HIGHLIGHTS OF THE COMPANIES (AMENDMENT) BILL, 2020

1. INTRODUCTION

The finance minister of India, Smt. Nirmala Sitharaman tabled the Companies (Amendment) Bill, 2020 (the "**Bill**") before the Lok Sabha on March 17, 2020, to introduce certain modifications to the Companies Act, 2013 (the "**Act**") with a view to promote ease of doing business and ease of living to corporates in India[1]. The proposed amendments under the Bill are based on the recommendations submitted by the Company Law Committee (the "**Committee**"), which was formed with representatives from the industry chambers, professional institutes and legal fraternity. The mandate of the Committee was relatively wide-ranging including envisaging various reforms to the Act such as reviewing offences, introducing mechanisms to reduce burden on courts, ensuring effective disposal of cases, improving functioning of various authorities under the Act and suggesting other changes with the objective of promoting ease of doing business in India[2]. The Committee submitted its report to the union minister, Ministry of Corporate Affairs (MCA) on November 14, 2019. The recommendations of the Committee were largely based on re-categorization of certain criminal compoundable offences into civil wrongs carrying civil liabilities[3], rationalization of penalties, mechanisms for reducing the overall pendency of disputes and certain other ancillary changes to address emerging issues impacting the working of corporates in the country[4].

2. OVERVIEW OF THE PROPOSED AMENDMENTS UNDER THE BILL

Some of the important amendments that have been proposed to be introduced by the Bill are discussed below.

2.1 Overhaul of penalties

The Bill aims to overhaul the penalty regime for various non-compliances, as currently contemplated under the Act in a 3 (three) fold manner:

(a) Removal of imprisonment and/or substitution with monetary penalty

The Committee recommended omission of certain offences under the Act as it was felt that such offences can be sufficiently dealt with under other prevailing laws such as the Insolvency and Bankruptcy Code, 2016 (the "**Code**"). It was also highlighted by the Committee that in the event any vacuum is created because of the deletion of an offence from the relevant Section of the Act, Section

[1] Page 3, Para 1, Committee Law Report, 2019.
[2] Page 11, Para 1.4, Committee Law Report, 2019.
[3] Page 3, Para 1, Committee Law Report, 2019.
[4] Page 11, Para 1.3, Committee Law Report, 2019.

450 of the Act (which deals with punishments where no other penalty is prescribed), can always be resorted to[5]. Accordingly, certain offences contemplated under the Act, such as defaults in relation to: (i) compliance with the provisions of the Act dealing with variation of shareholders rights[6]; (ii) publication of the order of the National Company Law Tribunal ("**Tribunal**") for reduction in shares[7]; and (iii) compliance with the orders of the Tribunal in respect of debentures[8], amongst others, have been proposed to be omitted from the Act. Additionally, with respect to certain other non-grave offences punishable with imprisonment and/or with monetary penalty, the Bill has proposed substitution of such offences with monetary penalty only. In this respect, offences such as default in compliance by a company: (i) while purchasing its own securities[9]; (ii) for registration of charges[10]; (iii) in maintaining registers, filing returns or taking other necessary steps regarding declaration of significant beneficial ownership[11]; and (iv) in maintaining books of account to be kept by the company[12], which currently contemplate imprisonment and/or monetary penalty for defaults, are proposed to be substituted solely with monetary penalties, as applicable. The rationale for introducing such modifications is to decriminalise minor procedural or technical lapses under the Act into civil wrongs and reduce the overall pendency of the courts by removing the criminality in case of defaults, the commission of which is not linked with any *malafide* intention on the account of the wrong-doer and/or does not involve larger public interest[13].

(b) **Reduction in amount of penalty**

The Bill also aims to reduce the penalties for certain offences such as non-maintenance of register of members[14], failure to file annual return within the prescribed timelines[15], failure to file resolutions and agreements in terms of the Act[16] and non-compliance of provisions relating to unpaid dividend account[17] and such modifications to the Act have been proposed as a part of providing a further ease of living to corporates living in the country[18].

(c) **Dealing with certain offences in an alternate framework**

The Committee was of the view that for certain offences under the Act, the proposition of replacing such offence with monetary penalty and/or mere rationalization of penalties may not achieve the intended result. Therefore, the Committee perceived that it may be worthwhile to device an alternate mechanism to address the concerns created by such offences in order to better achieve the desired objective of such provisions. Based on such suggestions of the Committee, an alternate framework for certain offences has been proposed to be introduced. For instance, one such proposed amendment relates to a situation where, if a company fails to abide by the order of the Regional Director under

[5] Page 26, Para 3.1, Committee Law Report, 2019.
[6] Penalty under Section 48 (5) of the Act.
[7] Penalty under Section 66 (11) of the Act.
[8] Penalty under Section 71 (11) of the Act.
[9] Penalty under Section 68 (11) of the Act.
[10] Penalty under Section 86 (1) of the Act.
[11] Penalty under Section 90 (11) of the Act.
[12] Penalty under Section 128 (6) of the Act.
[13] Page 36, Para 3, Statement of Objects and Reasons of the Bill.
[14] Penalty under Section 88 (5) of the Act.
[15] Penalty under Section 92 (5) and (6) of the Act.
[16] Penalty under Section 117 (2) of the Act.
[17] Penalty under Section 124 (7) of the Act.
[18] Page 36, Para 3, Statement of Objects and Reasons of the Bill.

Section 16(1)[19] of the Act, (requiring rectification of the name of the company on the grounds that such name is identical or similar to an existing company, or a registered trademark), within 3 (three) months of passing of such order, then in place of imposing civil liability on the company, an auto-generated name shall be assigned to such company, which name the company shall be bound to use until it gets it changed through due process as per the provisions of the Act. The other provisions of the Act where such alternate mechanisms have been proposed, include provisions relating to non-compliance with order of compounding of the Tribunal or the Regional Director[20], non-cooperation of promoters, directors and employees with the company liquidator[21] and company liquidator not serving the order of dissolution to Registrar of Companies ("**RoC**")[22].

2.2 Delisting and listing of companies

The Bill seeks to empower the Central Government to exclude certain companies in consultation with Securities and Exchange Board of India from the definition of 'listed companies'[23] under the Act. The objective of according such flexibility to the Central Government is to exclude such private companies that list their debt securities on a recognized stock exchange upon their allotment on private placement basis, thereby falling under the definition of a 'listed company' under the Act[24]. The Committee was of the view that the existing provisions may dis-incentivise private companies from seeking listing of their debt securities due to stringent regulation of the listed companies as compared to the unlisted private companies, even though doing so may be in the best interests of the company[25].

The Bill further provides for permitting listing of certain companies on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be provided by the rules framed in this regard[26].

2.3 Introduction of chapter on producer companies

The Bill seeks to amend Section 465 of the Act, dealing with aspects relating to producer companies. 'Producer companies' primarily refer to companies that are engaged in businesses such as the production, harvesting, procurement, grading, pooling, handling, processing, marketing, selling or exporting primary produce or generation, transmission, distribution of power or such other activities, as prescribed under the Companies Act, 1956. Currently, producer companies[27] are bound to follow the requirements as set out in Part IXA of the Companies Act, 1956 until a special legislation is enacted for such producer companies. The Committee suggested that instead of a new law to be enacted *vis-a-vis* the producer companies, modifications to the Act should be made so as to provide for the governance of such producer companies. Accordingly, the Bill provides that provisions similar to Part IXA of the Companies Act, 1956 should be inserted into the Act[28]

[19] Rectification of name of Company.
[20] Penalty under Section 441 (5) of the Act.
[21] Penalty under Section 284 (2) of the Act.
[22] Penalty under Section 302 (4) of the Act.
[23] Section 2 (52) of the Act.
[24] Page 43, Para 2.4, Committee Law Report, 2019.
[25] Page 43, Para 2.6, Committee Law Report, 2019.
[26] Proposed amendment to section 23 of the Act, Page 2, Para 5 of the Bill.
[27] "Producer Company" means a body corporate having objects or activities specified in section 581B and registered as Producer Company under the Companies Act, 1956. Similar definition is incorporated in the Bill.
[28] Page 46, Para 4.4, Committee Law Report, 2019.

to provide for matters relating to the governance of producer companies. Broadly, such provisions deal with incorporation, management, general meetings, share capital and membership rights, finance, accounts and audit, loans to members and investment and amalgamation and merger of producer companies.

2.4 Relaxations pertaining to corporate social responsibility

The Bill provides that the companies which have corporate social responsibility spending obligation up to INR 50,00,000 (Rupees fifty lakhs) will no longer be required to constitute the corporate social responsibility committee in accordance with the Act and the functions of such committee provided under the Act shall be required to be discharged by the board of directors of such company [29]. Further, in order to accord some leverage to companies which have spent an amount over and above the required amount to be spent on corporate social responsibility activities statutorily in a given financial year, the Bill seeks to permit such companies to set off the excess amount spent towards its corporate social responsibility obligation in such number of succeeding financial years and in such manner, as may be prescribed[30]. The rationale for such change is to ensure that static financial thresholds do not come in the way of corporate-driven socio-economic development and environmental conservation.[31] In line with the above, once the Bill is duly passed, the Central Government may make suitable amendments under the Companies (Corporate Social Responsibility Policy) Rules, 2014 to provide for the necessary nuances relating to the above.

2.5 Moving defaults under the Code

The Bill proposes to substitute sub-section (6) of Section 348 of the Act which imposes monetary penalties on the company liquidator for non-compliance of the provisions relating to information on pending liquidation as set out in Section 348 of the Act, by a new provision that if a company liquidator, who is an insolvency professional, is in default in complying with the provisions of the aforesaid Section, then the default shall be deemed to be a contravention punishable under the Code, and the rules and regulations framed thereunder. The Bill further seeks to omit the penalty[32] imposed on the company liquidator for conduct of audit by a person not qualified to act as auditor[33] from the Act.

2.6 Other Notable amendments that have been proposed under the Bill

The Bill seeks to introduce the following additional changes into the Act:

(a) Remuneration to non-executive directors

Section 197(3) of the Act provides that a company having no profits or inadequate profits in a financial year, shall not pay any sum by way of remuneration (exclusive of any fees payable in accordance with the Act) to its directors (including any managing or wholetime director or manager), except in accordance with the provisions of Schedule V of the Act which *inter alia* provides the limit on the remuneration of 'managerial persons' in case of losses or inadequacies in profit. Further, Section 149 of the Act while dealing with the remuneration of independent directors, does not provide for

[29] Section 135 (1) of the Act.
[30] Page 37, Statement of Objects and Reasons of the Bill.
[31] Page 55, Para 13.2, Committee Law Report, 2019.
[32] Section 348(7) of the Act.
[33] Page 41, Notes on Clauses of the Bill.

remuneration by a company in case of losses or inadequacies in profit. In this regard, the Committee was of the view that the commitment of the non-executive directors and independent directors towards a company is often underappreciated and therefore, the non-executive directors and independent directors should be appropriately compensated for their valuable time and efforts even in case of inadequacy of profits or incurrence of losses, as such compensation is permitted for executive directors. It was felt that inconsistency in payment of remuneration in case of inadequacy of profits or losses to executive directors *vis-à-vis* non-executive directors (including independent directors) would dis-incentivize the latter[34]. To this extent, the Bill seeks to amend Section 149 and 197 of the Act to include non-executive directors and independent directors (as applicable) at appropriate places[35] to bring parity in remuneration of the non-executive directors with the executive directors and independent directors[36]. To illustrate, say a company has agreed to pay an 'x' amount to an executive director and a 'y' amount to a non-executive director or independent director and such company has incurred losses or has inadequate profits, then pursuant to the existing provisions of the Act, such company will be able to provide remuneration of the 'x' amount to its executive directors only in accordance with Schedule V of the Act. Once, the proposed amendments are incorporated into the Act, such company will be able to provide the agreed 'y' remuneration to the non-executive directors and independent directors as well, subject to the provisions of Schedule V of the Act (as amended).

However, the Bill has not proposed any changes to Schedule V of the Act as of now and accordingly, once the Bill is passed, there may be amendments required to be carried out in Schedule V of the Act to effectuate the changes in the above provisions.

(b) **Exemption to certain classes of companies**

The Bill seeks to empower the Central Government to exempt certain companies in certain respects, by amending the following provisions of the Act:

(i) Amendment to Section 89: The Committee noted that the Act *vide* Section 90(1), empowers the Central Government to exempt certain class of companies from declaration of significant beneficial ownership and accordingly, proposed that similar exemption should also be provided for declaration of beneficial ownership under Section 89 of the Act. Further, on the recommendations of the stakeholders, the Committee also noted that such empowerment would enable the Central Government to exempt declaration of beneficial interest for an Indian company that may raise global depository receipts in International Financial Services Centre in Gujarat International Finance Tec-City[37]. In light of the above rationale, the Bill seeks to enable the Central Government to exempt any class of persons from undertaking the compliances as set out in Section 89 of the Act which *inter alia* deals with declaration of beneficial interest in shares.

(ii) Insertion of Section 393A: The Bill proposes to insert a new Section 393A in the Act with a view to empower the Central Government to exempt any classes of foreign companies or companies

[34] Page 48, Para 6.4, Committee Law Report, 2019.
[35] Proposed amendments are suggested by introducing a proviso to section 149 (9) and amendment to 197(3) of the Act.
[36] Page 48, Para 6.4, Committee Law Report, 2019.
[37] Page 51, Para 9.2, Committee Law Report, 2019.

incorporated outside India or to be incorporated outside India, from the applicability of the provisions of Chapter XXII of the Act relating to manner of governance of companies incorporated outside India. Such change has been introduced on the basis of the recommendations of the stakeholders and the International Financial Services Centre ("**IFSC**") Task Force as IFSC is deemed to be a foreign jurisdiction[38] and such exemptions will promote ease of doing business to corporates and provide a congenial atmosphere for companies to undertake business in India.

(c) **Lesser penalties for certain classes of companies**

The Bill seeks to extend the benefit of reduced penalties which was earlier available to small companies and one person companies to start-ups and producer companies as well. Such entities will now be liable to face reduced penal consequences (to the extent of not be more than one-half of the penalty specified in such provisions subject to a maximum of INR 2,00,000 (Rupees two lakhs) in case of a company and INR 1,00,000 (Rupees one lakh) in case of an officer who is in default or any other person, as the case may be) for any offence contemplated under the Act. Earlier, such protection was available only to small companies and one person companies under Section 446B of the Act for the limited purposes of failing to comply with the provisions of sub-section (5) of Section 92, sub-section (2) of Section 117 or sub-section (3) of Section 137[39].

(d) **Timeline for rights issue**

Section 62 of the Act, governs the rights issue process and provides that the offer for further issue of shares which is given to existing shareholders of the company shall be exercisable only for a specific time period which shall not be less than 15 (fifteen) days but not exceed 30 (thirty) days from the date of the offer. The Bill seeks to fasten the rights issue process in line with market practices, by reducing the mandatory timelines to be provided for exercising such rights under Section 62 of the Act by empowering the Central Government to provide for a shorter timeline in this respect[40]. Upon, such proposed amendment being incorporated in the Act, we may expect changes in the relevant rules arising from the Act or through a notification/circular setting out the shorter time period.

(e) **Exemption from filing resolutions**

The Bill seeks to extend the benefit of exemption[41] from filing of a resolution with the RoC, for grant of loans, or giving guarantee or providing security in respect of loans[42], as currently available to the banks, to non-banking finance companies and housing finance companies. Such amendments have been proposed with the intention of securing the confidentiality obligations and reducing the burden of the non-banking finance companies from additional compliances, as such companies engage in lending activities on a regular basis in their ordinary course[43].

[38] Page 52, Para 9.3, Committee Law Report, 2019.
[39] Failure to (i) file annual return; (ii) file resolutions and agreements; and (iii) failure to file financial statements, respectively.
[40] Page 52, Para 10, Committee Law Report, 2019.
[41] Exemption as provided in second proviso of sub-section (3), in clause (g) of section 117 of the Act.
[42] Loans availed under clause (f) of sub-section (3) of section 179 of the Act.
[43] Page 53, Para 11.3 Committee Law Report, 2019.

(f) **Constitution of NCLAT Benches**

The Bill seeks to introduce a new section 418A in the Act in order to provide for constitution of benches of the National Company Law Appellate Tribunal ("**NCLAT**") which will ordinarily sit in New Delhi or such other place, as the Central Government may in consultation with the chairperson, notify. Such introduction of benches to NCLAT is with the view to enable creation of specialized benches of the NCLAT considering the variety and amount of matters that are to be dealt with by the NCLAT[44].

3. INDUSLAW VIEW

The Bill has been promulgated with a view to foster the initiative of the Government for ease of doing business and ease of living of corporates in India by introducing changes to the Act. Owing to the COVID-19 pandemic, the Bill has not yet been passed by the Lok Sabha, however, it can be expected that the Bill would be approved by both houses of the Parliament with suitable modifications, if required. Broadly, the changes proposed in the Bill are aligned with the principle of providing ease of doing business to corporates in India, and deal with the following:

(a) Decriminalization of certain non-grave offences under the Act, especially in cases where the defaults are devoid of any malafide intention, or do not involve larger public interest;

(b) Rationalization of existing penalties;

(c) Other modifications and relaxations to promote ease of doing business in India including but not limited to easing the compliance framework for companies and according flexibility for running of businesses; and

(d) Framework for faster and effective disposal of cases.

The proposed amendments under the Bill will not only encourage honest stakeholders and corporates to continue their business in India but also reduce the overall burden of the courts. Further, considering the present situation of COVID-19, where a substantial number of companies are facing losses, it becomes imperative for the Government to introduce a more flexible framework for the corporates and stakeholders to smoothly run their business in India and accordingly, the proposed amendments introduced by the Bill are a welcome move.

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[44] Page 47, Para 5.2, Committee Law Report, 2019.