AN ANALYSIS OF THE RECOMMENDATIONS OF THE COMPANY LAW COMMITTEE, 2022

- **Contributed by CS Phanindra**

We are aware that the Companies Act, 2013, received the assent of the President on 29.08.2013, and the provisions came into effect in a phased manner from 12.09.2013. The Companies Act, 2013, was enacted on the basis of the various recommendations suggested by the very famous J.J.Irani Committee, in their report.

It is needless to say that the Companies Act, 2013, is a rule bases law, with substantive operative part of the provisions forming part of the Rules, unlike the Companies Act, 1956. The main object for the same being that, the rule based enactment, enables the Government to retain the power to amend the rules by virtue of Amendment rules, Notifications, supported by Circulars, without the requiring to approach the Parliament for amendments, unless they pertain to the provisions contained in the Act.

Since coming into effect, the Companies Act, 2013 the ministry has issued plethora of Rules, Amendment Rules, Clarificatory Circulars, Notifications, Exemption and adaptation notifications etc., for effective governance of the provisions. The Act has undergone 4 amendments vide the Companies (Amendment) Act, 2015, the Companies (Amendment) Act, 2017, the Companies (Amendment) Act, 2019 and the Companies (Amendment) Act, 2020.

Of all the amendments made to the Companies Act, 2013, till date, the Amendment Act of 2020, can be considered as the major one, vide which offences in respect of certain defaults/non-compliance[“**Offences**”] which lack element of fraud or do not involve large public interest, instead of imprisonment and/or fine, have been decriminalised, and penalty to be imposed under departmental adjudication proceedings.

With the aim of facilitating and promoting greater ease of doing business in India, the Government had set up Company Law Committee set up on 18th September 2019, initially for a period of 1 year, to suggest recommendations to the Government inter alia on changes for effective implementation of the Companies Act, 2013, the Limited Liability Partnership Act, 2008 and the Rules made thereunder. The tenure of the Committee has been extended from time to time, with the present tenure being up to 16th September 2022.

The terms of reference of the Committee, at the time of constitution are as under:

(i) Analyze the nature of the offences (compoundable and non-compoundable) and submit its recommendations as to whether any of the offence could be re-categorised as **‘civil wrongs’** along with measures to optimise the compliance requirements under the Companies Act, 2013 and concomitant measures to provide further Ease of Doing Business;

(ii) Examine the feasibility of introducing settlement mechanism, deferred prosecution agreement etc.,. within the fold of the Companies Act, 2013;

(iii) Study the existing framework under the Limited Liability Partnership Act, 2008 and suggest measures to plug the gaps, if any, while at the same time enhancing the Ease of Doing Business;

(iv) Propose measures to further de-clog and improve the functioning of the NCLT;

(v) Suggest measured for removing any bottlenecks in the overall functioning of the Statutory bodies like SFIO, IEPFA, HFRA etc., under the Act.

(vi) Identify specific provisions under the Companies Act, 2013 and the Limited Liability Partnership Act, 2008, which are required to be amended to bring about greater Ease of Living for the Corporate Stakeholders, including but not restricted to review of Forms under the Two Acts;

(vii) Any other relevant recommendations as it may deem necessary.

Based on the report containing the recommendations in connection with the amendments to the Companies At, 2013 and the Limited Liability Partnership Act, 2008, the Ministry of Corporate Affairs has sought for the comments/suggestions from the stakeholders.

In brief terms, let us go through the recommendations/changes proposed by the Committee to the **Companies Act, 2013.**

Sl. No.	Recommendation relating to
1	**RE-ALIGNING OF FINANCIAL YEAR:** **Issue to be addressed:** Pursuant to the proviso to Section 2(41) of the Act, a company which is the holding company or a subsidiary or associate of a company incorporated outside India, and is required to follow a different financial year for consolidation of its accounts outside India, may be allowed to follow such different FY upon making an application to the Central Government, earlier powers with NCLT, now delegated to the respective Regional Director. The Committee noted that if such a company, or body corporate, ceases to be a holding, subsidiary or associate company of the foreign entity, the existing provisions of the Act, does not have any enabling provision allowing such company to revert to the financial year, as to be followed under the Act, thereby not allowing the company to accurately measure its revenue and earnings in that Financial year, as per Indian laws. **Amendments recommended/proposed by the Committee:** Amendment is recommended/proposed to Section 2(41), that Companies which earlier had different financial year and which had ceased to be associated with a foreign entity, have to make an application to the Central Government to realign their financial year, as per the provisions of the Act. **Authors comments:** Recommending for making an application for re-alignment of Financial year, is not at all warranted, and this would result in clogging of the offices of the Central Government i.e., either Regional Directors or the Registrar of Companies, who would be ultimately delegated the powers to deal such application. Instead, a recommendation for amendment to the Section 2 (41) to provide that

	any companies, who cease to be associated with a foreign entity, and having Financial year otherwise than under the 2013, shall re-align their financial year in accordance with the provisions of the Act, should have been enough to address the issue.
2	**COMMUNICATIONS IN ELECTRONIC FORM:** **Issue to be addressed:** Section 20 (2) of the Act, provides for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode. Further a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting. Committee noted that in line with the relaxations given by the MCA to send Financial Statements and Board Reports through E-mail, and also the relaxation by SEBI to listed entities to send rights issue related documents through electronic mode, certain companies should be mandated to serve certain documents in electronic mode only. Further with regard to the fees under the proviso to Section 20 (2), the fees borne by a company's members while requesting such documents in a particular made, may be determined at any general meeting of the company, instead of Annual General Meeting. Further the Committee observed in addition to the sending of documents through electronic mode, Postal delivery of documents should also remain available where members have specifically requested to receive such documents also in physical form. **Amendments recommended/proposed by the Committee:** Amendment to Section 20 to introduce an overriding provision enabling the Central Government to prescribe rules for such class of companies, to mandatorily serve certain documents in electronic mode only. Also an amendment to the proviso to Section 20 (2) to allow companies to stipulate the concerned fees at any General Meeting, instead of Annual General Meeting. **Authors comments:** A welcome move, which will aid in reduction of exercise of posting, and will also be cost effective. The provision to also retain physical posting, to a member, who desires to receive so, is also a good initiative.
3.	**RECOGNISING ISSUANCE AND HOLDING OF FRACTIONAL SHARES, RSUs AND SARs** **Issue to be addressed:**

	The Act in its present form does not permit the holding of Fractional shares i.e., a portion of a share less than one share unit. Fractional shares may arise as a consequence of corporate actions like mergers, issue of bonuses or rights issues.

	Further, there are no provisions under the Act, in relation to the **Restricted Stock Units [RSUs]** and **Stock Appreciation Rights [SARs],** which are schemes linked to shares of a Company, aimed at granting its employees ownership rights in the company. **What is an RSU and an SAR:** **RSU:** RSU is a scheme, similar to a ESOP scheme, under which the employee will be entitled to the shares at the end of the vesting period, so long as the restrictions concerning the duration of employment and performance parameters are met. **SAR:** SAR is a form of incentive or deferred compensation tied to the employing company's stock performance. SARs give employees the right to the monetary equivalent of the appreciation in the value of a specified number of shares over a specified period. The settlement of the SARs may also be made by way of shares of the company. **Amendments recommended/proposed by the Committee:** Amendment to the act proposed to enable issuance, holding, transfer of fractional shares**, in dematerialised form**, for prescribed classes of companies in consultation with SEBI, for listed companies, as may be required. It is proposed for a insertion of a section in Chapter IV [Share Capital and Debentures], to permit issuance, holding, transfer of equity shares less than one unit for prescribed classes of companies. With regard to **Restricted Stock Units [RSUs]** and **Stock Appreciation Rights [SARs],** an amendment is proposed to Section 62 (1) to allow additional employee compensation schemes linked to the value of the share capital of a company. **Authors comments:** A welcome amendment, to provide for holding fractional shares, but how would the same practically turn-up is to be seen. With regard to RSUs and SARs, a well thought amendment, to provide for share linked compensation in addition to the fixed monetary compensation, and the start-ups will be the ones, which would benefit of this. The only catch here is that the amendments to the provisions and rules framed thereunder, should clearly spell out the valuation mechanism, and address the various issues and scenarios i.e., permutation and combinations in which such instruments may be issued.
4.	**EASING THE REQUIREMENT OF RAISING CAPITAL BY DISTRESSED COMPANIES:**

	Issue to be addressed: Section 53 of the Act, in the present form does not permit a Company to issue shares at discount. Accordingly, it would be difficult for distressed companies where the market value of the shares becomes less than the nominal value, thereby leading to difficulties in raising fresh share capital for the revival of the company.

	It is to be noted that vide Amendment Act, 2017, the Section 53 stands amended that a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949. **Amendments recommended/proposed by the Committee:** To suggest recommendations for the above, the Committee discussed the possibility of (i) removing the concept of the nominal value of shares or (ii) relaxing the requirements under Section 53 of the Act, to allow distressed companies to issue shares at a discount. However, the Committee felt that removing the concept of nominal value would have consequences in several other laws, which refer to the nominal value of shares, and made the following recommendations. (a) Distressed companies to be categorised as such class or classes of companies as prescribed by the Central Government; (b) Distressed companies should be allowed to issue shares at a discount, notwithstanding the prohibition under Section 53 and according Section 53 (2A) to permit distressed companies to issue shares at a discount in such manner as may be prescribed; (c) Valuation for such issue to be done by Registered Valuers, failing which the issue shall be void. **Authors comments:** A welcome amendment. However, strict compliance to be provided, to avoid misuse of the same.
5.	**REPLACING AFFIDAVITS WITH SELF-DECLARATION:** **Issue to be addressed:** Several provisions of the Act provide for submission of Affidavits by the parties in the various forms submitted before ROC, RD, NCLT and NCLAT. The Committee opined that the replacement of affidavits with declarations does not detract from the severity of consequences, given that furnishing a false declaration attracts punishment under Section 448 of the Act.

	Amendments recommended/proposed by the Committee: It is proposed that furnishing affidavits should be replaced with filing declarations under the provisions of the Act and Rules made thereunder, except for those provisions involving filing affidavits before the NCLT, NCLAT and RD. The Central Government may prescribe the format for filing such declarations. The Committee suggested for the following instances in which it proposes Affidavits to be replaced with Declarations:

	(a) Amendment to Section 68 (6) to permit a company to file a self-declaration in place of an affidavit when purchasing its own shares. (b) Amendment to Section 374 (c) to permit a company to file a self-declaration in place of an affidavit when seeking registration under Part I of Chapter XXI. (c) Amendment to Rule 7(4)(i), Companies (Incorporation) Rules, 2014, to permit the company to file a self-declaration in place of Affidavit, when making an application for conversion of the Company into a One Person Company. (d) Amendment to Rule 8A(1)(j), Companies (Incorporation) Rules, 2014, to permit the self-declaration in place of affidavit along with the name application, for including the phrase 'Electoral Trust' may be allowed for registration of companies to be formed under Section 8 of CA-13 following the Electoral Trusts Scheme, 2013. (e) Amendment to Rule 10(3)(b), Companies (Registration of Foreign Companies) Rules, 2014, to permit self-declaration in place of affidavit in respect of the translated documents, not in English, translation done in india, submitted by a foreign Company. (f) Amendment to Rule 4(3)(iii), The Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 to permit self-declaration in place of affidavit when making an application for closure of the Company under Section 248 (2) of the Act. **Authors comments:** A welcome amendment, simplifying the process.
6.	**CLARIFICATION OF PROVISIONS RELATING TO BUY-BACK OF SHARES:** **Issue to be addressed:** The Committee noted that in the proviso to Section 68 (2), for the limit relating to the calculation of the threshold of twenty-five per cent in case of buy-back of equity shares, the reference is given only to the paid-up share capital of the Company the Company in that Financial Year and no reference is given to include 'free reserves', which is to be included.

	Further the Committee discussed on granting clarity concerning the stage at which shares arising out of employee benefit schemes by companies that grant stock options (such as ESOPs) can be bought back. **Amendments recommended/proposed by the Committee:** The Committee viewed the word 'Free reserves' was left-out, in the computation of the threshold of 25 % in case of buy-back of equity shares, and the reference is given only to the paid-up share capital of the Company in that Financial Year, and accordingly, the same should be explicitly included in calculating the buy-back of equity shares.

	Accordingly, amendment to the proviso to Section 68 (2) to explicitly include 'free reserves' while calculating the threshold of twenty-five per cent in case of buy-back of equity shares, is proposed. With regard to the buy back of the ESOPs, it is proposed to make an amendment to the explanation to Section 68 of the Act, to provide that only those Options, which are exercised, can be bought back by the Company. **Authors comments:** A welcome amendment, to remove any ambiguity in the provision, being misused.
7.	**SPECIFIC PROHIBITION ON THE INCLUSION OF TRUSTS ON THE REGISTER OF MEMBERS:** **Issue to be addressed:** Section 153 of the Companies Act, 1956, provided that the register of members or debenture holders shall not contain notice of any trust expressly, impliedly or constructively. The rationale behind this section was to relieve the company from taking notice of third-party rights regarding the shares registered in the names of any members. The Committee noted that there are no provisions corresponding to Section 153 of the Companies Act, 1956, in the 2013 Act. However, Para 4, Table F, Schedule-I of 2013 Act, currently prohibits a company from recognising a person holding any share upon a trust. The Committee viewed that the provision akin to Section 153 of the Companies Act, 1956, would provide further clarity on this issue. **Amendments recommended/proposed by the Committee:** The Committee proposed for inclusion of a provision that expressly prohibits companies from entering notice of any trust, express, implied, or constructive on their register of members, and accordingly recommended for inserting of a new Section in Chapter VII to expressly prohibit companies from entering notice of any trust, express, implied, or constructive on their register of members. **Authors comments:**

	A welcome amendment, to clarity the ambiguity.
8.	**HOLDING GENERAL MEETINGS THROUGH THE USE OF TECHNOLOGY:** **Issue to be addressed:** The provisions of the 2013 Act, does not provide for conducting General Meeting through VC. Owing to the COVID-19 pandemic and the social distancing norms in place, Ministry of Corporate Affairs had allowed EGMs to be convened through Video-Conferencing ("**VC**") or Other Audio-Visual Means ("**OAVM**"), vide various circulars, and subsequently extended even to the Annual General Meetings. **The same now stand extended only till 31.12.2022, for both EGMs and AGMs.**

	Amendments recommended/proposed by the Committee: The Committee reviewed the procedure being following in various countries. Also the Committee took in to consideration various representations received from the stakeholders. Accordingly, the Committee formed a view that the Companies Act, 2013, should enable companies to hold general meetings, i.e., AGMs and EGMs physically, virtually, and in hybrid mode. Where the Extra-Ordinary General meeting is to be conducted entirely in electronic mode, the notice period for such meetings should be reduced to such period as may be prescribed by the Central Government. In line with the above proposals, the Committee has recommended for the following amendments: (a) Amendment to Section 96 to enable companies to hold Annual General Meetings in electronic mode in such manner as may be prescribed. (b) Amendment to Section 100 to enable companies to hold Extra-Ordinary General Meetings in electronic mode in such manner as may be prescribed. (c) Insertion of a proviso in Section 101 to provide that a general meeting held in electronic mode may be called by giving such notice as may be prescribed. **Authors comments:** A welcome amendment and is the need of the hour, but proper monitoring mechanism of the implementation of the provisions in letter and spirit, is to be put in place.
9.	**MAINTAINANCE OF STATUTORY REGISTERS IN ELECTRONIC FORM:**

	Issue to be addressed: Pursuant to the provisions of the Companies Act, 2013 and Rules framed thereunder, companies are mandated to maintain records in the form of registers containing particulars relating to members, directors, charges created, etc.,. The Companies maintain the same physically in the form of a hard bound combined register, and as and when any entries are to be made, the same are done and authenticated by the such person authorised by the Board. There are lot of issues in maintaining the same. **Amendments recommended/proposed by the Committee:** Considering the issues in relation to the physical maintenance of the Statutory Registers, the Committee proposed that certain companies should be required to mandatorily maintain their registers on an electronic platform in the manner laid down by the Central Government, and for this purpose, the Central Government may set up an electronic platform, as such an electronic platform would make the process more secure and transparent, thereby avoiding duplication of effort for companies. Also the Companies can be directed by the Central Government to share the information held on such statutory registers pursuant to certain enforcement-related functions. In line with the above recommendations, amendment to Section 120 is proposed to mandate that prescribed class or classes of companies maintain registers on an electronic facility provided by the Central Government. **Authors comments:** A welcome amendment, but will be only achieve its purpose if the electronic platform set-up is properly maintained by the Central Government.
10.	**IEPF RELATED CHANGES IN SECTION 124 AND 125:** **Issue to be addressed:** There are some issues with regard to the transfer of unpaid dividends and other amounts to the fund, dealt in Section 124 and 125 of the Companies Act, 2013. **Amendments recommended/proposed by the Committee:** The Committee considered the issues on hand and proposed for the following amendments: (a) Amendment to Section 124 (5) after the words "such transfer", the words "along with any dividend, which has not been paid or claimed" should be inserted to clarify that unclaimed dividend and interest, if any, concerning the shares referred to in sub-section (6) must also be transferred to the IEPF in a timely manner. (b) Amendment to Section 125(3)(a) to include "redemption amount towards unpaid or unclaimed preference shares" as a purpose for which the fund may be utilised, in addition to the existing purposes of refund in respect of unclaimed dividends,

	matured deposits, matured debentures, the application money due for refund and interest thereon. (c) Amendment to Section 125 empowering the IEPF authority to delegate functions to its member, officer, or any other person, subject to such conditions, if any, as may be specified, in line with the other authorities. (d) Amendment to Section 125 (2) and 125 (3) of the Companies Act, 2013 to provide that amount owed to shareholders who did not claim such amount paid to them after their shares and securities were bought back or cancelled by companies under Section 68 for seven years or more should be allowed to be transferred to the IEPF. **Authors comments:** A welcome amendment to provide for further sources to the Fund, and also various further purposes, for which the money available in the fund can be used.

11. **STRENGTHENING NFRA:**

Issue to be addressed:

All are aware that section 132(1) of the Companies Act, 2013, empowers the Central Government to constitute the National Financial Reporting Authority ("**NFRA**") for matters relating to accounting and auditing standards for companies.

Amendments recommended/proposed by the Committee:

The Committee had considered the various proposal received before it in connection with the various provisions governing NFRA, and has made the following proposal/recommendations:

(a) Amendment to the Companies Act, so as to empower NFRA to take appropriate action against the auditor for non-compliance with Companies Act, 2013, and requirements thereunder that do not qualify as 'professional or other misconduct'. NFRA should also be empowered to take appropriate penal action if its orders are not complied with, or any appeal is not preferred against the same with NCLAT.

(b) To have independence in t its operations, and to source all its expenditures, the Committee recommended for suitable amendments should be made to the Companies Act, 2013, for the constitution of a NFRA Fund. The accounts of the proposed NFRA Fund should be maintained in such form as prescribed by the Central Government in consultation with the CAG. The accounts of the proposed NFRA Fund should also be audited by the CAG and laid before each House of Parliament.

(c) Amendments to the Companies Act, 2013, to empower NFRA to make regulations for specific matters. In accordance with principles of good governance and accountability by the Central Government, such powers should be sufficiently encumbered with safeguards.

(d) Amendment to Section 132 of the Companies Act, 2013, to provide the NFRA Chairperson with general superintendence direction, and control regarding all administrative matters of the Authority.

Authors comments:

A welcome amendment to further strengthen the NFRA as a regulator, for better Corporate Governance.

12.	**STRENGTHENING THE AUDIT FRAMEWORK:** **Issue to be addressed:** Section 144 of the Companies Act, 2013, restricts the Companies from obtaining certain services from its Auditors. Section 147 of the Companies Act, 2013 does not provide for cover penal consequences for contravention of sub-sections of Section 143. Provisions of Section 140 of the Companies Act, 2013, and the rules framed thereunder provide for to include the 'reasons for resignation' and 'any other facts relevant to the resignation', in case of resignation by Auditors, but not to make any detailed disclosures for his resignation. There is no express provision for Joint Audit under the Companies Act, 2013. There is no concept of Forensic Audit under the Companies Act, 2013. **Amendments recommended/proposed by the Committee:** In line with the above findings, the Committee proposed that: The Companies Act, 2013, should enable the Central Government to prescribe a differential list of prohibitions on availing non-audit services for certain classes of companies, so that the Companies are enabled to obtain certain services from the Statutory Auditors, which would facilitate ease of operations, and accordingly the recommended for amendment to Section 144, to prescribe a differential list of prohibitions on availing any non-audit services. The Committee proposed that Section 147 of CA-13 should be amended to cover penal consequences for contravention of sub-sections of Section 143 other than sub-section (12), and according recommended for amendment to Section 147. The Committee proposed that a resigning auditor should be under an explicit obligation to make detailed disclosures before resignation and should specifically mention whether such resignation is due to non-cooperation from the client company, fraud or severe noncompliance, or diversion of funds. Moreover, if such information comes to light after the resignation of an auditor but has not been disclosed in the resignation statement, suitable action may be taken against the resigning auditor. Additionally, the auditor should be mandated to provide assurance about the company's accounts and independence of her decision to resign, and accordingly, it was recommended to amend Section 140, in the above lines. A proposal for enabling the Central Government to mandate joint audits for such classes of companies, as may be prescribed, and as it may deem necessary, was placed and in accordance with the proposal, recommended for amendment to Section 139. The Committee proposed for enabling the Central Government to order forensic audits in cases of investigation under Chapter XIV [Inspection, Inquiry and Investigation] in such

	manner as may be prescribed, and accordingly, amendment to Chapter XIV to recognise the concept of forensic audit in such cases, and subject to such Rules, as may be prescribed by the Central Government. **Authors comments:** A welcome amendment overall to strengthen the overall Audit frame work, and to provide for the inclusion of the concept of very much required Forensic Audit under the ambit of the Companies Act.

13.	**STANDARDIZING QUALIFICATIONS BY THE AUDITORS:** **Issue to be addressed:** The provisions of Sections 143(3)(f) and 143(3)(h) of the Companies Act, 2013, obligate the auditor to provide observations and comments on financial statements of the company and to provide qualifications, reservations or any adverse remarks, as the case may be, concerning the maintenance of accounts in that company. As such, an auditor is required to express a qualified opinion or an adverse remark if the financial statements indicate certain material misstatements. **Amendments recommended/proposed by the Committee:** The Committee noted that while auditors' reports often highlight reservations or adverse remarks regarding a company's financial statements, such remarks do not sufficiently elaborate on the corresponding negative effect on the economic health or functioning of the company. and accordingly, to ensure greater clarity, disclosure and standardisation, the Committee proposed for an enabling provision under the Companies Act, to allow Central Government to introduce a format for auditors to provide the impact of every qualification or adverse remark on the company's financial statements for circulation to the Board before the same is passed on to shareholders. Accordingly, an amendment to Section 143 enabling an auditor to prepare an impact statement for each qualification, reservation or adverse remark on the company's financial statements, is proposed/recommended. **Authors comments:** A welcome amendment, to provide for more information to the Shareholders to assess the effect of the reservations or adverse remarks.

14.	**SETTING UP OF RISK MANAGEMENT COMMITTEES:** **Issue to be addressed:**

	There are no provisions relating to the formation of an Risk Management Committees under the Companies Act, 2013. However the provisions of Section 134(3)(n) requires the Board's report to contain a statement indicating the development and implementation of a risk management policy for the company, including identification of risks that may pose a threat to the existence of the company. The provisions of the SEBI LODR Regulations in relation to the constitution of the Risk Management Committees by the Listed entities were perused by the Committee. **Amendments recommended/proposed by the Committee:** The Committee was of the opinion that a robust risk management allows every company to function efficiently and facilitates the development of corporations, particularly in unprecedented situations such as the ongoing COVID-19 pandemic. Accordingly, the Committee deliberated whether provisions on the constitution of Risk Management Committee, as a separate committee of the Board, could be included in the Companies Act, 2013, and recommended that certain class of Companies as may be prescribed by the Government, and accordingly, proposed for insertion of a Section in Chapter XII [Meetings of Board and its Powers]. **Authors comments:** An amendment well though of, but only if the provisions are framed in such a manner, that the same can be implemented in letter and spirit.

15.	**TENURE OF INDEPENDANT DIRECTORS:** **Issue to be addressed:** Suggestions have been given to the Committee in relation to the various discrepancies and mis-use of provisions of Section 149 in connection with the appointment of Independent Director, cooling period before re-appointment and Independent Directors taking up employment in the Company. **Amendments recommended/proposed by the Committee:** The Committee recommended that the period during which the Independent Director functioned as an Additional Director before being regularised should be included while computing the total tenure of 5 years of the Independent Director. The total tenure should not exceed the prescribed five years for a single term or ten years for two consecutive terms, as the case may be, under any circumstances, and according amendment to Section 149 to provide that an Independent Director's total tenure would include the tenure held as an additional director immediately preceding the regularisation as Independent Director. Further the threshold laid down in Section 149(6)(e)(ii)(B) concerning independence as to association with a company read with Section 149(11), gives an understanding as a blanket prohibition of functioning of the Independent Director as a legal or consulting firm regardless of the threshold of 10 % of the turnover. Accordingly the Committee

	recommended for amendment to the provisions of Section 149 (6) in to the Section 149 (11), and to further reduce the threshold of 10 % to 5 %, to cap the maximum revenue that may be generated by a legal or a consulting firm in certain circumstances, and to promote flexibility and ease of doing business for concerned stakeholders. **Authors comments:** A welcome amendment to remove the ambiguity in the provisions.

16.	**CHANGES TO THE PROVISIONS OF DISQUALIFICATION AND VACATION OF DIRECTORS' OFFICE:** **Issue to be addressed:** Section 164 and Section 167 of the Companies Act, 2013 lay down provisions relating to the disqualification and vacation of office of directors, respectively. Section 167 (1) (a) provides for vacation of office of a director on account of the disqualifications incurred by the said director pursuant to the provisions of the Section 164 of the Companies Act, 2013, and as per which in case a Director attains disqualifications under Section 164 (2), then the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section. This has a huge impact on all the Companies, which are not in default. Proviso to Section 164 (2) (b) provides for 6 months time to a Director, who has been appointed as a Director of the Company which has failed to file Financial Statements and Annual returns for a any continuous period of three financial years; and has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more. Further there is no exemption of disqualification under Section 164 (2) to the nominee directors appointed by debenture trustees registered with SEBI. **Amendments recommended/proposed by the Committee:** In view of the foregoing, the Committee has proposed that under Section 167(1)(a), the vacation of directorship should be limited to disqualifications triggered due to personal incapacity i.e., only under the provisions of Section 164 (1), and according the reference to Section 164(2), which relates to disqualification triggered on the grounds of default by companies where the director holds position, from Section 167(1)(a), needs to be deleted. The Committee suggested that the said amendment shall not be retrospective. Further the Committee proposed that the relaxation period/cooling period, for new directors under Section 164(2)(b) should be extended from Six Months to Two years from the date of appointment, so that they have sufficient time for complying with the filing or returns or repayment of deposits/debentures, and accordingly, amendment is proposed to

	the proviso to Section 164(2) to relax the disqualification trigger from six months to two years for freshly appointed directors of companies that are in default of Section 164(2)(b) The Committee proposed for insertion of a new proviso in Section 164(2) to provide that the disqualification referred to in clause (b) of Section 164 (2), should not apply to the nominee directors appointed by debenture trustees registered with SEBI. The Committee proposed that similar changes should be extended to LLPs through a notification under Section 67 of the LLP Act, 2008. **Authors comments:** A welcome amendment, which will address the paradox of vacation of office of all the other companies which are compliant, on account of disqualification incurred in a company, which has not filed returns.

17.	**COOLING-OFF PERIOD BEFORE AUDITORS BECOME DIRECTORS:** **Issue to be addressed:** The Committee noted Section 149 (6) prohibits a person from being appointed as an Independent Director of a company if he or any of his relatives has been an employee, proprietor or partner of a firm of auditors or company secretaries or cost auditors in such company or group of companies, in any of the three financial years preceding the year in which employment is to take place. There is no express provision under the Companies Act, 2013, prohibiting the Auditors from being appointed as Non-Executive Directors, Managing Directors and Whole Time Directors. Given the auditors' critical role, their independence is a pre-condition to good corporate governance. For the auditor's reports to be credible, the auditor must not have any personal prejudice or self-interest affecting their objectivity. Pertinently, a conflict of interest may arise where the auditor could potentially benefit from a financial interest in an audit client, particularly by way of future employment in the same company. **Amendments recommended/proposed by the Committee:** Hence, the Committee deliberated whether an appropriate restriction, in the form of a cooling-off period, could be inserted in Companies Act, 2013, to address the situation above, and proposed that there should be a mandatory one-year cooling-off period, from the date of cessation of office, after which an auditor of a company may be permitted to hold the position of Non-Executive Director, Managing Director, Whole Time Director, in the same company or group of companies. In the case of an audit firm structured as a partnership/LLP, such a restriction should only operate concerning the partner that audited the company, and accordingly an amendment is proposed to Section 164(1) to provide that a person shall not be eligible to become a company's director if he has been the auditor of the company

	in the last one year, and such a restriction will only apply to the auditing partner in the case of an audit firm structured as a partnership/LLP. **Authors comments:** A welcome amendment, as a mark of better Corporate Governance.

18.	**COOLING-OFF PERIOD BEFORE AN INDEPENDENT DIRECTOR BECOMES A MANAGERIAL PERSON:** **Issue to be addressed:** The Committee noted that pursuant to the provisions of Section 149(6)(e)(i) of the Companies Act, 2013, a person shall not be appointed as an Independent Director of a company if such a person currently holds or used to hold the position of a KMP or an employee in the same company or group of companies during any of the three financial years immediately preceding the financial year in which employment is to take place. However, there is no restriction on an Independent Director from becoming a managerial person, i.e., an MD, WTD or manager, in the same company or group of companies after ceasing to be an Independent Director of such company. **Amendments recommended/proposed by the Committee:** Hence, the Committee deliberated whether an appropriate restriction, in the form of a cooling-off period, could be inserted in Companies Act, 2013, and proposed that there should be a mandatory one-year cooling-off period, from the date of cessation of office, after which an Independent Director may be permitted to hold the position of an MD, WTD, or manager in the same company or group of companies, and to this effect, amendment to Section 196(3) to provide that a person shall not be eligible to become a company's MD, WTD, or manager if he has been an Independent Director of the company in the last one year. **Authors comments:** A welcome amendment, as a mark of better Corporate Governance and in the interest of greater transparency and accountability to the position of Independent Director.

19.	**CLARIFYING THE MANNER OF THE RESIGNATION OF CERTAIN KMPS:** **Issue to be addressed:** Section 168 of Companies Act, 2013, lays down provisions relating to the resignation of directors. Accordingly, a director can file his resignation from his office by providing notice to the company in writing. Upon receiving such resignation, the Board must take note thereof and intimate the RoC, within 30 days. The *proviso* to Section 168(1) further provides that directors may forward a copy of their resignation, along with detailed reasons, to the RoC, within thirty days of their resignation. Section 168(2) stipulates that the resignation tendered by the director shall be effective from the date of receipt of the notice by the company or any date specified by the director in the notice, whichever is later.

	The Committee noted that directors have been empowered to directly file their resignation with the RoC since there is no requirement on the company's part to formally accept a director's resignation for it to become effective. The Committee noted that there is no express provision similar to the above in respect of the KMPs other than Directors i.e., CEO, CFO and Company Secretary. **<u>Amendments recommended/proposed by the Committee:</u>** The Committee deliberated whether similar provisions should be introduced in the Companies Act, 2013 for mandating filing of resignation tendered by certain KMPs, other than directors, who are entrusted with the company's day-to-day functioning and whose appointment intimations were filed with the Registry, and accordingly proposed that Companies should be obligated to notify the RoC of resignations tendered by certain KMPs whose appointment intimation was filed with the RoC. In cases where the company fails to intimate the RoC within 30 days, the KMPs should be allowed to file their resignations directly with the RoC, by way of inserting a Section in Chapter XIII to provide the procedure in which resignation by certain KMPs to be carried out or given effect. The committee also suggested that the date on which such resignation of KMPs should come into effect may be harmonised in accordance with the provisions of Section 168 of the Companies Act, 2013, i.e., resignation of directors **<u>Authors comments:</u>** A welcome amendment, but will be only achieve its purpose if the electronic platform set-up is properly maintained by the Central Government.

20.	**REVIEWING PROVISIONS ON MERGER AND AMALGAMATION:** **Issue to be addressed:** A Liquidator is appointed by the NCLT in case of IBC proceedings resulting in to liquidation and are also appointed under the Companies Act 2013. The Committee deliberated on whether the reference to liquidators appointed under the IBC may be omitted from Sections 230(1) and 230(6) to only limit the same to those liquidators appointed under the Companies Act, 2013. Treasury shares refer to the own shares of a company and are categorised as assets of the company. Such treasury stock may arise on an amalgamation or merger where the transferee company receives its own shares pursuant to merger of transferor Company with itself. The provisions of Section 232 specifically state that as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished. However, the treatment of any existing treasury stock before the compromise, is not spelt out in the Act. Section 233 of CA-13 provides for a fast-track merger or amalgamation that may be entered into by two or more small companies, between a holding company and its wholly-owned subsidiary ("WOS"), or a prescribed class of companies. As per the section, the scheme is to be approved by shareholders holding at least ninety per cent of the total number of shares of the company. The threshold of approval by persons holding ninety per cent of total share capital and not ninety per cent of shareholders present and voting in the meeting, is difficult to achieve in listed companies, resulting in delays. Invocation of the provisions of Section 233 not only for amalgamation between entities but may also be used mutatis mutandis for any scheme of compromise or arrangement under Section 230(1) or division or transfer of a company referred in Section 232(1)(b). However the manner of invocation not provided. Further the existing NCLT mechanism is burdened with lot of IBC cases, resulting in delay of cases relating to Mergers and amalgamation. **Amendments recommended/proposed by the Committee:** In the above issues, the Committee deliberated and However, it was noted that omission of the reference to liquidators appointed under the IBC from Sections 230(1) and 230(6) may pose challenges since liquidators under the Companies Act, 2013 and the Liquidators appointed under the IBC by the NCLT, have been actively using the said provisions in discharge of their duties. The Committee proposed that each company holding treasury stock should report such shares through a declaration, which may be some what similar to BO/SBO Declaration. Additionally, such Companies will have to dispose the entire treasury stock within three years. The disposal of such shares may take place either through sale or reduction of capital,

	with out the intervention of the NCLT. On the failure of the Company to comply with the provisions to dispose, the Committee also proposed for initiation of appropriate penal action against the Company, and accordingly insertion of a proviso to Section 232 to provide that treasury stock held before the commencement of the Companies At, 2013 should be dealt with and extinguished in such manner as may be prescribed. With regard to the Fast Track mergers, the Committee proposed that a twin test requiring approval by (i) majority of persons present and voting at the meeting accounting for 75 % in value, of the shareholding of persons present and voting; and (ii) representing more than 50 %, in value, of the total number of shares of the company, should be mandated for approval under Section 233. Accordingly, amendment to the Section 233 is proposed/recommended to include a twin test as stated above, for approval of fast-track mergers. In this connection, the Committee proposed that Section 233(12) should provide to empower the Central Government to make Rules concerning the invocation of Section 233 for compromise or arrangements under Section 230(1) and division or transfer under Section 232(1)(b), and according proposed for amendment to Section 233 of the Companies Act, 2013. The Committee opined that constitution of the Special Benches of the NCLT should be allowed to be constituted by the Central Government to deal with matters of economic importance relating to mergers and amalgamation or corporate restructuring or specialised IBC cases, and accordingly, proposed for amendment to Section 419 to enable the Central Government to constitute special Benches of the NCLT. **Authors comments:** A welcome amendment clearing the impediments, and the unaddressed issues.

21.	**EASING RESTORATION OF STRUCK OFF COMPANIES:** **Issue to be addressed:** Section 252(1) of the Companies Act, 2013, provides that any person aggrieved by an order notifying a company as dissolved, as passed by the RoC, can file an **appeal** before the NCLT to restore the company's name in the register of companies within 3 years. The NCLT may order restoration of the company's name upon satisfaction that the name was struck off without any justified cause or in the absence of a valid ground. Section 252(3) of the Companies Act, 2013, further lays down that where the name of a company is struck off from the register of companies, the company's name may be restored by the NCLT on an **application** by the company, or any of its members or creditors before the expiry of 20 years. Accordingly, an order for restoration of the name may be passed to restore the company's name in the register of companies. The Committee noted that since under both Section 252 (1) and Section 252 (3) of the Companies Act, NCLT is the authority to be approached for revival of the Company, and as

	NCLT are dealing with the Companies Act matters and IBC matters are already overburdened. **Amendments recommended/proposed by the Committee:** The Committee deliberated whether the existing pressure on the NCLT be relived by shifting the appropriate authority for restoration of a Company to the Regional Director concerned, and proposed that in cases where aggrieved persons apply for restoration within 3 years under Section 252(1), the application should be filed before the Regional Director, and the Regional Director to pass order of restoration upon his satisfaction. Accordingly, amendment to Section 252 (1) to provide that a person aggrieved by the striking-off of a company may appeal, within a period of 3 years, to the RD instead of the NCLT. Further in cases where aggrieved persons apply for restoration beyond 3 years under Section 252(3), NCLT shall remain the authority to process the application, and the Committee does not propose any change to the same. **Authors comments:** A welcome amendment, de-clogging the already overburdened NCLT. A simplified process for restoration/revival shall be introduced under the proposed amendment, so that even with the Regional Director, the matter of restoration/revival is disposed-off at the earliest.

22.	**RECOGNISING SPECIAL PURPOSE ACQUISITION COMPANIES:** **Issue to be addressed:** In the present scheme of Companies Act, there is no concept of Special Purpose Acquisition Companies (“**SPAC**”). The IFSCA (Issuance and Listing of Securities) Regulations, 2021, recognises SPAC as a type of company that does not have an operating business and has been formed with the specific objective of acquiring a target company. This concept allows a shell company to issue an Initial Public Offering (“**IPO**”) without any commercial activity. After listing, the SPAC merges with or acquires a company, i.e., the target, thereby allowing the target company to benefit from such listing without going through the formalities and rigours of an IPO. **Amendments recommended/proposed by the Committee:** The Committee deliberated on the concept of SPAC, with the prevailing regulations across the globe. Therefore, the Committee felt that enabling the listing of India incorporated SPACs on global exchanges would open up avenues for Indian companies to operate and carry out business in such jurisdictions. scenarios. that a provision relating to the domestic listing of SPACs will require consultation with the SEBI. There committee proposed that there should be an enabling provision under the Companies Act, 2013, to recognise SPACs and allow entrepreneurs to list a SPAC incorporated in India on domestic and global exchanges. Provisions on relaxing the requirement to carry out

	businesses before being struck off and providing exit options to the dissenting shareholders of a SPAC if they disagree with the choice of the target company identified must also be provided for under the Companies Act, 2013 and according recommended that Insertion of a new chapter for the recognition and regulation of SPACs. Further the Committee also opined that for a foreign listing of Indian incorporated SPACs to become a reality, the commencement of Section 23(3) and 23(4) of CA-13 is a necessary pre-condition. **Authors comments:** A welcome amendment, to introduce a new concept of Companies, which will entail companies with huge funds, and without any activity, list in the stock exchange, and target on acquiring companies, which would in-turn get easily listed.

23.	**PROHIBITING CONVERSION OF A CO-OPERATIVE SOCIETY INTO A COMPANY:** **Issue to be addressed:** The Committee noted that Section 366 of the Companies Act, 2013, enables entities duly registered under other Acts, including cooperative societies, to register themselves as companies under the Companies Act, 2013. Accordingly, Section 366(1) states that any partnership firm, limited liability partnership, co-operative society, society or other business entity can apply for registration under Companies Act, 2013. The Committee further stated that presently, there are no rules that govern the manner of such conversion of Society in to a Company, and has erred to take note of Sub-rule 2 (c) of Rule 3 of the Companies (Authorised to Registered) Rules, 2014 as amended from time to time, which deals with the prescription/documentation for conversion of a Society (which the author presumes to include even Co-operative Societies also) into **Company limited by Guarantee under Section-8,** which is in line with the co-operative principles and not primarily motivated by the earning of profits. **Amendments recommended/proposed by the Committee:** The Committee has proposed that Section 366 of the Companies Act, 2013, should not permit the conversion of co-operative societies into a company, and accordingly recommended deletion of a reference to cooperative societies in Section 366 concerning companies capable of being registered. The Ministry needs to take note of the same and look in to it. **Authors comments:** The Author is of the view that the Committee has erred in understanding the provisions of Section 366 of the Companies Act, 2013, providing for conversion of the Co-operative Society in a Company limited by Guarantee under Section-8, and has gone with its

	recommendations linking with the directives of the Reserve Bank of India, with regard to Urban Co-operative Banks (UCBs) to Small Finance Banks (SFB), which is not the subject matter per-se dealt in Section 366, **with regard to conversion of the Co-operative Society/Society in a Company limited by Guarantee under Section-8.**

24.	**<u>FACILITATING E-ENFORCEMENT AND E-ADJUDICATION:</u>** **<u>Issue to be addressed:</u>** Section 398 of the Companies Act, 2013, deals with the power of the Central Government to prescribe Rules regarding the filing of applications, documents, inspection, etc., in electronic form. The Explanation appended to Section 398(1) states that: *"For the removal of doubts, it is hereby clarified that the rules made under this section shall not relate to imposition of fines or other pecuniary penalties or demand or payment of fees or contravention of any of the provisions of this Act or punishment therefor."* The Committee is of the view that the operation of this explanation acts as a roadblock in carrying out certain adjudication related activities in electronic mode. The Committee also opined that removing the Explanation would not entirely impede physical enforcement or adjudication since Section 400 of the Companies Act, 2013, empowers the Central Government to specify whether Rules framed under Section 398 are exclusively for electronic purposes or as an alternate/ in addition to physical form. **<u>Amendments recommended/proposed by the Committee:</u>** With the above, the Committee proposed that the Explanation under Section 398 of the Companies Act, 2013, be omitted to enable the Central Government to make Rules for electronically imposing fines, penalties, and payment of fees, and further facilitate e-enforcement and e-adjudication. **<u>Authors comments:</u>** A welcome amendment, to remove ambiguity and pave way to e-enforcement and e-adjudication.

25. **STRICTER REGULATION FOR NIDHIS:**

Issue to be addressed:

All are aware that a Nidhi is a company is incorporated to receive deposits from and lend to its members for their mutual benefit.

Based on the reports submitted to the Committee, the Committee observed that during the administration of the existing frame work under Section 406 of the Companies Act, 2013, the companies incorporated as Nidhis have committed violations of numerous provisions of the Companies Act, 2013 and the applicable Rules. It was brought to the Committee's notice that the violations are repetitive and that many such companies have been incorporated after demonetisation.

Amendments recommended/proposed by the Committee:

Based on the above, the Committee proposed that provisions on Nidhis should be revised to regulate incorporation and functioning of Nidhis more stringently, with the recommendations being as below:

(a) To provide for companies to fulfil certain financial and non-financial criteria as prescribed, to be eligible to be declared as Nidhi;

(b) To provide for such additional restrictions or conditions as may be considered necessary, to be imposed at the time of declaration of a company a Nidhi, and non compliance of the same, will enable the Central Government to revoke such declaration.

(c) To provide for a specific period for which a Company to be declared as Nidhi i.e., initially for a period of 5 years, and later to be renewed, subject to compliance by the Company of the provisions of the Nidhi Rules, framed under the Act.

(d) To provide power to Central Government to provide for schemes for restructuring (merger, amalgamation or takeover) of Nidhis which are either sick, financially weak or have been mis-managed.

(e) To provide for the existing Nidhis to comply with the new requirement with in a reasonable transition period of 2-3 years.

and accordingly, Chapter XXVI-Nidhis, to be amended to include more stringent and robust provisions for incorporating and regulating Nidhis.

Authors comments:

A welcome amendment, to de-clutter the ambiguity and for better regulation of Nidhis.

26.	**DRAFTING AND CLARIFICATORY CHANGES:** **Issue to be addressed:** There were certain suggestions with regard to inconsistencies in definitions and inclusions to some provisions of the Act, which are required to be addressed through suitable amendments to the said provisions, as suggested hereunder under the heading **Drafting and Clarificatory Changes.** **Amendments recommended/proposed by the Committee:** The Committee proposed for the following amendments: (a) Amendment to Section 24(2) to omit the reference to Section 458, concerning the power of the Securities and Exchange Board to regulate the issue and transfer of securities. (b) Amendment to the first proviso to Section 136(1) to provide for companies to send copies of audited financial statements and other relevant documentation at shorter notice, for both AGMs and other general meetings. (c) Amendment to Section 164(1)(g) to amend the provision as to "Conviction" to "Penalty in relation to Section 188" concerning related party transactions as a ground for disqualification of directors, in view of the de-criminalisation of most of the offences vide the Amendment Act, 2020. (d) Amendment to Section 187(1) concerning holding assets to include joint ventures and to allow holding companies to be the only member in its WOS and providing similar relaxations in the case of a WOS in which the entire shareholding is held by the holding company along with one or more of its WOSs. (e) Amendment to Section 248(6) concerning removing the name of a company from the register of companies, for the words "before passing an order under sub-section (5)", the words "before publishing the notice under sub-section (5)" needs to be substituted, to provide for as check, that before publishing the notice, satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company, rather than before passing of the order under Section 248 (5). Clarificatory amendment to Section 446B concerning lesser penalties for penalties for one person, small, start-ups, and Producer Companies, so as to provide, for the words "which shall not be more than", the word "of" should be substituted, which clears that in case of penalties for one person, small, start-ups, and Producer Companies, the same can be half of the penalties prescribed/specified under the relevant sections.

	(f) Amendment to provisions of Producer Companies with reference to Section 378Y and 378ZA(9) [Quorum for General Meetings], which presently lays down the quorum requirement of ¼ of the total members. The threshold is sought to be relaxed to provide for either of the requirement of ¼ of the members or 100 members, whichever is lesser. **Authors comments:** Welcome amendments removing inherent ambiguities in the provisions

Recommendations to the LLP Act:

With regard to the recommendations/changes to the Limited Liability Partnership Act, 2008, the Committee has made only one recommendation, and the same is detailed as below:

Sl. No.	Recommendation relating to
1	**INTRODUCTION OF CONCEPT OF PRODUCER LLPS:** **Issue on hand:** The Committee noted that the concept of Producer Companies was introduced in Companies Act, 1956, through the Companies (Amendment) Act, 2002. The amendment sought to include mutual assistance and co-operative principles within the regulatory framework of company law. There is no corresponding provision under the LLP Act, 2008, for formation of the Producer LLPs. The Committee noted that Producer LLPs would serve as a more desirable option for small producers since LLPs have been provided with a range of relaxations in the conduct of their affairs. For instance, an LLP is not required to get its accounts audited unless its turnover exceeds Rs. 40 lakhs or its capital contribution exceeds Rs. 25 lakhs. **Amendments recommended/proposed by the Committee:** In light of the benefits associated with producer institutions and the comparative advantages of LLPs vis-à-vis companies, particularly concerning reduced compliance burden, the Committee proposed the concept of Producer LLP's may be incorporated within the LLP Act, 2008, and accordingly, A new chapter is proposed to be inserted in the LLP Act, 2008. **Authors Comments:** A welcome amendment, which will enable the intending Farmers or farmer producer entities to form in a Limited Liability Partnership, who hither-to hesitated to form a Producer Company, would come within the regulatory framework of Limited Liability Partnership Act, 2008, post forming into a Producer LLP.

From the overall amendments proposed by the Committee, it is noticed that though an attempt seems to have been made for suggesting amendments to the existing provisions of the Companies Act, 2013 and Limited Liability Partnership Act, 2008, the practical issues faces by the stakeholders in the grass root level, seems to have been left unaddressed, even in accordance with the terms of the reference made to the Committee by the Ministry.