



**THE INSTITUTE OF
Company Secretaries of India**
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT EXECUTIVE PROGRAMME

for

December, 2022 Examination

SETTING UP OF BUSINESS ENTITIES & CLOSURE

MODULE 1, PAPER 3

Disclaimer: This document has been prepared purely for academic purposes only and it does not necessarily reflect the views of ICSI. Any person wishing to act on the basis of this document should do so only after cross checking with the original source.

Students appearing in Examination shall note the following:

Students appearing in December, 2022 Examination should also update themselves on all the relevant Notifications, Circulars, Clarifications, Orders etc. issued by MCA, SEBI, RBI & Central Government upto 31st May, 2022.

The students are advised to acquaint themselves with the monthly and Regulatory updates published by the Institute.

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Lesson – 2

Types of Companies

1. The Companies (Incorporation) Amendment Rules, 2022 (MCA Notification No. G.S.R. 291 (E).—Dated 8th April, 2022)

The Central Government notified the Companies (Incorporation) Rules, 2022, the said amendment rules inserted the proviso to Rule 12 (Application for Incorporation of Companies) as mentioned below:

“Provided further that in case of a Company being incorporated as a Nidhi, the declaration by the Central Government under section 406 of the Act shall be obtained by the Nidhi before commencing the business and a declaration in this behalf shall be submitted at the stage of incorporation by the company.”

Further, the amendment rules substituted the Form INC-20A and inserted a declaration under Part B of Form INC-32 (SPICE+) pertaining to, all necessary approvals have been obtained before commencing business of Nidhi, the said forms are specified under the annexure to the Companies (Incorporation) Rules, 2014.

Impact:

The Ministry of Corporate Affairs (“MCA”) notified the Companies (Incorporation) Amendment Rules, 2022 to further amend the Companies (Incorporation) Rules, 2014 vide notification no. G.S.R. 291(E) dated April 8, 2022. Through this amendment, MCA has inserted a proviso to Rule 12 wherein a company being incorporated as Nidhi will require a declaration by the Central Government under section 406 of the Companies Act, 2013 before commencement of business and a declaration in this behalf shall be submitted at the stage of incorporation by the company. Further, INC-20A and Part B of Form INC-32 (SPICE+) has also been revised to capture the aforesaid declaration by a Nidhi Company.

For details:

<https://egazette.nic.in/WriteReadData/2022/234994.pdf>

2. The Companies (Incorporation) Second Amendment Rules, 2022 (MCA Notification Dated 20th May, 2022)

The Ministry of Corporate Affairs (MCA) vide its Notification dated May 20, 2022 has notified the Companies (Incorporation) Second Amendment Rules, 2022 which shall come into force with effect from June 01, 2022. As per the amendment, Form No. INC-9 (Declaration by Subscribers and First Directors) has been substituted. The substituted Form *inter-alia* consist declaration in respect of compliance with Government approval under FEMA by inserting checkboxes;

- I am required to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to subscription of shares and the same has been obtained, and is enclosed herewith; or
- I am not required to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to subscription of shares.

Further, the Ministry has inserted new declaration in Form No. INC 32 (SPICE+), in part B, in

declaration, the following shall be inserted at the end, namely:

“I, on behalf of proposed directors, hereby declare that person seeking appointment is a national of a country which shares a land border with India, necessary security clearance from Ministry of Home Affairs, Government of India shall be attached with the consent.

Yes No. (if yes is opted, a copy of the security clearance is to be attached).”

Impact:

MCA notified the Companies (Incorporation) Second Amendment Rules, 2022 to further amend the Companies (Incorporation) Rules, 2014 dated May 20, 2022. As per the amendment, Form No. INC-9 (Declaration by Subscribers and First Directors) has been substituted to include declaration with respect to whether Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 is required to be obtained or not.

For details:

<https://www.mca.gov.in/bin/dms/getdocument?mcs=QJAZ8U7iIBs%252FRWVx91HwmO%253D%253D&type=open>

3. The Nidhi (Amendment) Rules, 2022 (MCA Notification No. G.S.R. 301 (E).—Dated 19th April, 2022)

The Ministry of Corporate Affairs (MCA) vide its Notification dated April 19, 2022 has notified the Nidhi (Amendment) Rules, 2022 which shall come into force on the date of its publication in the Official Gazette.

The said amendments inter-alia provide that:

- No company, which has not complied rule 3A pertaining to Declaration of Nidhis, shall raise any deposit from its members or provide any loan to its members under the provisions of these rules from the date of such non-compliance, or from the date of the commencement of the above said rules, or the date of rejection of the application in Form NDH-4, whichever is later. Further, if any deposit raised by a company after the date of non-compliance, the said deposit shall be deemed to have been raised in pursuance of Acceptance of Deposits by Companies (Chapter V). **(Insertion: Fourth and Fifth Proviso to Rule 3A)**
- The rule 3B has been inserted, which prescribed that:-

Public company desirous to be declared as a Nidhi shall apply, in Form NDH-4, within a period of one hundred twenty days of its incorporation for declaration as Nidhi, if it fulfils the following conditions, namely:-

- (I) it has not less than two hundred members; and
- (II) it has Net Owned Funds of twenty lakh rupees or more etc. **(Insertion: Rule 3B)**

The company shall attach a declaration with regard to the fulfilment of fit and proper person by all of its directors and promoters with the Form NDH-4. To determine that any promoter or director is a fit and proper person, the following criteria should be looked upon:

- a) Integrity, honesty, ethical behaviour, fairness, reputation and character

- b) Not incurring any of the following disqualifications:
- i. Any complaint or information under section 154 of CrPC has been filed or is pending against him
 - ii. Charge sheet filed against him in the matter of economic offences
 - iii. Restraining, prohibition or department order has been passed against him in any matter related to company law, securities law or financial market in force
 - iv. Conviction order passed against him involving moral turpitude
 - v. Declared involvement and not been discharged
 - vi. Unsound mind
 - vii. Wilful defaulter
 - viii. Fugitive economic offender
 - ix. Director of five or more companies
 - x. Such person is the director in five or more than five; or promoter in three or more than three Nidhi Companies.
- A Nidhi shall be a public company and shall have a minimum paid up equity share capital of Rs. 10 lakh (earlier Rs. 5 lakh) and shall comply with this requirement within a period of eighteen months of commencement of amendment rules. **[Substitution: Rule 4(1)]**
 - Rule 5 specify about the minimum number of members, Net owned fund, etc. Vide this amendment, it has been provided that the provision of this Rule 5 will not be applicable for the companies incorporated as Nidhi Company on or after the enforcement of Nidhi (Amendment) Rules 2022. So, the requirement of filling of application in Form NDH 1 within 90 days from the incorporation of the company shall not be applicable to the companies incorporated on or after the enforcement of Nidhi (Amendment) Rules, 2022. **[Insertion: Rule 5(5)]**
 - Under General Restrictions and Prohibitions- no Nidhi shall acquire or purchase securities of any other company or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management. **[Substitution: Rule 6(d)]**
 - A member shall not transfer more than fifty percent of his shareholding (as on the date of availing of loan or making of deposit) during the existence of such loan or deposit, as the case may be, provided that the member shall retain the minimum number of 10 equity shares equivalent to Rs. 100 at all times. **[Insertion: Rule 8(4)]**
 - Every Nidhi shall maintain Net Owned Funds of not less than twenty lakh rupees (earlier ten lakh rupees) or such higher amount as the Central Government may specify from time to time and shall comply with this requirement within a period of eighteen months of commencement of amendment rules. **(Substitution: Rule 9)**
 - A Nidhi company may not close a branch unless the proposal to close the branch, along with a plan for paying existing deposits and recovering existing loans, has been approved by the Board of Directors in a meeting and has received the prior approval of the Regional Director. Within 30 days of receiving the application, the regional director must issue an approval order. After receiving approval from the Regional Director, the Nidhi Company must publish in the local newspaper **(in Form NDH-5)** at its place of business prior to 30 days of closure, as well as post a copy of the closure notice on the Nidhi Company's notice

board for thirty days from the date of publication, and notify the Registrar within 30 days of closure.

Furthermore, any location that is not a registered office or branch where a Nidhi Company conducts business must be closed within six months after the enforcement of the Nidhi Company New Rules 2022 and must be reported to the Registrar in **Form NDH-2. [Rule 10]**

- The word silver shall be added next to the word gold where ever it is stated, so from now Nidhi Company will able to grant loans to its members for silver jewellery. **[Under Rule 12 and Rule 20]**
- In the case of joint shareholders loan Nidhi Company will be able to it only to the member whose name appears first in the register of members. **[Rule 15]**
- A Nidhi company shall not declare dividends exceeding 25% in a financial year. **[Substitution: Rule 18]**
- If a company does not comply with the requirements or fails to comply with any of the requirements on or after the date of enforcement of these Rules or if the central government has rejected the application, then it shall not raise the deposit from its members or provide any loan to its member under the provisions of these rules from the date of non-compliance or the date of enforcement of the Nidhi (Amendment) Rules, 2022 or the rejection of the application, whichever is later. And, also that the deposit raised by a company after the date of non-compliance or date of enforcement of the Nidhi (Amendment) Rules, 2022 or the date of rejection of the application, whichever is later, shall be deemed to have been raised in pursuance of Chapter V of the Companies Act and shall be subject to all the requirement of that chapter or any other provisions of the said Act. No fee shall be charged for filing an application under this rule if it is filed within 9 months from the enforcement of the new rules; however, earlier, it was 6 months. **[Rule 23A]**

For details:

<https://www.mca.gov.in/bin/dms/getdocument?mids=LTZyclKMNK0LX6JwM%252BaPeA%253D%253D&type=open>

Part-C

Lesson 21

Corporate Insolvency Resolution Process, Liquidation and Winding Up: An Overview

Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2022 (Vide Notification F. No. IBBI/2022-23/GN/REG.081 dated 05th April, 2022)

In exercise of the powers conferred by section 196(1)(t) read with section 240 of the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India amended the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.

Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2022 inter-alia provides that the liquidator shall endeavour to complete the liquidation process of the corporate person and submit the Final Report under regulation 38 within :

- (a) two hundred and seventy days from the liquidation commencement date where the creditors have approved the resolution under section 59(3)(c) or regulation 3(1)(c) and
- (b) ninety days from the liquidation commencement date in all other cases

Further, the liquidator shall submit the Final Report and the compliance certificate in Form-H along with the application under section 59(7) to the Adjudicating Authority.

Impact:

As per this amendment, the Liquidator is required to complete the liquidation process of the corporate person and submit the Final Report under regulation 38 within:

- a. 270 days from the liquidation commencement date where the creditors have approved the resolution under section 59(3)(c) or regulation 3(1)(c).
- b. 90 days from the liquidation commencement date in all other cases.

Compliance certificate to be submitted in Form-H.

For details:

<https://www.ibbi.gov.in/uploads/legalframework/08722b75c35b6fbbd5a38299a2284e6a.pdf>