

Companies Act Heading a Sterner Corporate Governance Regime

Introduction:

Pursuant to the introduction of Companies Act, 2013, all company related matters majorly are governed under the said 2013 Act. Many significant changes with regard to governance, management, compliance, enforcement, disclosure norms, auditors, mergers & acquisitions, etc. were introduced by the new Act of 2013. Additionally many new concepts like one-person company, small companies, dormant company, class action suits, registered valuers and CSR have been introduced. The 2013 Act has ushered in an era for streamlining framework for incorporating and regulating companies in India. While at one hand process of registration has been made clear, automated, easier and faster, on the other hand, compliance gaps were sealed by stringent guidelines for disclosures and returns applicable to all stakeholders in a company coupled with heavy penalties levied for various non-compliances.

Recently, many new amendments to the 2013 Act have been introduced under the Companies (Amendment) Act, 2019 (2019 Amendment Act) to tighten enforcement of provisions of the 2013 Act which predominantly require more comprehensive disclosures by stakeholders for various matters in a Company and other changes pertaining to Corporate Social Responsibility (CSR), provisions for de-clogging National Company Law Tribunal (NCLT).

2019 Amendment Act:

Interestingly, the new amendments introduced under the 2013 Act have step-by-step gone deeper for exhuming missing link-roots in various disclosures which were being made by companies in India. The new changes have resulted in expansion of responsibilities of the Central Government which can now compel the companies, directors and shareholders to furnish certain compulsory information and documents. Additional layer of information from the companies is assisting government in ensuring stricter corporate governance and help in marking-out defunct, shell and bogus companies.

Few **disclosures have been made compulsorily** under the recent amendments like Annual KYC of directors (for keeping directors data up to date along with their personal mobile numbers and email IDs and for exclusion of redundant / duplicate DINs); ACTIVE Form for keeping a tab on locations of the companies on Geo-tagging system (to crack shell companies); DPT-3 Form for unearthing fictitious entries between group/related entities in the form of advances / sundry creditors, etc.; and Form BEN-2 for reaching up to the

last warm body of shareholder behind every company in India.

Avoiding the filing of e-form ACTIVE with requisite particulars, shall mark a company as “ACTIVE-non-compliant” which will lead to debarring such company from making any further request for recording of an event-based information or changes i.e. vide e-forms SH-07 (Change in Authorized Capital); PAS-03 (Change in Paid-up Capital); DIR-12 (Changes in Director except cessation); INC-22 (Change in Registered Office); and INC-28 (Amalgamation, de-merger) to the Registrar of Companies unless e-Form ACTIVE is filed.

Additionally, many changes were introduced in relation to **incorporation compliances**, like:

- ◆ All companies are required to furnish the particulars of its registered office in e-Form INC-22 within a period of 30 days from the date of incorporation. All subsequent changes in situation of the registered office will also be notified to the Registrar in e-Form INC-22.
- ◆ Filing of declaration by newly incorporated companies before commencement of business has been reintroduced. Every subscriber to the memorandum of association is required to pay the value of the shares subscribed by him or her and file a declaration in this regard within a period of 180 days from the date of incorporation. The amendment has been carried out with a view to identify inactive companies at the initial stage.
- ◆ On the lines of registration for PAN / TAN by a company at the time incorporation through linked e-forms, a new linked e-form AGILE [Application for Goods and Services Tax Identification Number, Employees State Insurance Corporation (ESIC) Registration plus Employees Provident Fund Organization (EPFO) Registration] has been also introduced.



Similarly, provisions for better governance on CSR, **Unspent Corporate Social Responsibility Account** was also introduced. Companies that do not fully spend their CSR funds will now need to disclose in their annual report the reasons for non-spending and unless the unspent amount relates to any ongoing project, the amount has to be transferred to a fund within a period of six (6) months from the end of financial year in the form of a special account opened in any scheduled bank as 'Unspent Corporate Social Responsibility Account' within a period of 30 days from the end of the financial year; and such amount shall be spent by the company pursuant of its obligation towards the CSR policy within a period of three (3) financial years from the date of such transfer. Failing to

transfer the unspent amount in the "Unspent Corporate Social Responsibility Account" shall entail penal liability for noncompliance. Additionally, enhanced penalty for continuing offences has also been prescribed in the amended Act.



Further, for **de-clogging of NCLT**, role of the Central Government has been broadened by vesting it with the power to give approvals in various matters previously dealt with by NCLT to decrease the burden of NCLT. Few of them are:

- ◆ The powers pertaining to change in financial year observed by a company and conversion of a public company into private one have been delegated to Central Government.
- ◆ The power of Regional Director or any officer authorized by the Central Government for compounding of offences that are punishable under the 2013 Act has been increased from Rs. 5, 00, 000/- to Rs. 25, 00,000/-, which means that only the serious offences will knock the doors of NCLT. With this step, the Government is not only using penalties as a deterrence but is also de-cluttering the NCLT.
- ◆ Section 16 of 2013 Act has been amended to re-categorize of punishment. Defaulters will now have to face stricter

penalties i.e. instead of fine (a nominal amount of money for each default), monetary penalty with or without imprisonment will be meted out. Further, enhanced penalty or imprisonment or both is provided for the second and subsequent default (s) by a company.

Conclusion:

2019 Amendment Act while at one hand endeavors to enhance the power of the Central Government in the matters of companies' incorporation, approvals and compliances in India, on the other hand, the new E-Form will work as an efficient tools in the hands of the Government to do a detailed analysis of data collected through these E-Forms and then marking out the non-complying / shell companies and also to unmask the actual beneficiaries behind such sham companies. Nevertheless, these changes and measures are supporting towards facelift the overall governance system in the country.

The Central Government can act as a whistle blower where it may initiate legal proceedings against defaulting companies' suo moto and refer the same to NCLT. 2019 Amendment Act also aims to strengthen provisions that enable the Serious Fraud Investigation Office (SFIO) to ensure speedy and more effective enforcement, in pursuance of that endeavor, a new section has also been added. Now, the Central Government can make an application to NCLT for passing orders for disgorgement of assets, properties or cash of an officer or person or entity which has obtained an undue benefit. The deterrence effect is brought-in by increasing the amount of penalty in cases of fraud and otherwise. The compliances have become tighter and stricter for better governance of existing companies so that fraud and corruption can be controlled.

These changes leave negligible room for bogus companies to continue their operations surreptitiously. Provisions like physical verification of the registered office, furnishing of information by directors vide DIR-3 KYC etc. annually are designed to curb the menace of shell and bogus companies. Also, penalties and punishments are enhanced to create deterrence to make companies fully compliant with the provisions of the 2013 Act as amended to date. Reforms like re-introduction of declaration of commencement of business provision, greater accountability with respect to filing documents related to creation, modification and satisfaction of charges, non-maintenance of registered office to trigger de-registration process, holding of directorships beyond permissible limits to trigger disqualification of such directors will have far-reaching effect in making the company law regime more robust in India.

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