

F. No. 16/1/2020- Legal  
Government of India  
Ministry of Corporate Affairs

5<sup>th</sup> Floor, 'A' Wing, Shastri Bhawan,  
Dr. R.P. Road, New Delhi  
Dated: 2<sup>nd</sup> March, 2020

To,

All Regional Directors,  
All Registrars of Companies,  
All Official Liquidators.

**Subject: Clarification on prosecutions filed or internal adjudication proceedings initiated against Independent Directors, non-promoters and non-KMP non-executive directors - reg.**

Sir,

Under several provisions of the Companies Act, 2013 [Act], proceedings are required to be initiated against an officer in default for violations committed under the Act. The term "officer who is in default" is defined under section 2(60) of the Act, wherein various officers of the company have been identified.

2. Ordinarily, a whole-time director [WTD] and a key managerial personnel [KMP] are associated with the day-to-day functioning of the company and accordingly such WTDs and KMPs would be liable for defaults committed by a company. In absence of a KMP, such director or directors who have expressly given their consent for incurring liability in terms of the e-form GNL-3 filed with the Registrar would be liable. Where the consent for incurring liability for any of the provisions dealing with maintenance, filing or distribution of accounts or records is submitted in e-form GNL-3 by a person under the immediate authority of the Board or any KMP, the liability of such person will arise. However, in certain cases, the penal provisions in the Act hold a specific director, or officer, or any other person accountable for the default, in such cases, action should be initiated only against such



director, or officer, or person, as the case may be, such as disclosure of interest by directors under section 184 of the Act.

3. Section 149 (12) is a *non obstante* clause which provides that the liability of an independent director (ID) or a non-executive director (NED) not being promoter or key managerial personnel would be only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. In view of the express provisions of section 149(12), IDs and NEDs (non-promoter and non-KMP), should not be arrayed in any criminal or civil proceedings under the Act, unless the above mentioned criteria is met. Typically, apart from IDs, non-promoter and non-KMP, NEDs, would exist in the following cases:

- a) Directors nominated by the Government on the public sector undertakings;
- b) Directors nominated by Public Sector Financial Institutions, Financial Institutions or Banks having participation in equity of a company, or otherwise;
- c) Directors appointed in pursuance to any statutory or regulatory requirement such as directors appointed by the NCLT.

4. The nature of default is also crucial for arraigning officers of the company for defaults committed under the Act. All instances of filing of information/records with the registry, maintenance of statutory registers or minutes of the meetings, or compliance with the orders issued by the statutory authorities, including the NCLT under the Act are not the responsibility of the IDs or the NEDs, unless any specific requirement is provided in the Act or in such orders, as the case may be. The responsibility of the NEDs, ordinarily arise in such cases, where there are no WTDs and KMPs.

5. At the time of serving notices to the company, during inquiry, inspection, investigation, or adjudication proceedings, necessary documents may be sought so as to ascertain the involvement of the concerned officers of the company. In case, lapses are attributable to the decisions taken by the Board or its Committees, all care must be taken to ensure that civil or criminal proceedings are not unnecessarily initiated against the IDs or the NEDs, unless sufficient evidence exists to the contrary.



6. The records available in the office of the Registrar, including e-forms DIR-11 or DIR-12, along with copies of the annual returns or financial statements should also be examined so as to ascertain whether a particular director or the KMP was serving in the company as on the date of default.

7. In case of any doubts, with regard to the liability of any person, for any proceedings required to be initiated by the Registrar, guidance may be sought from the Ministry of Corporate Affairs through the office of Director General of Corporate Affairs. Consequently any such proceedings must be initiated after receiving due sanction from the Ministry.

8. All Registrars are directed to immediately and scrupulously follow the above mentioned Standard Operating Procedure with respect to all ongoing cases. Further, with respect to cases where prosecution may have been already filed but the above mentioned cases criteria is not satisfied, the same may be submitted to this Ministry for necessary examination and further direction thereon.

9. This issues with the approval of the competent authority.

Yours faithfully,

(Parvez Naikwadi)

Assistant Director  
Legal & Prosecution

Copy to:-

1. DGCoA
2. E-Governance Section with a request to place this circular on the Ministry website.
3. Guard File