with the CSR norms. According to it, the company would be punishable with a minimum fine of INR50,000 which could extend to INR25 lakh. On the other hand, every officer who is in default will be punishable with imprisonment for a term which may extend to three years or a minimum fine of INR50,000 which could extend to INR5 lakh or with both.

  The Guidance Note (GN) on CSR issued by ICAI in June 2015 clarified that no provision for the amount which is not spent i.e. any shortfall in the amount that was expected to be spent as per the provisions of the 2013 Act on CSR activities and the amount actually spent at the end of a reporting period is required to be made in the financial statements. However, with the amendment, the companies should evaluate whether a provision for the unspent amount should be created. It is important to note that the amendment of the CSR provisions is not effective yet.

- **Power of NFRA**: Currently, the NFRA has the power to make an order for debarring the member or the firm from engaging himself/herself or itself from practice as member of the ICAI for a minimum period of six months and maximum period of 10 years, in case a professional or other misconduct is being proved with regard to any member or firm of CAs, registered under the CA Act, 1949.

  The Act now clarified that the NFRA will have the power to make order for debarring the member or the firm for the said period from:

  a) Being appointed as an auditor, internal auditor, undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate or

  b) Performing any valuation as provided under Section 247 of the 2013 Act. For instance:

     i. Valuation of share price in case of further issue of share capital by a company

     ii. Valuation of shares, property and all assets for the purpose of proposed compromise or an arrangement between a company and its creditors or between a company and its members and

     iii. Valuation of the assets held by a company in case a winding up order has been passed or a company liquidator has been appointed by the National Company Law Tribunal (NCLT).

- **Power of CG in case of oppression and mismanagement**: Currently, the CG is authorised to apply directly to the Tribunal if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to the public interest.

  The Act additionally, empowers the CG to approach the Tribunal to issue an order against the persons who are connected with the conduct and management of the company as 'not fit and proper persons' for the acts committed by them and which could tantamount to mismanagement. Such persons would not hold office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the order. Also such a person would not be entitled to any compensation for the loss or termination of office.

KPMG in India

Ahmedabad
Commerce House V, 9th Floor,
902, Near Vodafone House,
Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200

Bengaluru
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bengaluru – 560 071
Tel: +91 80 3980 6000

Chandigarh
SCO 22-23 (1st Floor)
Sector 8C, Madhya Marg
Chandigarh – 160 009
Tel: +91 172 664 4000

Chennai
KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road
Chetpet, Chennai – 600 031
Tel: +91 44 3914 5000

Gurugram
Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurugram, Haryana – 122 002
Tel: +91 124 307 4000

Hyderabad
Salarpuria Knowledge City, 6th
Floor, Unit 3, Phase III, Sy No.
83/1, Plot No 2, Serilingampally
Mandal,
Ranga Reddy District,
Hyderabad – 500 081
Tel: +91 40 6111 6000

Jaipur
Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi
Syama Business Centre
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019
Tel: +91 484 302 5600

Kolkata
Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091
Tel: +91 33 4403 4000

Mumbai
1st Floor, Lodha Excelus,
Apollo Mills
N. M. Joshi Marg,
Mahalaxmi, Mumbai – 400 011
Tel: +91 22 3989 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business Park
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305
Tel: +91 0120 386 8000

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex, Mundhwa
Road, Ghorpadi, Pune – 411 001
Tel: +91 20 6747 7000

Vadodara
Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023
Tel: +91 265 619 4200

Vijayawada
Door No. 54-15-18E, Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District ,
Andhra Pradesh - 520008
Contact: 0866-6691000

KPMG in India’s IFRS institute

Visit KPMG in India’s IFRS institute - a web-based platform, which seeks to act as a wide-ranging site for information and updates on IFRS implementation in India.

The website provides information and resources to help board and audit committee members, executives, management, stakeholders and government representatives gain insight and access to thought leadership publications that are based on the evolving global financial reporting framework.

Missed an issue of Accounting and Auditing Update or First Notes

Issue no. 36 – July 2019

The topics covered in this issue are:

- Accounting for investments through preference shares in associates and/or joint ventures
- SEC amends Regulation S-K disclosures
- Regulatory updates.

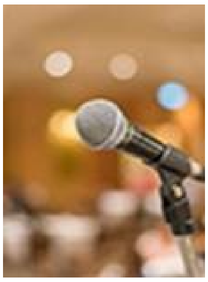
SEBI issues revised format for compliance report on corporate governance by listed entities

31 July 2019

Regulation 27(2) of the Securities and Exchange Board of India (SEBI) (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations) requires every equity listed entity to submit a quarterly compliance report on corporate governance (report) to the recognised stock exchange(s) within 15 days from the close of the quarter in the format specified by SEBI. Accordingly, SEBI through its circular dated 24 September 2015 specified the formats for the report.

On 16 July 2019, SEBI issued revised formats for compliance report on corporate governance. The modifications to the formats have been made on the basis of the recent changes made to the Listing Regulations pursuant to Kotak Committee and other amendments.

This issue of First Notes provides an overview of the modified formats issued by SEBI.



Voices on Reporting

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

A special session of VOR webinar is scheduled to be held on 22 August 2019 to discuss key implementation challenges with practical examples arising from application of Ind AS 116, *Leases* from the perspective of the technology sector.

For registration details, please click here.

Feedback/queries can be sent to aaupdate@kpmg.com

Previous editions are available to download from: home.kpmg/in