REPORT
OF
THE COMMITTEE
TO REVIEW OFFENCES
UNDER THE COMPANIES
ACT, 2013

AUGUST, 2018

Minsitry of Corporate Affairs
Government of India

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REPORT OF THE COMMITTEE TO REVIEW OFFENCES UNDER THE COMPANIES ACT, 2013

New Delhi, the 14 August, 2018

To,

Honourable Union Minister of Corporate Affairs

Sir,

We have the privilege and honour to present the report of the Committee set up on 13th July, 2018, to make recommendations to the Government *inter alia* on re-categorisation of certain 'acts' punishable as compoundable offences to 'acts' carrying civil liabilities, improvements to be made in the in-house adjudication mechanism, etc.

2. The Committee had the privilege of participation of representatives from the Industry chambers, Professional Institutes and Legal fraternity. During the course of discussion, it was endeavoured to arrive at a meaningful understanding of the nature and gravity of the offences, while considering the overall pendency of the courts. In respect of offences having serious implications, no change has been suggested. The Committee also examined in public interest certain other provisions of the Companies Act, 2013 which have a large bearing on strengthening corporate governance standards as well as transparency and probity of the corporates in the country.

3. We thank you for providing us an opportunity to present our views on the issues concerning the regulatory approach and overall compliance of the provisions of the Companies Act, 2013 and related matters thereto.

Yours sincerely,

14/08/18
(Shri Injeti Srinivas)
Chairman

(Shri Uday Kotak)
Member

(Shri Sidharth Birla)
Member

(Shri T. K. Vishwanathan)*
Member

(Shri Ajay Bahl)
Member

(Shri Shardul Shroff)
Member

(Shri Amarjit Chopra)
Member

(Ms. Preeti Malhotra)
Member

14/8/18
(Shri K V R Murty)
Member-Secretary

(Shri Arghya Sengupta)*
Member

*These two members could not attend any of the meetings of the Committee due to personal reasons.

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PREFACE

This report attempts to make an objective assessment of the existing regulatory framework under the Companies Act, 2013 and makes recommendations to be able to achieve a marked improvement in corporate compliance. In order to ensure that serious offenders are brought to book, it is necessary to free the courts from dealing with offences that are essentially procedural and technical lapses that can be handled effectively through an in-house adjudication mechanism. For the sake of clarity it may be emphasised that there is no intent to dilute the rigours or scope of the enforcement action relating to serious corporate offences, including fraud. On the contrary the aim is to strengthen the enforcement of law against serious offences by de-burdening the courts of matters of routine nature. It may also be noted that the cross-cutting liability under section 447, which deals with corporate fraud, remains wherever fraud is found irrespective of the section under which an offence is committed and the primary liability it attracts.

2. The report also attempts to declog the National Company Law Tribunal (**"NCLT"**) by recommending suitable amendments, including significant reduction in compounding cases before the Tribunal. In addition it also touches upon certain essential elements related to corporate governance such as declaration of commencement of business, maintenance of a registered office, protection of depositors, registration and management of charges, declaration of significant beneficial ownership, and independence of independent directors. The main recommendations of the Committee are as follows:

    I. Re-categorising of 16 offences out of the 81 which are in the category of compoundable offences to an in-house adjudication framework wherein defaults would be subject to a penalty levied by an adjudicating officer.

    II. No change is suggested in respect of any of the non-compoundable offences.

    III. Instituting a transparent and technology driven in house adjudication mechanism and increasing the transparency in the in-house adjudication mechanism by minimizing physical interface, conducting proceedings on an online platform and publication of the orders on the website.

IV. Strengthening the in-house adjudication mechanism by necessitating a concomitant order for making good the default at the time of levying penalty, to subserve the ultimate aim of achieving better compliance.

V. Declogging the NCLT by:
   a. enlarging the jurisdiction of Regional Director (**"RD"**) by enhancing the pecuniary limits up to which they can compound offences under section 441 of the Act.
   b. vesting in the Central Government the power to approve the alteration in the financial year of a company under section 2(41); and
   c. vesting the Central Government the power to approve cases of conversion of public companies into private companies.

VI. Chapter IV contains recommendations related to corporate compliance and corporate governance. The main recommendations include re-introduction of declaration of commencement of business provision to better tackle the menace of 'shell companies'; protection of public deposits through greater disclosures; 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; and imposition of a cap on maximum remuneration to independent directors to ensure that there does not exist material pecuniary relationship between the independent director and the promoter group that can impair his independence.

3. I am hopeful that the recommendations of the Committee will provide useful inputs for a robust corporate compliance framework and enhanced corporate governance, while simultaneously reducing the overall burden of special courts and NCLT.

14/08/18

Injeti Srinivas
Secretary, Ministry of Corporate Affairs &
Chairman, Committee to review offences under Companies Act, 2013
New Delhi, 14 August, 2018

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ACKNOWLEDGEMENTS

The Committee appreciates the inputs received from Shri Allwyn Noronha and Shri Rushil Oberoi of AZB & Partners; Ms. Shagun Bhargava of FICCI; Shri Anubhav Saha of GSA Associates; Shri Ajay Vaidya of Kotak Mahindra Bank; Shri Rudra Kumar Pandey, Vishal Nijhawan and Amanjot Malhi of Shardul Amarchand Mangaldas & Co.; Shri Dinkar Sharma of Smart Group, and Ms. Shreya Garg, Ms. Aishwarya Satija, Ms. Vedika Mittal and Shri. Param Pandya of Vidhi Centre for Legal Policy.

The Committee would also like to make a special mention of the efforts made by the officers of MCA namely Shri Sanjay Shorey, Joint Director, Shri Sridhar Parmarthi, Joint Director, Shri Narendra Kumar Dua, Joint Director, Shri Pranay Chaturvedi, Deputy Director, Shri Chandan Kumar, Deputy Director, Shri Animesh Bose, Deputy Director, Shri Avinash Kaushik, STA, Shri Krishan Paul Dutt, STA and Shri K.G. Chawla, Consultant in drafting this report, besides providing administrative and technical support to the Committee.

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I. INTRODUCTION

"The life of the law has not been logic; it has been experience."

- Oliver Wendell Holmes, Jr

1.1 The Joint Parliamentary Committee ("**JPC**") on the stock market scam and matters related thereto, had submitted its report to the Parliament in 2002. During the course of its examination, it noted that the penalties prescribed in Companies Act, 1956 ("**CA 1956**") were nominal and offences were easily compoundable.

1.2 In recognition of this view, at the time of formulating the new legislation for replacing the CA 1956, it was ensured that offences of serious nature were made non-compoundable. Section 447 of the Companies Act, 2013 (**"CA 2013"**) is an overarching provision which lays down the punishment for fraud and defines fraud in relation to the affairs of a company or a body corporate. CA 2013 refers to section 447 in several instances for punishing fraudulent conduct. An offence of fraud below a certain financial threshold not involving public interest was made compoundable vide the Companies (Amendment) Act, 2017 ("**CAA 2017**").

1.3 The CAA, 2017 also substituted the provision relating to establishment of Special Courts under section 435. Earlier the establishment and designation of Special Courts was limited to providing speedy trials of serious offences, i.e. where the offence was punishable with imprisonment of two years or more. Now after the said amendment, section 435 provides for speedy trail of all offences under the CA 2013 by the Special Courts.

1.4 However conducting trials in a speedier manner is also dependent on the overall pendency of the Special Courts. Therefore a need has been felt that offences largely involving technical defaults or procedural lapses may be re-categorised and civil liabilities may be imposed through an in-house adjudication as against filing of complaint before a trial court. This view had also been articulated in the recommendations of many Committees setup from time to time.

1.5 The Shardul Shroff Committee constituted in 2001, recommended creation of Securities & Companies Courts vested with powers of civil and criminal courts having jurisdiction over all offences/ violations committed under the Companies

Act or offences against securities. It recommended that, ideally, civil penalties should be prescribed for the commission of economic or 'white collar' offences.

1.6 The Irani Committee constituted in 2005 made the following observations in the context of CA 1956:

> *"Under the present law, all lapses, howsoever trivial, are required to be tried by the Trial Court as criminal offences. Delays are also attributable to the procedural aspects required to be followed to bring the offender to book under Companies Act, 1956. Most violations are of procedural nature. However, there is no structure for dealing with such offences speedily. The delayed processing of complaints leads to enormous administrative burden and high cost to the economy. The process of prosecution gets prolonged and the deterrent effects of the penal provisions get diluted."*

Irani Committee recommended setting up of an in-house mechanism for levying penalties on account of technical defaults.

1.7 The Standing Committee on Finance, while examining the Companies Bill, 2009, in its 21st report dated 31st August 2010, stated that:

> *"Transgressions, purely procedural or technical in nature, should be viewed in a broader perspective, while serious non-compliance or violations including fraudulent conduct should invite stringent /deterrent provisions".*

1.8 A glance at the pendency of the cases (**Annexure - I**) suggests that a large number of cases concerning compoundable offences are pending in the trial courts, a significant number out which relate to non-filing of "Financial Statements" and "Annual Returns". Several measures have been taken by the Ministry of Corporate Affairs (the "**MCA**") to reduce the overall pendency of cases in courts, such as introducing settlement schemes in 2000, 2010 and 2014 to provide a window to the defaulters to file their annual statements at a discounted fees with concomitant immunity from criminal proceedings. Even otherwise, prosecutions relating to defaults on account of non-filing, which have been made good over a time have been withdrawn from time to time to ease the burden on the courts. The Vaish Committee constituted in 2005 recommended withdrawal of cases where larger public interest is not involved to allow the courts to pay more attention on disposal of the cases relating to frauds, scams and embezzlement of funds. The findings of the Vaish Committee hinged on the overall delay in disposal of cases. It was noted at that time that the pendency every year was steadily increasing by around 2000 cases and the average period of disposal of

cases was about 5 years and the average cost awarded per case to the Government came to Rs.573/-.

1.9 At present, under the CA 2013, there are 18 instances where defaults/violations are subject to civil liability by levying penalty through an adjudication mechanism. These defaults broadly relate to technical or minor non-compliances such as non-noting of alteration in every copy of memorandum of association; non-publication of authorised, subscribed and paid-up capital together; manner of recording of minutes; default in providing copy of financial statement to any member etc. It is felt that this list is not exhaustive as there are other 'defaults' which are as of now punishable as offences but the nature of those defaults are also procedural/technical, which may be rectified by levy of penalty instead of filing prosecution in courts, so as to incentivize enhanced compliance.

1.10 Pursuant to this, the Government constituted the Committee to review offences under the Companies Act, 2013 (the "**Committee**") under the chairmanship of the Shri Injeti Srinivas, Secretary, Ministry of Corporate Affairs vide an office order dated 13 July 2018 (**Annexure - II**). The Committee consisted of Shri T.K. Vishwanathan, Former Secretary General Lok Sabha and Chairman, BLRC, Shri Uday Kotak, MD, Kotak Mahindra Bank, Shri Shardul S Shroff, Executive Chairman Shardul Amarchand Mangaldas & Co., Shri Ajay Bahl, Founder Managing Partner, AZB & Partners, Shri Amarjit Chopra, Senior Partner, GSA Associate, Shri Arghya Sengupta, Vidhi Centre for Legal Policy, Shri Sidharth Birla, Former President, FICCI, Ms. Preeti Malhotra, Partner and Executive Director of Smart Group and Shri K V R Murty, Joint Secretary, Ministry of Corporate Affairs (Member Secretary of the Committee). The Committee was required to submit its recommendation to the Central Government for consideration of the same, within 30 days of its first meeting.

1.11 The terms of reference of the Committee were (a) examine the nature of all 'acts' categorized as compoundable offences viz. offences punishable with fine only or punishable with fine or imprisonment or both under the CA-13 and recommend if any of such 'acts' may be re-categorized as 'acts' which attract civil liabilities wherein the company and its 'officers in default' are liable for penalty; (b) To review the provisions relating to non-compoundable offences and recommend whether any such provisions need to be re-categorized as compoundable offence; (c) To examine the existing mechanism of levy of penalty under the CA-13 and suggest any improvements thereon; (d) To lay down the broad contours

of an in-house adjudicatory mechanism where penalty may be levied in a MCA21 system driven manner so that discretion is minimized; (e) To take necessary steps in formulation of draft changes in the law; (f) Any other matter which may be relevant in this regard.

II. WORKING PROCESS OF THE COMMITTEE

2.1 The Committee had its first meeting on 21 July 2018. Prior to the meeting, a discussion paper on the issue was circulated to all the members, wherein the broad principles for a review of the penal provisions of CA 2013 as also the terms of reference of the Committee were conveyed with reference to the provisions of the CA 2013. Two more meetings of the Committee were held on 28 July 2018 and 04 August 2018 respectively.

2.2 In each of the meetings, extensive deliberations were held on each of the existing penal provisions so as to arrive at a consensus on the offences which may be re-categorized to an in-house adjudication mechanism. A core principle followed by the Committee was to ensure that for grave and serious offences, strong deterrence of the law should continue. Therefore due care and caution was exercised to ensure that only such offences which are procedural or technical in nature, and where public interest is not evident are brought within the ambit of in-house adjudication. Even in these cases, sustained non-compliance in rectifying the default and in paying the amount of penalty levied would give rise to criminal sanctions under section 454(8).

2.3 During the discussions, many useful suggestions were received for formulating a robust and transparent mechanism for adjudication, which have been duly considered by the Committee.

2.4 Another objective for the Committee was to examine ways to declog the trial courts of routine cases so that cases of more serious nature could be pursued with enhanced rigour. It was also felt that given the increased pendency of cases in NCLT and NCLAT on account of petitions filed under Insolvency and Bankruptcy Code, 2016 ("**IBC**") and the Competition Act, 2002, some measures would be required to be taken to transfer some of the jurisdiction of NCLT and NCLAT, through appropriate amendments to other authorities.

2.5 In addition, suggestions were also received regarding the issue pertaining to certain companies commonly referred as "shell companies", protection of investors and creditors, and corporate governance, which have also been suitably considered by the Committee.

III. STRUCTURE OF THE REPORT

3.1 The report presents the detailed reasoning along with the recommendations of the Committee on the need to review the existing regulatory mechanism in order to foster a better corporate compliance environment.

3.2 There are three annexures to this report: **Annexure I** on the pendency of cases pertaining to offences under the Companies Act in the trial courts as on 30.06.2018. **Annexure II** regarding the constitution of the Committee. **Annexure III** on the summary of proposed amendments to CA 2013.

CHAPTER – I: OFFENCES UNDER THE COMPANIES ACT, 2013

1. Compoundable offences

1.1 Section 441 of CA 2013 provides a mechanism for compounding of offences which are not punishable with imprisonment only, or with imprisonment and also with fine. Thus, compoundable offences are those offences, where the prescribed punishment is only fine, or imprisonment or fine, or both. The jurisdiction of the RD extends up to the pecuniary limits of five lakh rupees, determinable on the basis of maximum amount of fine. All offences where the maximum fine is more than five lakh rupees are compoundable by NCLT only.

1.2 Several Committees formed from time to time have recommended creation of a civil liability framework under the Companies Act for defaults which are technical/procedural in nature. While it may not be possible to strictly define as to what constitutes a technical or procedural lapse, an effort to analyze the nature of all compoundable offences under CA 2013 would be a step towards the right direction. Based on this premise, it was felt that for better appreciation of the nature of defaults in each case, a classification of various compoundable offences based on the nature, gravity and discoverability of the offences on the MCA21 system may be made out. At the same time it is also required to be seen whether the law also jeopardizes the position of the wrongdoer by diminishing any benefits that may accrue to him. For e.g. a default may make the underlying act void. In all such cases a broader view is required to be taken.

1.3 The need for classification was also felt to give a sound logical footing to the recommendations and ensure greater objectivity. Given the heterogeneous nature of the defaults involved, it was felt that the classification would assist the Committee in arriving at some concrete findings. After detailed analysis of the compoundable offences, the following classification of offences has been made:

- **A.** Those resulting from non-compliance of the order/direction of the Central Government/NCLT/RD or RoC; **(Category - I)**
- **B.** Those resulting from default in respect of maintenance of certain records in the registered office of the company; **(Category - II)**
- **C.** Those resulting from defaults on account of non-disclosures of interest of persons to the company, which vitiates the records of the company; **(Category - III)**

D. Those resulting from defaults related to certain corporate governance norms; **(Category - IV)**

E. Those resulting from technical defaults relating to intimation of certain information by filing forms with the RoC or in sending of notices to the stakeholders; **(Category - V)**

F. Those resulting from defaults involving substantial violations which may affect the going concern nature of the company or are contrary to larger public interest or otherwise involve serious implications in relation to the stakeholders; (**Category - VI**)

G. Those resulting from default related to liquidation proceedings; (**Category - VII**)

H. Those resulting from defaults not specifically punishable under any provision, but made punishable through an omnibus clause. (**Category - VIII**)

1.4 The detailed findings along with recommendations of the Committee in respect of each of the aforesaid classification are as under:

A. <u>Non-compliance of the orders of Central Government/NCLT/RD or RoC</u>

A.1 Defiance of the orders or directions of the statutory authorities cannot be categorized as a procedural lapse. Instances such as these should not be subject to an in-house adjudication as the person concerned having defied the order of a statutory authority is unlikely to comply with the order of the adjudicating authority either.

A.2 Statutory authorities under the CA 2013 are vested with the powers of pronouncing orders or giving directions which may affect the rights and liabilities of the parties. Under section 16, RD can issue directions to a company to change its name in certain circumstances. RoC has powers to call for information or explanation from a company under section 206. NCLT is vested with broad based powers of adjudicating grievances of shareholders in respect of: (a) variation of their rights under section 48, (b) entries in the register of members under section 59, (c) default in holding of AGM under section 97, etc.

The debenture holders may also enforce their rights in respect of redemption of debentures by filing an application before NCLT under section 71. NCLT on an application may also freeze the assets and restrict the transfer of securities in certain cases by giving necessary orders under section 221 and section 222 respectively. At the same time, schemes of amalgamations and mergers are also filed before NCLT under section 232. Penal provisions for non-compliance of the orders of the NCLT/RD, passed in relation to compounding of offences and that of the adjudicating officers, while imposing penalty are provided under sections 441(5) and 454(8) respectively.

A.3 Unlike RD or RoC, NCLT has the same powers as exercisable by the High Court under the Contempt of Courts Act, 1971. It may launch proceedings of civil contempt against any party disobeying its order. Notwithstanding such powers, the Committee feels that in all such instances where the orders of the authorities have been disregarded by the companies and their officers without any cogent reasons and without challenging such orders in the appropriate forum, the non-compliance should continue to attract criminal action. It is therefore recommended that the status-quo be maintained in respect of this category of offences.

A.4 The list of provisions under this category is as under:

Category - I		
S. No	**Penal provision**	**Ingredients of substantive provision**
1.	16 (3)	RD gives an order to the company to change its name if it is too nearly resembling to an existing name or violates a trademark.
2.	48(5)	Variation of the rights of shareholders of any class with consent of three fourth of the holders. Application to the NCLT by dissenting shareholders.
3.	59(5)	Grievance before Tribunal regarding entries in register of member.

4.	66(11)	Publication of the order of NCLT confirming reduction of share capital.
5.	71(11)	Debenture trustee and debenture holders may apply to NCLT for obtaining an order against the issuing company regarding redemption of debentures. NCLT to pass an order.
6.	99	Default in holding AGM in accordance with the law or default in compliance with the directions of NCLT to hold meeting.
7.	206 (7)	Failure of the company to furnish any information or explanation when called upon to do so by RoC.
8.	221(2)	Non-compliance of the order of NCLT regarding freezing of assets of the company.
9.	222(2)	Imposition of restrictions on securities during investigation by NCLT.
10.	232(8)	Merger and amalgamation of companies – compliance requirements. NCLT to pass order.
11.	242(8)	Powers of NCLT to pass an order when an application has been made under section 241.
12.	243(2)	Default in complying the directions of NCLT regarding termination or modification of certain agreements.
13.	405 (4)	Power of the Central Government to direct companies to furnish information or statistics.
14.	441(5)	Non-compliance of the order of compounding of NCLT or RD.
15.	454(8)	Company or the officer of the company in default does not pay the penalty within a period of 90 days.

<u>Recommendation</u>: Offences specified in Category – I should not be brought under the regime of in-house adjudication by levying penalties, as they cover defaults of serious nature involving non-compliance of the orders of the statutory authorities. No change is recommended in such cases.

B. <u>Default in respect of maintenance of certain records in the registered office of the company</u>

B.1 In the existing law, certain defaults in respect of maintenance of records in the registered office give rise to civil liabilities by imposition of penalties. Section 118(11) provides for penalty in case of default in respect of maintenance of minutes of proceedings of the general meeting. Section 189(6) also provides for penalty on account of defaults associated with maintenance of the registers of contracts or arrangements in which the directors are interested.

B.2 However the defaults pertaining to maintenance of members' register, debenture-holders register and register of other security holders under section 88, maintenance of a register of significant beneficial owners under section 90 and maintenance of the books of account of the company under section 128 may have serious implications in relation to rights and liabilities of the members and creditors of the company and/or may otherwise be detrimental to public interest.

B.3 Under section 90(12), a person who wilfully furnishes any false or incorrect information or suppresses any material information would be liable to an action under section 447. Any dereliction in the requirement of maintenance of register of significant beneficial owners under section 90(2), may also amount to suppression of material information under section 90(12), which in any case may also give rise to action under section 447. The provision relating to identification of significant beneficial ownership is a crucial instrument to identify the natural persons who are the ultimate beneficiaries, so violation thereof should continue to attract criminal sanctions.

B.4 Under section 56(6), the punishment in respect of default of the provisions in respect of the transfer and transmission of securities has been provided. Defaults can be on account of dereliction on the part of the company to register a transfer/transmission of shares based on the records available or in issuing certificates in such respect. Disputes arising under this section may require a wider examination.

B.5 The list of provisions under this category is as under:

Category - II		
S. No	**Penal provision**	**Ingredients of substantive provision**
1.	56(6)	Failure to comply with the procedure in which the transfer of securities is required to be done.
2.	88(5)	Maintenance of members' register, debenture-holders register and register of other security holders.
3.	90(11)	Company to maintain a register of significant beneficial owners
4.	128(6)	Maintenance of the books of accounts of the company at its registered office and its inspection thereof by any director

<u>Recommendation</u>: Offences specified in Category – II should not be brought under the regime of in-house adjudication by levying penalties, as they cover defaults of serious nature which affect the rights and liabilities of the members and other stakeholders. No change is recommended in such cases.

C. Defaults on account of non-disclosures of interest of persons to the company, which vitiates the records of the company

C.1 Timely disclosures of interest by various parties is the bedrock of any trust based regulatory framework. Any non-disclosure thereof vitiates the records of the company and also taints the underlying transactions, which are effected without sufficient disclosure.

C.2 CAA 2017 has inserted section 89(10), to introduce a common definition of beneficial interest in share for the purposes of section 89 and section 90, which includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to—

(i) exercise or cause to be exercised any or all of the rights attached to such share; or

(ii) receive or participate in any dividend or other distribution in respect of such share.

The declarations under section 89 and section 90 by beneficial owner and significant beneficial owner respectively are significant, as they provide a lead to the ultimate beneficial owner or at times the 'hidden' owner.

C.3 Similarly, under section 184, if a director does not disclose his interest in relation to a contract or an agreement, such contract or agreement becomes voidable at the option of the company. In addition, such non-disclosure of interest under section 184 is also a ground of vacation of the office of director under section 167.

C.4 Under section 90(1), a significant beneficial owner is required to disclose the nature of his interest to the company. The company can also ascertain as to whether any person is having a significant beneficial interest by issuing a notice to such person. In case of non-compliance, the company may approach NCLT for restricting the rights attached to such shares. In addition, under section 90(12), any person wilfully furnishing any false or incorrect information is liable

for action under section 447. In view of the overall implications associated with these provisions no change is recommended.

C.5 The list of all provisions under this category is as under:

Category - III		
S. No	**Penal provision**	**Ingredients of substantive provision/sub-section**
1.	89 (5)	Declaration to be made by the registered owner and the beneficial owner in respect of shares.
2.	90 (10)	Declaration of interest to be made by the significant beneficial owner.
3.	184 (4)	Disclosure of interest by the director in the first Board meeting every financial year or wherever there is any change. Disclosure of interest in the in relation to any contract or arrangement.

<u>Recommendation</u>: Offences specified in Category – III should not be brought under the regime of in-house adjudication by levying penalties, as they pertain to important disclosures, which when not made vitiates the records of the company. There are serious implications attached to such non-disclosures. No change is recommended in such cases.

D. <u>Defaults related to certain corporate governance norms</u>

D.1 While certain defaults relating to compliance of corporate governance may be serious and have grave consequences for a large spectrum of stakeholders, there are other defaults which may be categorized as merely technical on the account of the overall gravity (where the punishment of default is by fine only) or there exists provisions in the law which in any case bar any wrongdoer from cornering the gains while making a default.

D.2 Under section 53, the transaction involving issuance of shares at a discount is void. Instances like acceptance of directorships above a certain threshold provided in section 165 and non-appointment of key managerial personnel by certain classes of companies under section 203 are easily discoverable under the MCA21 system, where compliance may be ensured by initiating a summary adjudication proceedings.

D.3 Any amount received by a director as a compensation for the loss of his office, otherwise than in accordance with the provisions of section 191, as well as any managerial remuneration received without adherence to the provisions of section 197 is to be held by such director in trust. All such ill-gotten gains may only be regularized in specific circumstances by resorting to corrective actions prescribed in law. For e.g., a company cannot waive any amount refundable to it by the director under section 197 (as amended by CAA 2017), unless a special resolution is passed by the company within two years from the date the amount becoming refundable. An auditor is also required to report as to whether remuneration paid to any director is in excess of the limit laid down under this section. In view of the adequate safeguards available in the provisions and on account of the gravity of the default, certain specific provisions related to default of corporate governance norms may be subject to adjudication by levying of penalties.

D.4 The list of all provisions under this category is as under:

Category - IV		
S. No	**Penal provision**	**Ingredients of substantive provision**
1.	53 (3)	Prohibition on issues of shares at discount.
2.	165 (6)	Accepting directorships beyond specified limit.
3.	191 (5)	Payment to director not to be made in case of loss of office except under certain

		circumstances and subject to prescribed limits. Any amount received by the director is to be held in trust.
4.	197 (15)	Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits.
5.	203 (5)	Appointment of key managerial personnel in certain classes of companies.

<u>Recommendation</u>: All offences specified in Category – IV should be brought under in-house adjudication which involves levying penalties in case of defaults, in view of the inherent safeguards in the law which bar the wrongdoer and on account of easy discoverability of certain defaults on the MCA21 system, which may be rectified by imposing penalties in an in-house mechanism.

E. <u>Technical defaults relating to intimation of certain information by filing forms with the RoC or in sending of notices to the stakeholders</u>

E.1 Even under the present law, penalty is leviable in case a return of allotment for private placement is not filed with the Registrar within the prescribed period under section 42(9). Similarly under section 173(4), an officer of the company who fails to give notice for a board meeting is at present subject to penalty.

E.2 On a similar premise other defaults involving delay in providing certain information/statements to the RoC or where certain information or declarations are not provided by the company to the concerned shareholders in accordance with law may also be made subject to in-house adjudication. Under section 64(2), failure to file

notice on alteration of share capital is a technical lapse, which may be rectified by levying a penalty.

E.3 Section 86 pertains to defaults with regard to registration, modification and satisfaction of charges. Registration of charges may have serious consequences for the companies and creditors. Section 77(3) provides that no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be, or any other creditor unless it is duly registered. In addition, instances of default in registration of charges may also indicate an element of suppression which may be gathered at the time of inquiry or inspection or by examining the financial statements which disclose the secured borrowings of a company. Due to the overall implications, for the stakeholders at large, the offence related to defaults associated with registration, modification and satisfaction of charges may be retained.

E.4 As per section 89 (7), company is required to file the information in respect of beneficial interest in shares after receiving the same for the person concerned. Given the overall importance of the information regarding disclosure of beneficial ownership, the defaults cannot be treated as merely procedural lapses. So the offence in this regard may be retained.

E.5 The requirement of filing annual returns and financial statements under section 92(5) and section 137(3) respectively are of utmost importance. The law already provides for striking off companies and disqualification of directors for non-compliance over a period of time. After amendment made vide CAA, 2017, first proviso to section 403, provides for levy of additional fees of not less than hundred rupees for every day's delay in case of default under section 92 and section 137. The Companies (Registration Offices and Fees) Rules, 2014 has already been amended so to levy additional fees on per day basis on the erring companies. It has also been noticed that the number of prosecutions filed under section 92(5) and section 137(3) are significantly higher in comparison to other provisions. However

there is not much purpose served in launching such large number of prosecutions due to the presence of other deterrents in law. It is recommended that defaults under these provisions be subject to in-house adjudication mechanism.

E.6 The default in attaching a statement in respect of special business in every notice calling for general meeting and a default in informing about the provision of appointment of proxy in the notice calling a general meeting to shareholders under sections 102(5) and 105(3) respectively are defaults of technical in nature. As explained above, instances of similar nature under CA 2013 are already subject to in-house adjudication.

E.7 Non-filing of resolutions and agreements required to be filed with the RoC under section 117(2), non-filing of a report on each AGM by a public listed company under section 121(3) and non-filing of a circular of offer involving transfer of shares under section 238(3) are compliances of technical nature which may be corrected by initiating adjudication through an in-house mechanism.

E.8 An auditor resigning from a company is required to file a statement in this regard with reasons within a prescribed time under section 140(3). This information and the reasons thereof are critical from the point of view of shareholders. However the lapse is technical unless the filing is inordinately delayed. In-house adjudication against such defaults will lead to speedy disposal of such cases.

E.9 Section 157 and section 159 pertain to defaults in respect of DIN. Under the present system all appointments and removal have to be carried out through the online system. A director not having DIN cannot act in the company. In fact all such directors are disqualified under section 164. The new e-form DIR-3 allows only those persons to obtain DIN who intend to be appointed as a director in an existing company. Therefore DIN cannot be obtained on a standalone basis, where there is no intention of being appointed as a director. E-form DIR-KYC is a step towards making the DIN database more robust

and effective. Therefore non-compliances in this respect be made subject to an in-house mechanism.

E.10 Under section 238, a transferee company issuing a circular/scheme involving transfer of shares of a transferor company under section 235, has to present the same for registration with RoC before issuing the same to the members of the transferor company. The default is technical in nature, which may be rectified by imposing a penalty.

E.11 The list of all provisions under this category is as under:

Category - V		
S. No	**Penal provision**	**Ingredients of substantive provision**
1.	64 (2)	Failure to give notice to the Registrar for alteration of share capital.
2.	86	Duty to register charges, to report their satisfaction within prescribed timelines and the duty to maintain register of charges.
3.	89 (7)	Company to file a return with Registrar within the prescribed time after receiving a declaration of beneficial interest in shares from a person.
4.	92(5)	Filing of annual return within the specified period.
5.	102 (5)	Provision of attaching a statement concerning special business in the notice calling for general meeting and the information to be stated therein.
6.	105 (3)	Default in giving declaration regarding provision of appointment of proxy in the notice calling a general meeting.
7.	117 (2)	Default in filing of certain resolutions and agreements with the Registrar.
8.	121 (3)	Preparation of a report on each annual general meeting by a listed public company and filing of the same with the Registrar.

9.	137 (3)	Copy of the financial statement to be filed with the Registrar.
10.	140 (3)	Requirement of filing a statement with the Registrar after resigning as an auditor of a company.
11.	157 (2)	Company to inform DIN to Registrar.
12.	159	Other contraventions related to allotment or intimation of DIN.
13.	238(3)	Requirement of registration of offer of schemes involving transfer of shares.

Recommendation: Eleven out of thirteen offences specified in Category – V (except sl. no. 2 and sl. no. 3 which pertain to charge and beneficial ownership respectively) should be brought under in-house adjudication which involves levying penalties in case of defaults. The lapses accrue on account of non-reporting to the RoC or on account of failure to provide sufficient information to the stakeholders. Some of the existing provisions under CA 2013 already provide for imposition of penalties for such defaults.

F. Defaults involving substantial violations which may affect the going concern nature of the company or are contrary larger public interest or otherwise involve serious implications in relation to the stakeholders

F.1 Certain defaults are of a serious nature, which require rigours of a criminal trial. The impact of the default under this classification may be broad-ranging which may affect the larger public interest, shareholders' interest, creditors' interest or it may affect the going concern nature of the company itself. There is also at times an element of deceit, or an intent to siphon out funds, which cannot be termed as merely 'technical'.

F.2 Under section 8 of CA 2013, licenses are granted to companies carrying a specific object without any intention of making profit and subject to other restrictions provided in law. Such companies may

contravene the terms of the license and carry out activities which are impermissible for such class of companies, which may harm the larger public interest.

F.3 SEBI is empowered to act against defaults in respect of matters to be stated in the prospectus under section 26(9). Further listing is essential before making a public offer under section 40(5). Such defaults involve larger public interest as there is involvement of public funds.

F.4 Buy-back of securities is governed under section 68. A number substantive compliances are required to be fulfilled in this regard. Default of the provisions may affect the going concern nature of the company as they have a direct bearing on the solvency of the company.

F.5 Section 74(3) and section 76A(a) pertain to punishment for not repaying the deposits accepted under the CA 2013 or any deposit accepted prior to the commencement of the CA 2013. Interest of the creditors at large is involved in such matters.

F.6 Section 124 mandates the creation of an unpaid dividend account for crediting all unclaimed dividends. After a period of seven years from the date of transfer, the funds remaining unpaid have to be transferred to IEPF along with the shares in respect of whom the dividend remains unclaimed and unpaid. There is larger public interest involved in this matter, so defaults need not be subject to in-house adjudication.

F.7 Section 92(6) provides for punishment in case of wrongful certification of annual return by a company secretary. Section 134(8) relates to default regarding substantial compliances in respect of approval of financial statements, attachment of Board's report, statements to be provided in the Board's report, etc. Section 129(7) relates to the manner of preparation of financial statement in accordance with Schedule III and applicable accounting standards. Section 147 and section 148 relate to punishment against auditors and

cost auditors in respect of dereliction of their duties. Under section 143(15), the punishment is in relation to an omission on the part of the auditor to report fraud. Similarly, section 204 relates to secretarial audit for bigger companies. All these defaults pertain to matters involving substantial compliance.

F.8 Wide ranging duties of the directors towards the company, its employees, shareholders and the community at large are laid down under section 166(2). Breach of such duties would not amount to mere technical default. However principles can be suggested under the rules or guidelines as to how conflicting duties between stakeholders, for example, employees, shareholders, environment and community at large are to be adjusted and in the absence of such principles, the determination of a substantive violation may become difficult.

F.9 Section 167(2) relates to vacation of office of the director. Any person who functions as a director despite such vacation commits a serious breach.

F.10 Violations in respect of Audit Committee, Nomination and Remuneration Committee, Stakeholders Relationship Committee and establishment of a vigil mechanism are punishable under section 178(8). These Committees play a vital role in the overall corporate governance architecture, so any breach thereof may be adverse to the interests of the stakeholders.

F.11 In order to give loans to directors or to firms related to directors, compliances under section 185 are required to be carried out. Investments of the company have to be held in the name of the company in accordance with section 187. These two provisions are an effective check on the siphoning of money from a company. Importantly, section 186(13) which penalizes defaults on account of loans and investments made out by the company is a non-compoundable offence. These defaults may ultimately shake the very foundations of the going concern nature of the company.

F.12 Valuers have an important function to perform under CA 2013. Incorrect valuation may jeopardize the interests of various stakeholders. For e.g. secured debentures issued without proper valuation of the underlying security would affect the rights of the debenture holders at large. The duties of valuer are material and therefore any default under section 247(4) cannot be regarded as a procedural lapse.

F.13 There are certain defaults, where there is an element of deceit. The nature of default in itself shows that *bona fides* are lacking. Invitation of proxies when issued at company's expense gives rise to a default under section 105(5). The compliances while entering into related party transactions are laid down in section 188, punishment in case of default on the part of directors is laid down in section 188(5). Under section 249, restrictions with regard to filing of an application of strike off by a company are laid out, in case of default, punishment is provided under section 249(2). Section 452 penalizes a person for wrongfully obtaining possession of any property of the company. Section 447 deals with punishment for fraud, vide CAA 2017, offence involving fraud below a certain threshold not involving public interest has been made compoundable. In all these cases, there is an inherent intent to deceive.

F.14 Punishment in relation to defaults committed by foreign company, incorporated outside India, may not be made subject to this in-house mechanism, as it may be difficult in implementing the same, on account of the fact that there is only one RoC in India, who accepts the returns filed by such companies. In addition, the place of business norms of such companies are regulated by RBI. Similarly section 464 places restriction on the number of members that an association or a partnership of persons can have. In case of breach, action lies against such associations or partnerships. Due to issues relating to implementation and the larger public interest involved, these defaults may not be made subject to adjudication.

F.15 The list of all provisions under this category is as under:

Category - VI		
S. No	**Penal provision**	**Ingredients of substantive provision**
1.	8(11)	Formation of companies with charitable objects, etc.- fraudulent conduct of affairs
2.	26 (9)	Matters to be stated in prospectus
3.	40(5)	Securities to be dealt with in stock exchanges
4.	68(11)	Power of company to purchase its own securities
5.	74(3)	Repayment of deposits, etc., accepted before commencement of this Act
6.	76A	Punishment for contravention of section 73 or section 76
7.	92(6)	Annual return - certification
8.	105(5)	Proxies – invitation on company's expense.
9.	124(7)	Unpaid Dividend Account
10.	129(7)	Financial statement
11.	134(8)	Financial statement, Board's report, etc.
12.	143(15)	Powers and duties of auditors and auditing standards
13.	147(1)	Punishment for contravention – in relation to auditor
14.	147(2)	Punishment for contravention – in relation to auditor
15.	148(8)	Central Government to specify audit of items of cost in respect of certain companies
16.	166(7)	Duties of directors
17.	167(2)	Vacation of office of director.
18.	178(8)	Nomination and Remuneration Committee and Stakeholders Relationship Committee
19.	185(4)	Loan to directors, etc
20.	187(4)	Investments of company to be held in its own name
21.	188(5)	Related party transactions

22.	204(4)	Secretarial audit for bigger companies
23.	247(3)	Valuation by registered valuers
24.	249(2)	Restrictions on making application under section 248 in certain situations.
25.	392	Punishment for contravention – Foreign company
26.	447	Punishment for fraud – where fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest.
27.	451	Punishment in case of repeated default – within a period three years
28.	452(1)	Punishment for wrongful withholding of property
29.	464(3)	Prohibition of association or partnership of persons exceeding certain number

Recommendation: Offences specified in Category – VI should not be brought under the regime of in-house adjudication by levying penalties, as they cover defaults of substantial violations which may affect the going concern nature of the company or are contrary larger public interest. No change is recommended in such cases.

G. Default related to liquidation proceedings

G.1 In case of defaults related to liquidation proceedings, it may not be appropriate to replace fine with penalty. Such proceedings take place before the NCLT, which has powers of contempt to enforce the orders passed by it. Any adjudication in such cases may actually impede the proceedings and be counterproductive.

G.2 The list of all provisions under this category is as under:

Category - VII		
S. No	**Penal provision**	**Ingredients of substantive provision/sub-section**
1.	274(4)	Direction for filing statement of affairs.
2.	284(2)	Promoters, directors, etc., to cooperate with Company Liquidator
3.	302(4)	Dissolution of company by Tribunal.
4.	342(6)	Prosecution of delinquent officers and members of company
5.	344(2)	Statement that company is in liquidation
6.	347(4)	Disposal of books and papers of company
7.	348(6)	Information as to pending liquidations
8.	348(7)	Information as to pending liquidations:-
9.	356(2)	Powers of Tribunal to declare dissolution of company void

Recommendation: Offences specified in Category – VII should not be brought under the regime of in-house adjudication by levying penalties, due to the nature of proceedings involved. No change is recommended in such cases.

H. Defaults not specifically punishable under any provision, but made punishable through an omnibus clause

H.1 Section 172 provides for punishment in respect of any contravention for which no specific punishment is provided in Chapter XI. This chapter contains several important provisions including provisions relating to independent directors, woman director, etc. Section 450 is even broader based as it lays down punishment in respect any contravention for which no specific punishment is laid down in the entire CA 2013. Similarly section 469(3) gives Central Government the powers to prescribe punishment up to a certain limit in case of

contravention of any of the provisions of the rule made pursuance to the Act. Due to the wide ranging nature of the defaults involved and to avert any unintended consequences, it is recommended that these provisions may not be brought within the ambit of in-house adjudication.

H.2 The list of all provisions under this category is as under:

Category -VIII		
S. No	**Penal provision**	**Ingredients of substantive provision/sub-section**
1.	172	Punishment – in relation to Chapter XI
2.	450	Punishment where no specific penalty or punishment is provided
3.	469(3)	Power of Central Government to make rules

<u>Recommendation</u>: Offences specified in Category – VIII should not be brought under the regime of in-house adjudication by levying penalties, due to the wide ranging nature of defaults and in order to avert any unintended consequences. No change is recommended in such cases.

1.5 **The list of all offences recommended to be re-categorized as defaults carrying civil liabilities, which would be subject to an in-house adjudication mechanism, along with the present punishment prescribed in each case is as under**:

S No.	Section	Nature of default	Punishment
1.	53(3)	Prohibition on issue of shares at a discount	Fine or imprisonment or both

2.	64(2)	Failure/delay in filing notice for alteration of share capital	Fine only
3.	92(5)	Failure/delay in filing annual return	Fine or imprisonment or both
4.	102(5)	Attachment of a statement of special business in a notice calling for general meeting	Fine only
5.	105(3)	Default in providing a declaration regarding appointment of proxy in a notice calling for general meeting	Fine only
6.	117(2)	Failure/delay in filing certain resolutions	Fine only
7.	121(3)	Failure/delay in filing report on AGM by public listed company	Fine only
8.	137(3)	Failure/delay in filing financial statement	Fine or imprisonment or both
9.	140(3)	Failure/delay in filing statement by auditor after resignation	Fine only
10.	157(2)	Failure/delay by company in informing DIN of director	Fine only
11.	159	Contraventions related to DIN	Fine or imprisonment or both
12.	165(6)	Accepting directorships beyond specified limits	Fine only
13.	191(5)	Payment to director not to be made on loss of office	Fine only
14.	197(15)	Managerial remuneration	Fine only
15.	203(5)	Appointment of KMPs in certain class of companies	Fine only
16.	238(3)	Registration of the offer of scheme involving transfer of shares	Fine only

Thus twelve out of sixteen offences recommended to be shifted to the in-house adjudication mechanism are punishable with only fine.

2. Non-compoundable offences

2.1 CA 2013 lays down the punishment for fraud under section 447. The provision reads as follows:

> *Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:*
> *Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.*
> *Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both.*
>
> *Explanation. – For the purposes of this section –*
> *(i) "fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;*
>
> *(ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;*
>
> *(iii) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.*

2.2 CAA, 2017 introduced second proviso to section 447 to make an offence involving fraud of an amount less than ten lakh rupees or one per cent. of the turnover of the company (whichever is lower) without involvement of public interest, compoundable. Several sections of CA 2013 refer to section 447 for punishing fraudulent conduct, the list of all such sections is as under:

SN	Non-Compoundable offences under Companies Act, 2013	Prescribed Punishment
1	7(5) & (6): fraud/false information during incorporation of company:	Action for Fraud under Section 447
2	8(11) Proviso: Formation of companies with charitable objects, etc.- fraudulent conduct of affairs	Action for Fraud under Section 447
3	34. Criminal liability for misstatements in prospectus	Action for Fraud under Section 447
4	36. Punishment for fraudulently inducing persons to invest money	Action for Fraud under Section 447
5	38(1). Punishment for personation for acquisition, etc., of securities	Action for Fraud under Section 447
6	46(5): fraud in connection with duplicate Certificate of Shares	Action for Fraud under Section 447
7.	66(10): Reduction of Share Capital – fraud	Action for Fraud under Section 447
8.	76A Proviso: Punishment for contravention of section 73 or section 76	Action for Fraud under Section 447
9.	90(12): False/incorrect information or suppression of any material information in respect of significant beneficial ownership	Action for Fraud under Section 447
10.	140(5) Proviso: Removal of Auditor involved in fraud	Action for Fraud under Section 447

SN	Non-Compoundable offences under Companies Act, 2013	Prescribed Punishment
11.	148(8)(b) : Cost records and Cost audit	Action for Fraud under Section 447
12.	206(4) Proviso: Power to call for information, inspect books and conduct enquires – conducting affairs of the company in a fraudulent manner	Action for Fraud under Section 447
13.	213 Proviso: Investigation into company's affairs in other cases	Action for Fraud under Section 447
14.	229: Penalty for furnishing false statement, mutilation destruction of documents to	Action for Fraud under Section 447
15.	251(1): Fraudulent application for removal of name	Action for Fraud under Section 447
16.	339(3): Liability for fraudulent conduct of business	Action for Fraud under Section 447
17.	448: Punishment for false statement	Action for Fraud under Section 447

2.3 Other non-compoundable offences also relate to substantial non-compliances which do not merit a re-look at this stage.

CHAPTER – II: ADJUDICATION OF PENALTIES

1. Inherent benefits

1.1 The principles applicable for levy of civil penalties for a default, stand on a different footing in comparison to punishment imposed with fine or imprisonment in a criminal proceeding.

1.2 There are inherent benefits in prescribing civil liabilities for procedural lapses as it would remove the requirement of proving *mens rea* normally associated with a criminal trial, in such cases. As a consequence, the burden of proof on the regulator would also be much less. In *Director of Enforcement v. MCTM Corporation*[1], it was held by the Hon'ble Supreme Court that a civil liability is imposed for a mere 'blameworthy conduct' and not for a crime, so presence of a 'guilty intention' is not a *sine qua non*.

2. Requirement for attendance of the defaulting officers during adjudication proceedings

2.1 Section 454 of the CA 2013 read with the Companies (Adjudication of Penalties) Rules, 2014 (hereinafter referred to as "**Rules"**) relates to adjudication of penalties. It makes provision for appointment of adjudicating officers by the Central Government for adjudication of penalties under the provisions of the Act. It further provides that the adjudicating officer may impose penalty on the company and its officers who are in default by an order and by stating the non-compliance or default under the provisions of the Act.

2.2 Under sub-section (5) to section 454, it has been provided that the adjudicating officer shall give a reasonable opportunity of being heard to the company and its officers who are in default before imposing any penalty. Rule 3 (3) of the rules, states as follows:

> *If, after considering the cause, if any, shown by such company or officer, the adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of such company, through its authorized*

[1] AIR 1996 SC 1100

representative, or officer of such company whether personally or through his authorized representative.

2.3 On perusal of the above, it is clear that at present the rules mandate the presence of defaulting officers of the company before the adjudicating officer during the adjudication proceedings. While the principles of natural justice may not be derogable, it would be required to be clarified in the rules that the adjudicating officer must record the reasons for requiring the presence of the defaulting officers as a part of the order. Therefore physical presence of the parties must be an exception, if at all, and not the rule. However if any party of its own volition solicits its presence for adjudication, it may be allowed to do so. Similarly, while summoning the attendance of any person acquainted with the facts and circumstances of the case under rule 3(7), an adjudicating officer should be required to record cogent reasons for the same, which must be stated in the order.

3. Creating an infrastructure for e-proceedings

3.1 A system of issuing e-notices should be created, wherein notices are issued online and responses thereto are also filed online on the same platform. In case no response is received through e-notices within the stipulated time, physical notices should be automatically sent to the parties after uploading the same on the online platform. The physical notices should also insist that replies should be filed on the online platform itself. This would ensure that a robust repository of the proceedings is created online.

3.2 In case the representative(s) of any company and/or its officers prefer to make an oral representation, they may be permitted to do so by choosing the option of making an oral representation on the online platform after filing their reply through the electronic mode. Where the parties appear before the adjudicating officer, the proceedings should be videographed for the sake of transparency.

3.3 The orders passed by the adjudicating officer should be published on the website. This would create awareness amongst the stakeholders and bring transparency. This would also improve the quality of orders as 'good' orders would become precedents.

3.4 In case defaults are determinable through the MCA21 system, such as the defaults on account of non-filing or delayed filing, an auto-populated list of a certain percentage of such defaults should be generated in a random manner. No other cases may be picked up, unless an inquiry or inspection has been ordered.

3.5 The proposed framework as recommended above may be introduced by making amendment to the rules and by upgrading the online platform.

4. Quantum of penalty for defaults

4.1 During the course of discussions, a suggestion was received to make necessary provisions in the law for providing different penalties for different classes of companies. While the suggestion does appear to have merits, the existing provisions relating to penalties under the CA 2013 do not envisage such a gradation on the basis of the size of the company. Again it may be difficult to prescribe different penalties for the same defaults in respect of different classes of companies in statute. It may also mean serious changes to the entire penal mechanism provided in the Act. Therefore it is recommended that existing structure of fines, laid down in CA 2013 for the offences which are suggested to be shifted to the in-house adjudication mechanism, may be taken into account and legislative changes may be made accordingly.

4.2 **In case where defaults are of continuing nature, a penalty for each day's delay is recommended.**

5. Ensuring compliance of the default and prescribing stiffer penalties in case of repeated defaults

5.1 Under section 454(8), punishment is prescribed in respect of a company or an officer in default where a penalty imposed by the adjudicating officer or the RD remains unpaid. As of now the section does not require the adjudicating officer to give any other directions besides imposition of penalty. The penal section only recognizes the non-payment of penalty after a lapse of a period as an offence. But it is important that the default may also be made good to the extent possible.

5.2 **Therefore it is recommended that while levying penalty, the adjudicating officer shall, wherever he considers fit, also direct the defaulter to make good the default. This is necessary as the intention is not only to levy penalty but also to ensure compliance. In this regard, necessary amendment is required to be made in section 454.**

5.3 Presently there is no separate provision for levying higher penalty in respect of repeated defaulters. Section 451 of CA 2013 provides that where an offence is repeated for the second or subsequent occasions within a period of three years, twice the amount of fine may be imposed. But this section is not applicable where a default is subject to penalty under the in-house mechanism.

5.4 **Therefore it is proposed that a new section (section 454A) should be inserted to provide that 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.**

CHAPTER-III: DECLOGGING THE NCLT

1. Permission to allow a company to change its financial year

1.1 Section 2(41) defines 'financial year', as follows:

> *"financial year", in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:*
>
> *Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year:*
>
> *Provided further that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause;*

1.2 **It is recommended that NCLT need not be burdened with applications for change of financial year. These applications may be disposed at the level of RD itself. Therefore section 2(41) may be amended to provide the power to dispose the application for change of financial year and pass suitable orders thereon to the Central Government, which may delegate the same under section 458 to any other authority, if it is so required.**

1.3 **In case of applications made by a body corporate (other than the company), the Central Government may take a view regarding delegating the same to the NCLT.**

2. Conversion of public company to private company

2.1 Under section 31 of the CA 1956, conversion of public company to private company, required an approval of the Central Government, which was delegated to RoC. Under section 14 of CA 2013, the conversion of public

company to private company takes effect after the same is approved by NCLT, which shall make such order as it may deem fit. Under rule 68(5) of the NCLT Rules, 2016, after filing an application for conversion of a public company into private company before NCLT, the company is required to serve a copy of the notice together with a copy of a petition to the to the Central Government, RoC and to the Securities and Exchange Board of India, in the case of listed companies and to the regulatory body, if the company is regulated under any other Act, at least fourteen days before the date of hearing. Under rule 68(6), where a petitioner receives an objection from a person, whose interest is likely to be affected, the petitioner is required to serve the same to the RoC. Thus the report of the RD/RoC to NCLT is essential in disposing off a petition for conversion, as matters of record are placed before NCLT. In view of the nature of proceedings and with a view to ensure speedier disposal, it is recommended that NCLT need not be burdened with petitions of conversion of public companies to private companies.

2.2 **It is recommended that the power to approve the conversion of public companies under section 14 be vested with the Central Government, which may exercise the powers of delegation under section 458 to delegate the same to the RD or RoC, if required. The Central Government may also take a view of delegating this power to the NCLT for a certain class of companies having a higher turnover or significant amount of debt.**

3. Compounding of offences

3.1 Under section 441(1)(b), RD's pecuniary jurisdiction in case of compounding extends to offences where the maximum amount of fine does not exceed five lakh rupees. In other cases, the power of compounding vests with the NCLT.

3.2 CA 2013 provides a significantly higher fine exceeding five lakh rupees for certain violations, a list of such provisions is as under:

S. No.	Provision in the Companies Act, 2013	Quantum of Fine prescribed (in Rs.)
1.	Section 8 – Formulation of companies with charitable objects, etc.	Company: 10,00,000-1,00,00,000 Director/Officer: 25,000-25,00,000

2.	Section 40 – Securities to be dealt with in stock exchanges.	Company: 5,00,000-50,00,000 Officer: 50,000-3,00,000
3.	Section 66(11) – Reduction of share capital.	Company: 5,00,000-25,00,000
4.	Section 86 – Punishment for contravention	Company: 1,00,000 - 10,00,000 Officer: 25,000-1,00,000
5.	Section 90(10) – Register of significant beneficial owners in a company.	Person: 1,00,000-10,00,000 and in case of a continuing default a further fine of 1,000/day for which the default continues
6.	Section 90(11) – Register of significant beneficial owners in a company.	Company and officer: 10,00,000-50,00,000 and in case of a continuing default a further fine of 1,000/day for which the default continues
7.	Section 124(7) - Unpaid Dividend Account	Company: 5,00,000-25,00,000 Officer: 1,00,000-5,00,000
8.	Section 134(8) – Financial statement, Board's report, etc.	Company: 50,000-25,00,000 Officer: 50,000-5,00,000
9.	Section 143(15) – Powers and duties of auditors and auditing standards	Fine on auditor, cost accountant or company secretary is between 1,00,000-25,00,000
10.	Section 185(4) – Loans to directors, etc.	Company, officer and every person: 5,00,000-25,00,000
11.	Section 187(4) – Investments of company to be held in its own name	Company: 25,000-25,00,000 Officer: 25,000-1,00,000
12.	Section 447 (second proviso) - Fraud	Any person – 20,00,000

3.3 In certain cases, the maximum fine may exceed five lakh rupees on account of a continuing failure. Some of the relevant provisions in this regard are as under:

S. No.	Provision in the Companies Act, 2013	Quantum of Fine prescribed (in Rs.)
1.	Section 88(5) – Register of members, etc.	Company and officer: 50,000-3,00,000 In case of a continuing offence a further fine of 1,000/day for which the default continues
2.	Section 89(5) & (7) - Declaration in respect of beneficial interest in any share	Company, officer and every person: Fine up to 50,000 and in case of a continuing default a further fine of 1,000/day for which the default continues
3.	Section 99 – Punishment for default in complying with provisions of sections 96 to 98.	Company and officer: 1,00,000 and in case of a continuing default a further fine of 5,000/day for which the default continues
4.	Section 392 – Punishment for contravention.	Foreign Company: 1,00,000-3,00,000 and with an additional fine which may be 50,000/day in case of continuing default

3.4 **Under section 441(3)(a), the application for the compounding of an offence shall be made to RoC, who shall forward the same, together with his comments thereon to RD or NCLT as the case may be. In his comments, the RoC has to invariably point out as to whether a default has been made good or not. This finding is crucial for disposal of the petition. On perusal of the above, it is seen that the compliance in respect of most of the aforementioned offences are objectively discoverable, which may be presented in the report forwarded by RoC. Therefore, it is recommended that the pecuniary jurisdiction of RD section 441(1)(b) be enhanced to twenty five lakh rupees from five lakh rupees. It is also recommended, that the maximum fine which may be imposed under the second proviso to section 447 be increased from twenty lakhs to fifty lakhs. If implemented, the compounding applications for violations other than section 8, 40, 90 and 447 (to the extent compoundable) would be done at the level of RD. This would go a long way in de-clogging the NCLT.**

3.5 **Clause (a) to sub-section (6) of section 441, which requires the permission of the Special Court for compounding of offences, is a redundant provision. NCLAT in its judgment dated 29.08.2017 in *Cinepolis India Pvt. Ltd. v. RoC*, CA (AT) No. 137 of 2017, while relying on the interpretation of section 621A of CA 1956 (corresponding to section 441 of CA 2013) by the Supreme Court in *VLS Finance v. Union of India*[2], held that a prior approval of the Special Court before compounding of offence by the NCLT is not required. The Committee recommends that clause (a) of sub-section (6) of section 441 be omitted.**

4. Measures to bring in more transparency in the compounding proceedings

4.1 The Committee recommends that the following two clarifications are required to be provided to make the process of compounding more transparent:

a. **Minimum amount imposed during compounding:** Section 441 of CA 2013 corresponds to section 621A of CA 1956. In both these sections it is provided that the amount payable at the time of compounding shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded. While the penal provisions provided under CA 1956 did not lay down the minimum amount of fine in respect of offences, CA 2013 does so. Therefore it is required to be clarified that the minimum amount of sum for compounding an offence shall not be less than the minimum amount of fine prescribed for such offence, subject to deduction of fees or additional fees as stated in the second proviso to section 441(1).

b. **Adjustment of fees and additional fees from the amount of sum levied at the time of compounding:** The second proviso to section 441(1) allows adjustment of fees and additional fees against the amount of sum levied on the defaulter at the time of compounding. It may be clarified that such adjustment should only be allowed in respect of any sum levied on the company only and not on the officers in default.

4.2 In line with the recommendations given at para 3.3 of Chapter – II, with reference to adjudication of penalties, it is recommended that all the orders of

[2] (2013) SCC 278

compounding be also uploaded on the Ministry's website for increased accountability and greater transparency.

5. Voluntary revision of financial statements or Board's report.

5.1 Shri Amarjit Chopra, expressed his views regarding the requirement of taking approval of NCLT before voluntary revision of financial statements under section 131. Consequent to implementation of Ind AS 8, material prior period errors are required to be corrected retrospectively under certain circumstances. Therefore an element of materiality is required to be introduced in this provision, so that only those cases where revision is material may be filed before NCLT. **The Committee felt that a wider deliberation is required to be conducted on this issue before taking any informed decision.**

CHAPTER-IV: OTHER RELEVANT RECOMMENDATIONS RELATED TO CORPORATE COMPLIANCE AND CORPORATE GOVERNANCE

1. Declaration before commencement of business

1.1 A provision requiring a declaration from the company within a stipulated time, that it has received the value of the shares from the subscribers of the company, and it has filed a form for verification of its registered office, could provide an early warning against setting up of companies with negligible business operations, which are often used as a conduit for illegal activities. Such a provision originally existed in the CA, 2013, but was later omitted to ease the doing of business for companies. However it is necessary to examine the unintended consequences of such omission.

1.2 Section 11 of CA 2013 (omitted by the Companies (Amendment) Act, 2015) read as follows:

"11.Commencement of Business, etc.
(1) A company having a share capital shall not commence any business or exercise any borrowing powers unless –

(a) a declaration is filed by a director in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the paid-up share capital of the company is not less than five lakh rupees in case of a public company and not less than one lakh rupees in case of a private company on the date of making of this declaration; and

(b) the company has filed with the Registrar a verification of its registered office as provided in sub-section (2) of section 12.

(2) If any default is made in complying with the requirements of this section, the company shall be liable to a penalty which may extend to five thousand rupees and every officer who is in default shall be punishable with fine which may extend to one thousand rupees for every day during which the default continues.

(3) Where no declaration has been filed with the Registrar under clause (a) of sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that

the company is not carrying on any business or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII."

1.3 The section provided that a company having paid-up share captial was required to make a declaration to the RoC that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the company has filed with the RoC a verification of its registered office, before commencement of any business or exercise of any borrowing powers. Non-compliance of filing this declaration even after a lapse of 180 days became a ground of striking off the company.

1.4 Experience gained while striking off defunct companies shows that such a provision may hugely assist in early identification and strike off of inactive companies as the period prescribed under section 11 before launching proceedings under section 248 was merely 180 days from the incorporation of the company. This would not require a RoC to wait over a period of two years in respect of a defaulting company before initiating striking off under section 248. **Therefore it is recommended that section 11 may be restored after removing the requirements related to minimum paid-up capital and the consequential omission to section 248, in respect of section 11 may also be restored.**

2. Requirement of maintenance of registered office

2.1 Section 12 contains the requirement of maintaining registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The provision clearly establishes that a physical/actual presence of the company at a particular address is mandatory. Further the requirement of maintenance of registered office is perpetual, i.e. till the existence of the corporate identity of the company. In addition, a company is required to intimate the RoC of every change of situation of the registered office within 30 days of the change. Non-compliance of the provisions of this section gives rise to penalty.

2.2 It has been noticed time and again during inquiries, inspections and investigations that a large number of companies are not maintaining the registered office, which gives an impression that these companies may be existing merely as 'paper companies'. **Therefore it is recommended that non-**

maintenance of the registered office should be made one of the grounds for striking off companies under section 248.

3. Raising of public deposits

3.1 In clause 66 of the Companies Bill, 2009 there was a clear proposal for prohibiting the acceptance or renewal of public deposits after the commencement of the Act. This provision was later on removed on the recommendations of the 21st Report of the Parliamentary Standing Committee on Finance, presented to the Parliament on 31.08.2010. However, with the commencement of CA 2013, all companies were required to file the form stating the amount of deposits accepted by them prior to the commencement of the Act in Form DPT-4. An analysis of the filings indicates that a total of 3635 companies filed Form DPT-4, showing acceptance of deposits worth Rs. 332.1 crore. Besides this, an analysis of the annual filings of the return of deposits shows that very few companies have been filing such returns (374 for the FY 2015-16, 501 for the FY 2016-17 and 465 for the 2017-18). It has been observed that certain companies have misused the provisions relating to acceptance of deposits from public. The definition of deposit under rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014, excludes certain transactions from the ambit of 'deposits', and as a result these transactions go unreported. Some of the exclusions, such as the one relating to appropriation of advance for supply of goods and services within a period of 365 days are being exploited for following dubious trade practices. During assessment of the Basel Core Principles under the Financial Sector Assessment Programme (FSAP) of India, IMF has recommended that deposit taking by institutions that are not regulated as banks should be prohibited, notwithstanding a very small volume of such deposits.

3.2 The decision of omitting section 76, which allows an eligible public company to raise public deposits may require greater consultation. **However an eform may be introduced where all companies (public or private) may be required to provide the details of transactions which are excluded from the purview of 'deposit' under rules.**

4. Registration of charges

4.1 Creation and modification of charges should be reported in a timely manner. Any liquidator appointed under IBC would only take such charges into account which are registered against a company. It has come to light in a number of cases that companies have not registered the charges on their assets after indulging in borrowings from banks and other financial institutions. Therefore an urgency is clearly felt in timely creation and registration of charges. Section 77 requires a company to report the creation and modification of charge within 30 days. Under the first proviso to section 77(1), this period is further extendable by 270 days on payment of additional fees. Even after the lapse of 300 days, rectification in the register of charges is permissible under section 87, whereby the delay may be condoned.

4.2 The present provisions allow a reasonably long period of time for reporting creation or modification of charges. In fact, under section 87, no upper limit is prescribed for condonation of delay for registration and modification of charges. Such a provision has been seen to be breeding laxity on the part of the companies as well the creditors in timely reporting. There is no doubt that a delayed reporting may have an adverse effect on the interest of shareholders and secured creditors at the time of winding up. Therefore it is necessary to make the companies more vigilant in this regard and ensure that charges are reported in a timely manner.

4.3 **The Committee recommends that this period of 300 days for creation and modification of charge under section 77 be reduced to 60 days, i.e. 30 days of normal filing period and 30 days with additional fees. The provision of seeking extension of time under section 87 as per the second proviso to section 77(1), is also required to be modified, whereby a prohibitive *ad valorem* fees based on the amount of charge be levied for creation/modification of charge beyond 60 days but within 120 days. After 120 days the creation/modification of charge would not be registered.**

4.4 **The Committee also recommends that sub-clause (a) and sub-clause (b) of clause (i) of sub-section (1) to section 87 which deals with extension of time in respect of registration and modification of charge be omitted. Clause (ii) of sub-section (1) to section 87, which deals with 'just and equitable' ground for registration of charge, is also required to be omitted. Therefore the section 87, dealing with rectification of charge should remain applicable only in cases of rectification of mis-statement/omission in an existing charge or for extension**

of time in case of satisfaction of charge. Wilful suppression with respect of reporting creation/modification of charges should attract the provisions of section 447.

5. Significant beneficial ownership

5.1 Under section 90(5), a company is empowered to call upon a person who it reasonably believes is or was a significant beneficial owner, or he knows about the identity of the significant beneficial owner, to disclose the nature of interest of such person. If such person does not provide any information or where the information provided is not satisfactory, such company under section 90(7), company shall approach NCLT for imposing restrictions on the shares, whose significant beneficial owner is not determinable despite efforts made by the company. In case such application is allowed and restrictions on the rights attached to the shares are imposed, the person aggrieved may approach the NCLT for lifting of such restrictions under section 90(9). **It is recommended that if no person files an application before NCLT for lifting such restrictions within a period of one year, such shares should be transferred to Investor Education and Protection Fund without any restrictions.**

5.2 Considering the importance of the disclosures under section 90, **the Committee also recommends that the punishment for violation of section 90(1) prescribed under section 90(10) should be enhanced, so that the contravention is punishable with fine or imprisonment, or both, instead of being punishable with only fine.**

6. Independent directors

6.1 An independent director (**"ID"**) is appointed for a period of five years in a company and may be reappointed for another term of five years subject to passing of a special resolution. The functions of an ID *inter alia* includes balancing conflicting interests of shareholders and protecting the interests of minority shareholders. Given the nature of responsibility, IDs are non-executive directors who are supposed to have no material pecuniary relationships which may affect their independence. Section 149(8) read with Schedule IV mandates IDs with discharge of extremely important and onerous duties that require

independence of mind and thought beyond influence. Kumar Mangalam Birla Committee underlined the need of IDs who are not obligated to the Promoter Group to toe its line. The Naresh Chandra Committee also underlined the crucial and pivotal role ascribed to IDs and Corporate Governance and thus on the essentiality of their being truly independent. The importance of the institution of ID, was captured in the following words by the Uday Kotak Committee on Corporate Governance:

> *"The institution of Independent Directors (hereinafter referred to as 'IDs') forms the backbone of the corporate governance framework worldwide and in India. IDs are expected to bring objectivity into the functioning of the board and improve its effectiveness. IDs are required to safeguard the interests of all stakeholders, particularly minority shareholders, balance the conflicting interest of the stakeholders and bring an objective view to the evaluation of the performance of the board and management."*

6.2 Monetary and non-monetary compensation from a company would undoubtedly rank as one of the most important factors which is likely to influence an individual's ability to exercise unbiased and independent judgement and take necessary action thereon. Excessive pecuniary relationship could lead to potential erosion of independence. Since what is excessive will vary from person to person, a test of a directors' independence could be the proportion that the financial rewards from the company constitute in the ID's overall earnings, as a potential loss of such rewards or even the threat of the could then make the ID vulnerable to the influence of the promoter group.

6.3 **The Committee therefore recommends the following progressive measures for delineating the components of the financial package which may be extended to IDs and section 149(6)(c) be amended accordingly:**

a. **The sitting fees and expenses incurred, as may be prescribed for participation in the meetings of Board and Committees shall not be considered for the purpose of assessing pecuniary relationship of an ID.**
b. **The sum total of pecuniary relationship of an ID with the company, its holding, subsidiary or associate company, or their promoters or directors (excluding sitting fees and expenses incurred for**

participation) during a year shall not exceed 20% of his total income, of which, professional or any services other than Board related services rendered by an ID to the company its holding, subsidiary or associate company, or their promoters or directors shall not account for more than 10% of the total income as laid down under section 149(6)(c).

6.4 The two non-obstante provisions under section 149(9) and section 197(7) provide for remuneration payable to an ID and are similar in content. **The Committee recommends that section 197(7) be omitted. Section 149(9), should be retained with a clarification that the remuneration payable to IDs should be subject to overall limits.** The General Circular No. 14/2014 dated 09.06.2014, to the extent that it pertains to 'pecuniary relationship' between the company and its ID may be required to be reviewed.

7. Maximum number of directorships

7.1 Section 165 provides a cap on the number of directorships. **The Committee recommends that if the number of directorships held by an individual exceeds the number provided under section 165, such an individual should be subject to disqualification under section 164(1) read with section 167(1). Therefore it is recommended that consequential amendments may be made in section 164. It is also recommended that the exemptions accorded to section 8 companies in this respect may be withdrawn.** Shri Shardul Shroff was of the opinion that any directorship held beyond the permissible limit should be declared as void. While making legislative amendments, this position may be considered in the backdrop of section 176 of CA, 2013, which does not invalidate the actions of the directors, whose appointments were defective, till the same has been noticed by the company. The exemption with respect to dormant companies may remain. The MCA21 system should be equipped to disallow persons from holding directorships beyond a threshold.

ANNEXURE – I

Pendency of prosecutions filed within the jurisdiction of Regional Directors along with the applications of withdrawal pending before the court as on 30.06.2018

Regional Director (s)	Compoundable	Non Compoundable
NORTHERN REGION	2101	121
WESTERN REGION	5378	407
EASTERN REGION	18292	268
SOUTHERN REGION	1235	57
NORTH WEST REGION	3256	157
NORTH EAST REGION	1797	0
SOUTH EAST REGION	543	45
APPLICATIONS BEFORE COURT FOR WITHDRAWAL	6391	0
TOTAL	38993	1055

ANNEXURE - II

F. No. 2/1/2018-CL.V
Government of India
Ministry of Corporate Affairs
'A' Wing, 5th Floor, Shastri Bhawan
New Delhi: - 110001

Dated: 13 July, 2018

ORDER

Subject:- Constitution of Committee to review the offences under the Companies Act, 2013.

The Government hereby constitutes a Committee to review the offences under the Companies Act, 2013, consisting of the following:-

S. No.	Name of Person/Institution	Position
1.	Secretary, MCA	- Chairperson
2.	Shri T.K. Vishwanathan, Ex-Secretary General, Lok Sabha	- Member
3.	Shri Shardul S Shroff, Executive Chairman Shardul Amarchand Mangaldas & Co.	- Member
4.	Shri Ajay Bahl, Founder Managing Partner, AZB & Partners	- Member
5.	Shri Amarjit Chopra, Senior Partner, GSA Associate	- Member
6.	Shri Uday Kotak, MD, Kotak Mahindra Bank	- Member
7.	Shri Arghya Sengupta, Vidhi Centre for Legal Policy	- Member
8.	Shri Sidharth Birla, Past President, FICCI	- Member
9.	Ms. Preeti Malhotra, Partner and Executive Director of Smart Group	-Member
10.	Joint Secretary (Policy)	- Member Secretary

2. The Committee may invite or co-opt subject matter experts relating to corporate law or any other subject matter, as well as experts from SEBI, RBI, C&AG as needed. The committee may also invite any other person or body in the interest of broad based consultation.

3. The terms of reference of the Committee would be as follows :

(i) To examine the nature of all 'acts' categorized as compoundable offences viz. offences punishable with fine only or punishable with fine or imprisonment or both under the

CA-13 and recommend if any of such 'acts' may be re-categorized as 'acts' which attract civil liabilities wherein the company and its 'officers in default' are liable for penalty;

(ii) To review the provisions relating to non-compoundable offences and recommend whether any such provisions need to be re-categorized as compoundable offence;

(iii) To examine the existing mechanism of levy of penalty under the CA-13 and suggest any improvements thereon;

(iv) To lay down the broad contours of an in-house adjudicatory mechanism where penalty may be levied in a MCA21 system driven manner so that discretion is minimized;

(v) To take necessary steps in formulation of draft changes in the law;

(vi) Any other matter which may be relevant in this regard.

4. Non-official members of the Committee will be eligible for travelling, conveyance and other allowances as per extant Government instructions, wherever the sponsoring agency is unable to bear their expenditure. Secretarial support to the Committee will be given by the Ministry of Corporate Affairs.

5. The Committee shall submit its recommendations within thirty days of its first meeting.

(Pranay Chaturvedi)
Deputy Director
Phone: 23071190

To

The Members of the Committee

Copy also to:-

(i) PS to CAM
(ii) Sr. PPS to Secretary
(iii) PS to AS
(iv) PSs to all JS
(v) All RDs/ROCs/OLs
(vi) Guard File
(vii) Website of the Ministry

ANNEXURE – III

SUMMARY OF PROPOSED AMENDMENTS TO THE COMPANIES ACT, 2013

Sr. No.	Provision	Proposed Amendment
1.	Section 2(41) Definition of financial year	To replace the word "Tribunal" in the first proviso with the words "Central Government"
2.	Section 11 Commencement of Business, etc.	To re-introduce the section 11 omitted under the Companies (Amendment) Act, 2015 (after doing away with the requirements of minimum paid up capital) to provide for a declaration by a company having share capital before it commences its business or exercises borrowing power. Non-compliance of section 11 by an officer in default shall result in liability to a penalty instead of fine.
3.	Section 12 Registered Office of Company	To insert sub-section (9) to section 12, to state that "if Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provision of sub-section (8), cause a physical verification of the registered office of the company and if any default is found in complying with the requirements of sub-section (1), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII".
4.	Section 14 Alteration of Articles	To replace the word "Tribunal" in the second proviso to section 14(1) with the words "Central Government".

Sr. No.	Provision	Proposed Amendment
		To replace the words "of the Tribunal approving the alteration as per sub-section (1)" in section 14(2) with the words "under sub-section (1)".
5.	Section 53(3) Prohibition of issue of shares at a discount	Non-compliance with sub-section (3) of Section 53 shall result in the company and any officer in default being liable to a penalty, instead of being punishable with fine or imprisonment or with both.
6.	Section 64(2) Notice to be given to Registrar for alteration of share capital	Non-compliance with sub-section (1) of Section 64 shall result in the company and any officer in default being liable to a penalty, instead of being punishable with fine.
7.	Section 77 Duty to Register Charges, etc.	In the first proviso to section 77(1), to replace the words "three hundred" with "sixty" In the second proviso to section 77(1), following changes to be made: a) to omit reference to section 87; b) to provide an additional period extendable upto 60 days for registration after payment of *ad valorem* fees as may be prescribed.
8.	Section 86 Punishment for contravention - charge	A sub-section to be inserted to clarify that any person who wilfully or knowingly furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he shall be liable to action under section 447.

Sr. No.	Provision	Proposed Amendment
9	Section 87 Rectification by Central Government in register of charges	This section dealing with rectification of charge should remain applicable only in cases of rectification of mis-statement/omission in an existing charge or for extension of time in case of satisfaction of charge. Sub-clause (a) and sub-clause (b) of clause (i) of sub-section (1) to section 87 which deals with extension of time in respect of registration and modification of charge be omitted. Clause (ii) of sub-section (1) to section 87, which deals with 'just and equitable' ground for registration of charge be omitted. To omit the words "the filing of the particulars or for the registration of the charge or for the" in section 87(1).
10.	Section 90 Register for significant beneficial owners	A proviso to be inserted in section 90(9), to provide that if no person files an application before NCLT for lifting such restrictions within a period of one year, such shares shall be transferred to Investor Education and Protection Fund without any restrictions. In sub-section (10), after the words "punishable with", the words "imprisonment for a term which may extend to one year or with" shall be replaced.
11	Section 92(5) Annual return	Non-compliance with sub-section (4) of Section 92 shall result in: (i) the company being liable to a penalty, instead of being punishable with fine; and

Sr. No.	Provision	Proposed Amendment
		(ii) every officer in default being liable to a penalty, instead of being punishable with fine or imprisonment or with both.
12.	Section 102(5) Statement to be annexed to notice	Non-compliance with Section 102 shall result in every promoter, director, manager or other key managerial personnel who is in default being liable to a penalty, instead of being punishable with fine.
13.	Section 105(3) Proxies	Non-compliance with sub-section (2) of Section 105 shall result in every officer in default being liable to a penalty, instead of being punishable with fine.
14.	Section 117(2) Resolutions and agreements to be filed	Non-compliance with sub-section (1) of Section 117 shall result in the company and every officer in default including liquidator of a company, if any, being liable to a penalty, instead of being punishable with fine.
15.	Section 121(3) Report on annual general meeting	Non-compliance with sub-section (2) of Section 121 shall result in the company and every officer in default being liable to a penalty, instead of being punishable with fine.
16.	Section 137(3) Copy of financial statement to be filed with Registrar	Non-compliance with sub-section (1) or (2) of Section 137 shall result in: (i) the company being liable to a penalty, instead of being punishable with fine; and (ii) the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the board of directors with the responsibility of complying with the provisions of Section 137, and, in the absence of

Sr. No.	Provision	Proposed Amendment
		any such director, all the directors of the company, being liable to a penalty, instead of being punishable with fine or imprisonment or with both.
17.	Section 140(3) Removal, resignation of auditor and giving of special notice	Non-compliance with sub-section (2) of Section 140 shall result in the auditor being liable to a penalty, instead of being punishable with fine.
18.	Section 149 Company to have Board of Directors	To substitute section 149(6)(c) to provide that: a. The sitting fees and expenses incurred, as may be prescribed for participation in the meetings of Board and Committees shall not be considered for the purpose of assessing pecuniary relationship of an ID. b. The sum total of pecuniary relationship of an ID with the company, its holding, subsidiary or associate company, or their promoters or directors (excluding sitting fees and expenses incurred for participation) during a year shall not exceed 20% of his total income, of which, professional or any services other than Board related services rendered by an ID to the company its holding, subsidiary or associate company, or their promoters or directors shall not account for more than 10% of the total income as laid down under section 149(6)(c).
19.	Section 157(2) Company to Inform Director Identification	Non-compliance with sub-section (1) of Section 157 shall result in the company and every officer in default being liable to a penalty, instead of being punishable with fine.

Sr. No.	Provision	Proposed Amendment
	Number to Registrar	
20.	Section 159 Punishment for Contravention – in respect of DIN	Non-compliance with Section 152 (*Appointment of directors*), Section 155 (*Prohibition to obtain more than one Director Identification Number*) and Section 156 (*Director to intimate Director Identification Number*) shall result in any individual or director of a company in default being liable to a penalty, instead of being punishable with fine or imprisonment.
21.	Section 164 Disqualifications from appointment of directors	Insertion of a clause in section 164(1), whereby a person shall be subject to disqualification if he accepts directorships exceeding the maximum number of directorships provided in section 165.
22.	Section 165(6) Number of Directorships	If a person accepts appointment as a director in contravention of sub-section (1) of Section 165 (*Number of directorships*) such person shall be liable to a penalty, instead of being punishable with fine.
23.	Section 191(5) Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares	Non-compliance with Section 191 shall result in the director of the company being liable to a penalty, instead of being punishable with fine.
24.	Section 197	Sub-section (7) be omitted. The provision in section 149(9) to be all encompassing.

Sr. No.	Provision	Proposed Amendment
	Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits	Under sub-section (15) Non-compliance with Section 197 (*Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits*) shall result in any person in default being liable to a penalty, instead of being punishable with fine.
25.	Section 203(5) Appointment of Key Managerial Personnel	Non-compliance with Section 203 (*Appointment of key managerial personnel*) shall result in the company, every director and key managerial personnel of the company who is in default being liable to a penalty, instead of being punishable with fine.
26.	Section 238(3) Registration of Offer of Schemes Involving Transfer of Shares.	Non-compliance with clause (c) of sub-section (1) of Section 238 (*Registration of offer of schemes involving transfer of shares*) shall result in the director being liable to a penalty, instead of being punishable with fine.
27.	Section 248 Power of Registrar to Remove Name of Company from Register of Companies.	To insert clauses in section 248(1) to provide for the following additional grounds of striking off: • non-filing of the declaration under section 11(1) has not been filed within 180 days of its incorporation; • non-maintenance of the registered office under section 12.

Sr. No.	Provision	Proposed Amendment
28.	Section 441 (1)(b) Compounding of Certain Offences	To replace the words "does not exceed five lakh rupees" with the words "does not exceed twenty five lakh rupees".
29.	Section 441(6)(a) Compounding of Certain Offences	To omit section 441(6)(a), to remove the requirement, which is redundant.
30.	Section 447	To replace the words "twenty lakh rupees" in the second proviso to section 447 with the words "fifty lakh rupees".
31.	Section 454(3) Adjudication of Penalties	To provide that the adjudicating officer shall also give the direction of making good of the default at the time of levying penalty.
32.	Section 454(8) Adjudication of Penalties	Default would occur when the company or the officer in default would fail to comply with the order of the adjudicating officer or RD as the case may be.
33.	Section 454A Penalty for repeated default.	To insert a new section (section 454A) 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.

LIST OF DEFINED TERMS

CA 1956	Companies Act, 1956
CA 2013	Companies Act, 2013
CAA 2017	Companies (Amendment) Act, 2017
DIN	Director Identification Number
IBC	Insolvency and Bankruptcy Code, 2016
ID	Independent Director
IEPF	Investor Education and Protection Fund
JPC	Joint Parliamentary Committee
MCA	Ministry of Corporate Affairs
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
RBI	Reserve Bank of India
RD	Regional Director
RoC	Registrar of Companies