Highlights of Companies Amendment Bill, 2016

The Companies (Amendment) Bill, 2016 to further amend the Companies Act as part of efforts to address difficulties faced by stakeholders and facilitate the ease of doing business in the country has been introduced in Lok Sabha on 16th March, 2016 by Hon'ble Minister of Finance, Corporate Affairs and Information and Broadcasting Shri Arun Jaitley.

The Companies (Amendment) Bill, 2016 has been framed on the basis of recommendations of Companies Law Committee (CLC), the report of which was submitted by CLC to Hon'ble Union Minister of Finance, Corporate Affairs and Information & Broadcasting on February 01, 2016.

As per the **Statement of Objects and Reasons** of the Amendment Bill, the proposed changes are broadly aimed at:

- addressing difficulties in implementation owing to stringent compliance requirements;
- facilitating ease of doing business in order to promote growth with employment;
- harmonisation with accounting standards, the Securities and Exchange Board of India Act, 1992 and the regulations made thereunder, and the Reserve Bank of India Act, 1934 and the regulations made thereunder;
- rectifying omissions and inconsistencies in the Act.

Highlights:

To address difficulties in implementation

Name reservation/approval:

- There were concerns that the period of sixty days for reservation of name should be from date of approval and not from the date of application. This concern is addressed however, considering the fact that a changed process for centralised processing of name reservation/approval has already been implemented, the period of name reservation is proposed to be reduced to 20 days from sixty days. The specified period for name reservation is proposed from the date of approval and not from the date of application.

Registered office of the company:

- Section 12(1) requires that a company shall, on and from the fifteenth day of its incorporation, and at all times thereafter, have a registered office. This did not allow a company to have its registered office immediately on incorporation, or earlier than the

fifteenth day of its incorporation, whereas a company could have its office from the day of its incorporation. Amendment proposed to provide for a company to have its registered office within the given period of incorporation of company. Further, the period of fifteen days is increased to thirty days.

- There were difficulties with regard to filing of change of the registered office of a company with the Registrar. The concern was that the period of fifteen days is too short as certain documents like lease deeds, rent agreements and other related documents that are required to be submitted besides various approvals may have to be obtained. Accordingly to address the concerns, it is proposed to be increased to thirty days.

Effect of number of members falling below the minimum requirement:

- Section 3(1) of the Act provides for the minimum number of persons required for formation of a company. However, the minimum number of persons required for continuation of a company after it is formed and legal consequences of number of members falling below the minimum number is not provided in the Act. It is proposed that every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than the prescribed number of members shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

Deposit Insurance:

- Considering the fact that none of the Insurance companies are offering insurance products for covering company deposit default risks, the requirement for deposit insurance is omitted.

Re-opening of accounts of companies:

- It has not been provided as to for how many years, the books of account of companies could be reopened. Accordingly, a period of eight years is proposed for reopening of accounts of a company. With this proposed amendment, Companies would be relieved from the burden of maintaining their accounts forever or beyond a reasonable time limit.

Signing of financial statements:

- Provisions of section 134 require that, amongst others, the financial statement shall be signed by the Chief Executive Officer, if he is a director in the company. The amendment proposes that the Chief Executive Officer shall sign the financial statements irrespective of whether he is a director or not because Chief Executive Officer is a Key managerial Personnel, and responsible for the overall management of the company. Further, since the appointment of a managing director is not mandatory for all companies, it is proposed to insert the words "if any", after the words "managing director".

Performance evaluation of Directors:

- Alignment of provisions of sections 134 (3)(p), 178(2) and schedule IV with respect to performance evaluation of directors.

  Sections 134 (3)(p) provides for performance evaluation by the Board. Section 178 (2) provides that the Nomination & Remuneration Committee shall carry out evaluation of every director's performance. Schedule IV provides that: a) the independent directors shall review the performance of non-independent directors, the Board as a whole and the Chairperson of the Company; b) the performance evaluation of independent directors shall be done by the entire board of directors, excluding the director being evaluated.

  With the proposed amendment, the provisions of the sections would be harmonised. It is proposed that the Nomination & Remuneration Committee shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance.

Corporate Social Responsibility:

Definition of 'any financial year'

- Section 135 is applicable to companies which falls within the threshold of specified net worth or turnover or net profit and are required to constitute the CSR Committee in any financial year. It is proposed that the words "any financial year" be replaced by the

words 'preceding financial year'. This is as per the recommendations of the High Level CSR Committee.

CSR Committee constitution

- Rule 5(1) of CSR Policy Rules, 2014, permits unlisted companies to have the Committee without Independent Directors, where they are not required to appoint Independent Directors. Likewise this rule provides for some relaxation for private companies and foreign companies.
  So, in case of companies where Independent Directors are not required to be appointed as per Rule 5(1), it is not clear as to how many minimum directors are required in CSR Committee. Accordingly, it is proposed that in case of such companies, the company shall have its CSR Committee with two or more Directors.

  This will bring clarity.

CSR Activities

- Schedule VII indicates the broad areas of activities for spending as CSR. Accordingly, for liberal interpretation and to bring more clarity, it is proposed that instead of providing that CSR policy has to indicate the activities to be undertaken by the company as specified in Schedule VII, it should indicate the activities to be undertaken in **areas or subjects** specified in Schedule VII.

Net Profit

- CSR Rules define the term, 'net profit'. The rules also provide for calculation of net profit for the purposes of foreign company. However, explanation to Section 135(5) provides that for the purpose of this provision, the 'average net profit' shall be calculated in accordance with Section 198.

- Accordingly, there is ambiguity in the Act and the Rules. The High Level CSR Committee had also recommended in para 4.16 of the Report that for the term "average net profit" as provided in Explanation below Section 135(5) to be replaced with the words "net profit", to remove any ambiguity.

- Further, the manner of calculation of 'net profits' of a foreign company, is provided under the CSR Rules, while referring to

Section 381. It is proposed that as it is an substantive issue, it should form part of the Act.

- Accordingly, the explanation is proposed to be substituted to address both the issues.

Ratification of Auditors:

- The first proviso to section 139(1) requires that the matter relating to appointment of auditor be placed for ratification by the members in each AGM.

  There were concerns on ratification of auditors. Provision of ratification was defeating the objective of giving five year term to the auditors. Further there was no clarity in case the shareholders choose not to ratify the auditor's appointment as per Section 139 (1).

  Also there is an inconsistency, in case the shareholders take decision not to ratify any appointment during the period of five-years, as this would be similar to removal of the auditor and provisions of Section 140(1) should come into play.

  Explanation to Rule 3 of Companies (Audit and Auditors) Rules, 2014, provides for such a situation and requires that the Board shall appoint another individual or firm as the auditor (s) after following the procedure laid down in this behalf under the Act.

  Accordingly, this is an inconsistency due to the two provisions, wherein removal would require a special resolution and approval of the Central Government while removal through non-ratification would need a resolution.

  Accordingly, to remove the inconsistency, the omission of the provisions with respect to ratification is proposed.

Appointment of Independent Director:

- In determining the independence of directors, even minor pecuniary relationships are covered even though such transactions may not compromise the independence of the directors. SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015 prohibits only 'material' pecuniary relationships for disqualifying appointment of persons as Independent Directors. It is proposed to specify limits with respect to pecuniary relationship of a director with respect to eligibility of a director to be appointed as an independent director. It

also seeks to specify the scope of restriction on pecuniary relationship entered into by a relative.

Calling of meeting at shorter notice:

- Section 101 of the Act provides that the consent of members holding at least ninety-five percent of the voting power be obtained to call for a general meeting at notice shorter than twenty-one day. However, under Section 136, for the circulation of annual accounts to the members, the Section requires twenty-one days' notice, and does not provide for a shorter period to circulate the annual accounts.
  In this regard, the MCA had clarified by way of a circular dated 21st July 2015 that the shorter notice period would also apply to the circulation of annual accounts.

- This is proposed to provide for the same in the Act itself.

To facilitate ease of doing business

Alteration in MOA:

- Companies allowed to have an unrestricted object clause, to engage in any lawful act or activity for the time being in force. Model Memorandum of Association proposed.
  The Name and CIN of companies has to relate to the objects of the company and in case of companies having multiple objects this posed difficulties. To aid in more liberal operational regime especially for companies having multiple object it is proposed to have a generic objects Clause.

- Self declarations with reference to incorporation of company in place of affidavit from first subscribers and directors proposed. This will ease the additional documentary burden and avoid delay in the incorporation process.

Annual Return:

- Section 92(3) mandates the filing of an extract of the annual return as a part of the Board's report.
  Most of information in the extract is also required to be filled in financial statement or are available on the website of the company leading to duplication of information being reported to the shareholders.

Accordingly, this requirement is proposed to be omitted. It is also proposed that web address of the information may be provided in the Board's Report.

Disclosures under Board's Report:

- In case the disclosures as required under section 134 (3) are appearing elsewhere in financial statement, instead of repeating the same. It is proposed that reference of the disclosure elsewhere be given. This will reduce the burden of companies in preparing bulky Board's Report and reduce the paper work.
  Similarly, it is also proposed that the policies of companies if uploaded on the websites, instead of providing the complete policy, only its salient features and web address be given.

- The wholly owned subsidiary of company incorporated outside India is allowed to hold its extra ordinary general meeting outside India.

- It is proposed that the items required to be passed mandatorily by postal ballot may be transacted at a general meeting where the facility of electronic voting is provided by the company.

- With a view to facilitate ease of doing business and for reducing the burden of One Person Company and Small Company, it is proposed to empower the Central Government to prescribe an abridged Board's Report instead of complete report.

- It is proposed to empower Central Government to recognise any other universally accepted identification number as an identification document similar to director identification number.

Participation through video-conferencing

- It is proposed to allow participation of directors on certain items which are presently restricted at Board meetings through video conferencing or other audio visual means if there is quorum through physical presence of directors.

- To address the difficulties being faced in genuine transactions due to the complete embargo on providing loans to subsidiaries with common directors, the companies are permitted give loans to entities in which directors are interested after passing special

resolution and adhering to disclosure requirements. This would give big relief to the companies.

- It also seeks to empower Central Government to prescribe abridged Board's report for small company and one person company.

- The Bill also proposes to provide abridged form of Annual Return for one person companies and small companies.

- The requirement of deposit of rupees one lakh with respect to nomination of directors shall not be applicable in case of appointment of independent directors or directors nominated by nomination and remuneration committee.

- Proposal for deleting the restrictions on layers of investment companies is provided.

Harmonization

Disclosures in the prospectus:

- Disclosures in the prospectus required under the Companies Act and the Securities and Exchange Board of India Act, 1992 and the regulations made there under are proposed to be aligned by omitting prescriptions in the Companies Act and allowing these prescriptions to be made by the Securities and Exchange Board of India in consultation with the Central Government;

- On the basis of regulatory concerns, and to identify the natural person controlling a corporate entity, it is proposed to define the term "beneficial interest in a share". Further, it is also being proposed that a declaration be given to the company by who is significant beneficial owner: significant beneficial owner includes every individual acting alone or together or through one or more person including a trust and persons resident outside India, who holds beneficial interest of not less than twenty-five per cent or other prescribed percentage in shares of a company or the right to exercise or the actual exercising of significant influence or control under clause (*27*) of section 2 of the Act.

- Since SEBI regulations are comprehensive and cover the provisions, the omission of sections relating to prohibition on forward dealings in

securities of company and insider trading of securities by director or key managerial personnel is proposed.

Rationalising Penal provisions

Penalties:

The Bill seeks to amend section 76A, 132, 140, 147 and 180 etc. to reduce the quantum of fine in a move towards relaxing the severe **penalties** provided under the Act. The Bill seeks to insert two new sections with respect to factors for determining the level of punishment and for lesser penalties for one person companies and small companies

- Section 76A provides for penal provisions with regard to defaulting company with respect to repayment of the amount of deposit and the interest due.
  It is proposed to relax the minimum penalty by linking this with the amount of deposits accepted, accordingly, the minimum fine proposed as Rupees One Crore, or twice the deposit accepted, whichever is lower. Maximum penalty remains unchanged.

- In case of professional or other misconduct on the part of the auditor, the NFRA has the power to make an order for imposing penalty, for individual auditors and for firm of auditors.
  The minimum penalty in case of individuals is one lakh and in case of firms, the minimum penalty is rupees ten lakh. The amendment is proposed to rationalise minimum fine on the firm to rupees five lakh.

Other important provisions

Re-opening of Accounts:

- In the interest of the principle of natural justice, other concerned parties, like a company or the Auditor/Chartered Accountant of the company should also be given an opportunity to present their point of view. Accordingly, it is proposed in the provision relating to re-opening of accounts to requires the companies to serve notice to 'any other person concerned' also who may submit their concerns in the form of representations before passing of order for re-opening of accounts by Court or Tribunal.

Managerial Remuneration:

- The requirement of approval of the Central Government for Managerial remuneration above prescribed limits are proposed to be replaced by approval through special resolution by shareholders.

Restrictions on layers of subsidiaries and investment companies:

- The Amendment Act also proposes to remove restrictions on layers of subsidiaries and investment companies as it has been represented by stakeholders that imposing restrictions on layers could be construed as restrictive for conduct of businesses and it could have a substantial bearing on the functioning, structuring and the ability of companies to raise funds.

Foreign Company:

- As provided under section 591(1) of the Companies Act, 1956, it is proposed to clearly provide that the remaining body corporate as covered within the definition of foreign company would need to comply with the provisions of Chapter XXII, as applicable. In this regard, necessary amendment in Section 379 is proposed with respect to the threshold on transactions, etc. conducted by such companies.

Filing Fees:

- Section 403(1) allows a company to file documents belatedly up to two hundred and seventy days from the date on which such document becomes overdue for filing (i.e. after providing for the prescribed period for filing as per the concerned provision) by paying additional fee and without attracting liability for prosecution/penal action. Delayed filings beyond two hundred and seventy days can still be done with the maximum additional fee but the company is also liable for prosecution/penal action.

  It is, therefore, being viewed that in respect of delay in filings under any other section (other than the six mentioned above), the company will have to obtain condonation of delay under Section 460(b) and is not eligible for immunity from prosecution/penal action for any delay if condonation is not obtained. It is observed that the provision, coupled with low filing fees, has resulted in a low level of annual statutory filings as compared to previous years.

It is proposed to amend section 403 of Act to bring more clarity with respect to late filings of documents under sections 89, 92, 117, 121, 137 and 157 and defaults in filings, consequences, etc.

Private Placement:

- The Private Placement process is proposed to be simplified by doing away with separate offer letter and reducing number of filings to Registrar.

Definitions:

- It is also proposed for modifying the definitions of associate company, cost accountant, debentures, financial year, holding company, key managerial personnel, net worth, related party, small company, subsidiary company and turnover, and omit the definition of interested director.

Constitution of NCLT:

- It is also proposed to align with Supreme Court directions with respect to constitution of Selection Committee.

Insolvency and Bankruptcy Code, 2016 –Highlights

- The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha on December 21, 2015 and was referred to Joint committee on The Insolvency and Bankruptcy Code, 2015. The report was presented in Loksabha and laid down in Rajya sabha on April 28, 2016. The code was passed by Loksabha on May 05, 2016and Rajya Sabha on May 11, 2016. The Insolvency and Bankruptcy Code, 2016 received president's assent on May 28 2016. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. Different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

- The preamble of the code reads as under:
  To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues

and to establish an Insolvency and Bankruptcy Fund, and for matters connected therewith or incidental thereto.

- The Code proposes to cover Insolvency of individuals, unlimited liability partnerships, Limited Liability partnerships (LLPs) and companies.

- The Insolvency Resolution Process (IRP) for individuals and unlimited liability partnerships varies from that of companies and LLPs. The Debt Recovery Tribunal ("DRT") shall be the Adjudicating Authority with jurisdiction over individuals and unlimited liability partnership firms. Appeals from the order of DRT shall lie to the Debt Recovery Appellate Tribunal ("DRAT"). The National Company Law Tribunal ("NCLT") shall be the Adjudicating Authority with jurisdiction over companies, limited liability entities. Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal ("NCLAT").

- The Code seeks to repeal the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920.

- The Code seeks to amend the following 11 Legislations.
  1. The Indian Partnership Act 1932
  2. The Central Excise Act 1944
  3. The Income Tax Act 1961
  4. The Customs Act. 1962
  5. Recovery of Debts Due to Banks and Financial Institutions Act, 1993
  6. The Finance Act 1994
  7. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002
  8. Sick Industrial Companies (Special Provisions) Repeal Act, 2003
  9. The payment and Settlement Systems Act 2007
  10. The Limited Liability Partnership Act 2008
  11. the Companies Act, 2013

- The Code proposes to establish an Insolvency Regulator (The Insolvency and Bankruptcy Board of India) to exercise regulatory oversight over

  1. Insolvency Professionals,
  2. Insolvency Professional Agencies and
  3. Information Utilities.

- The Code proposes to regulate insolvency professionals and insolvency professional agencies. Under Regulator's oversight, these

agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members leading to the development of a competitive industry for insolvency professionals.

- The Code proposes for information utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies. An individual insolvency database is also proposed to be set up with the goal of providing information on insolvency status of individuals.

- The Code proposes a swift process and timeline of 180 days for dealing with applications for corporate insolvency resolution. This can be extended for 90 days by the Adjudicating Authority only in exceptional cases. During insolvency resolution period (of 180/270 days), the management of the debtor is placed in the hands of an interim resolution professional/resolution professional.

- Further, an insolvency resolution plan prepared by the resolution professional has to be approved by a majority of 75% of voting share of the financial creditors. Once the plan is approved, it would require sanction of the Adjudicating Authority. If an insolvency resolution plan is rejected, the Adjudicating Authority will make an order for the liquidation.
- The Code proposes for a fast track insolvency resolution process for companies with smaller operations. The process will have to be completed within 90 days, which may be extended upto 45 more days if 75% of financial creditors agree. Extension shall not be given more than once.

Constitution of National Company Law Tribunal and National Company Law Appellate Tribunal.

The Ministry of Corporate Affairs has issued notification for constitution of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) with effect from 1st June, 2016 vide notification no. S.O. 1935(E) dated 1st June, 2016.

With the constitution of the NCLT, the Company Law Board constituted under the Companies Act, 1956 stands dissolved.

1. **Notification of provisions under Companies Act 2013.**

The Ministry has vide its notification no S.O.1934 (E) dated June 01, 2016 notified the following provisions of the Companies Act, 2013.

S.NO.	SECTION	PARTICULARS
1.	Sub-section(7) of section 7[except clause (c) and (d)]	Power of Tribunal to pass orders etc. where company has been incorporated by furnishing any false or incorrect information or representation etc.
2.	Second proviso to sub-section (1) of section 14	Provisions relating to conversion of public company into private company
3.	Section 14(2)	
4.	Section 55(3)	To approve issue of further redeemable preference shares when a company is unable to redeem its existing unredeemed preference shares or to pay dividend thereon.
5.	Proviso to clause(b) of section 61(1)	To approve consolidation or division of share capital resulting in change in voting percentage of shareholders.
6.	Section 62(4) to (6)	Order of government for conversion of loans/debentures into shares in public interest and Where the terms of conversion of debentures into shares of a company ordered by the Government are not acceptable to the company, the company may appeal to the Tribunal for making such order as it may deem fit.
7.	Section 71(9) to (11)	Where the assets of a company are insufficient to discharge the debentures, the debenture trustee may apply to the NCLT. NCLT to order redemption of debentures forthwith by payment of principal and interest due thereon Penalties for not complying with the

		order of the tribunal
8.	Section 75	Damages for fraud with respect to failure to repay deposits and interest thereon
9.	Section 97	Power of Tribunal to call annual general meeting
10.	Section 98	Power of Tribunal to call meetings of members, etc. i.e In case it is impracticable to call a meeting, the Tribunal may either suo moto, or on application of a director or member of the company who is entitled to vote at the meeting, order to call meeting i.e extra ordinary general meetings and give such directions as may be necessary.
11.	Section 99	Punishment for default in complying with provisions of sections 96 to 98(i.e provisions relating to Annual General Meetings)
12.	Section 119(4)	Inspection of minute-books of general meeting: Power of tribunal to order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.
13.	Section 130	Re-opening of accounts on court's or Tribunal's orders
14.	Section 131	Voluntary revision of financial statements or Board's report.
15.	Second proviso to section 140(4) and section 140(5)	The provisions inter-alia includes: To restrict copies of representation of the auditor to be removed to be sent out.

		The Tribunal may, on the application of the company or any aggrieved person, order that copy of representation by the Auditor need not be sent to members nor read at the meeting. Where NCLT is satisfied that the Auditor has acted in a fraudulent manner, it mat order that the Auditor may be changed
16.	Section 169(4)	This section inter-alia includes provisions conferring powers to tribunal to order that representation from the director need not be sent to the members and nor read at the meeting.
17.	Section 213	Investigation into company's affairs in other cases.
18.	Section 216(2)	Investigation of ownership of company
19.	Section 218	Protection of employees during investigation
20.	Section 221	Freezing of assets of company on inquiry and investigation.
21.	Section 222	Imposition of restrictions upon securities
22.	Section 224(5)	Actions to be taken in pursuance of inspector's report
23.	Section241	Application to Tribunal for relief in cases of oppression, etc.
24.	Section 242 [except clause(b) of sub-section (1), clause (c)& (g) of sub-section (2)]	Certain powers of tribunals notified except for certain High Court matters such as reduction of capital etc.,
25.	Section 243	Consequence of termination or

		modification of certain agreements.
26.	Section 244	Right to apply under section 241i.e application to tribunal in case of oppression etc.
27.	Section 245	Class Action
28.	Reference of word "Tribunal" in section 399(2)	Leave of the Tribunal required for issuance of certain documents
29.	Section 415 to 433(both inclusive)	Provisions relating to Constitution of National Company Law Tribunal and National Company Law Appellate Tribunal
30.	Section 434 (1) (a) and (b)	Transfer of powers from Company Law Board to National Company Law Tribunal
31.	Section 434(2)	Powers of Central Government to make rules relating to transfer of cases from Company Law Board to National Company Law Tribunal.
32.	Section 441	Compounding of certain offences
33.	Section 466	Dissolution of Company Law Board and consequential provisions.

In addition the Ministry has already notified Section 2(41), 58, 59, 73, 74 under which the powers were exercised by Company Law Board and stood transferred to National Company Law Tribunal.