



**Corporate  
Professionals**



# **ADJUDICATION, COMPOUNDING AND PROSECUTION UNDER THE COMPANIES ACT**



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# OVERVIEW OF THE STRUCTURE OF OFFENCES UNDER THE COMPANIES ACT, 2013



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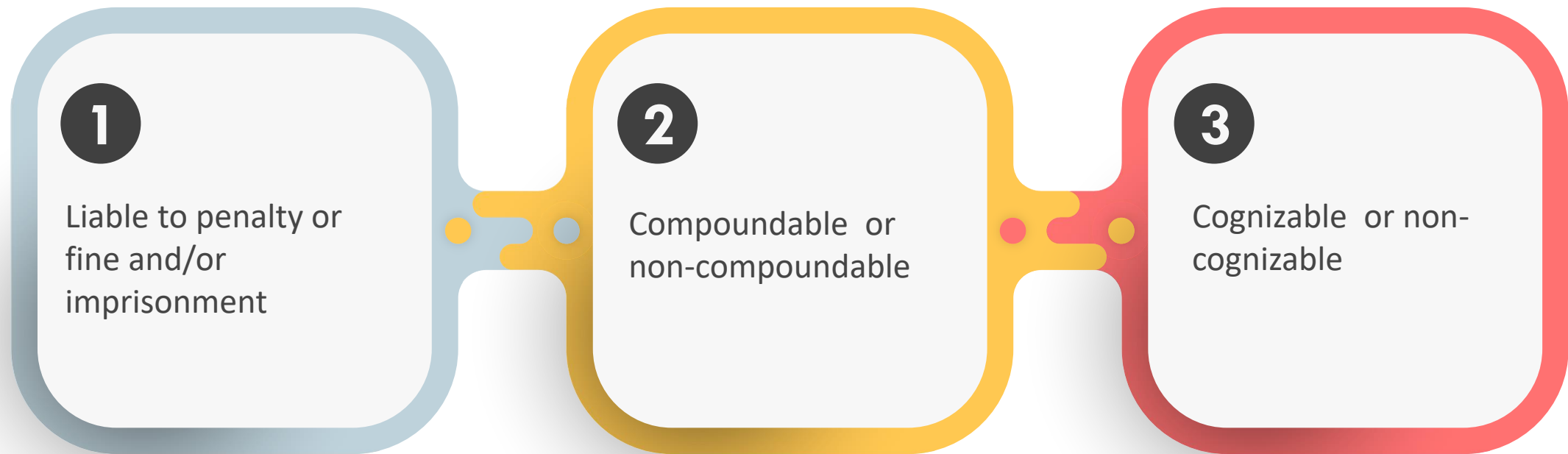


## **Framework for dealing with defaults/offences under the Companies Act, 2013**



# Three basic concepts

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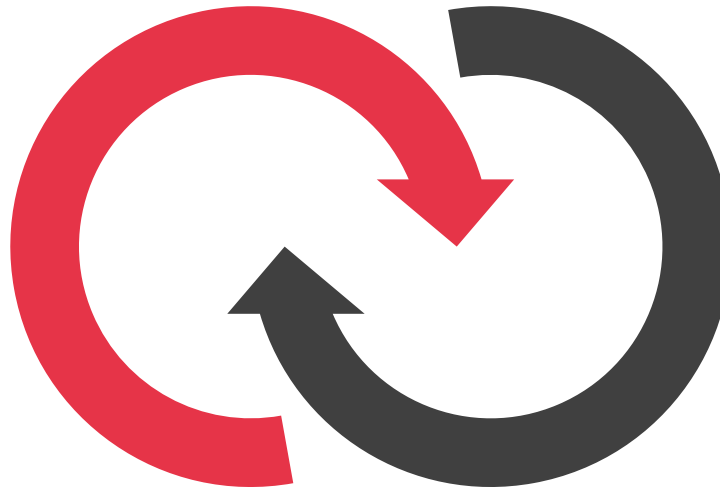


# Difference between penalty or fine/ imprisonment under the Companies Act, 2013

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## Penalty

Wherever, the word used in the section is penalty, it means the default is within the in-house adjudication mechanism i.e. the amount of penalty will be adjudicated by ROC.



## Fine/imprisonment

Wherever, the word(s) used are fine, fine and/or imprisonment, it means the adjudication of fine/imprisonment will be done by the court of competent jurisdiction.

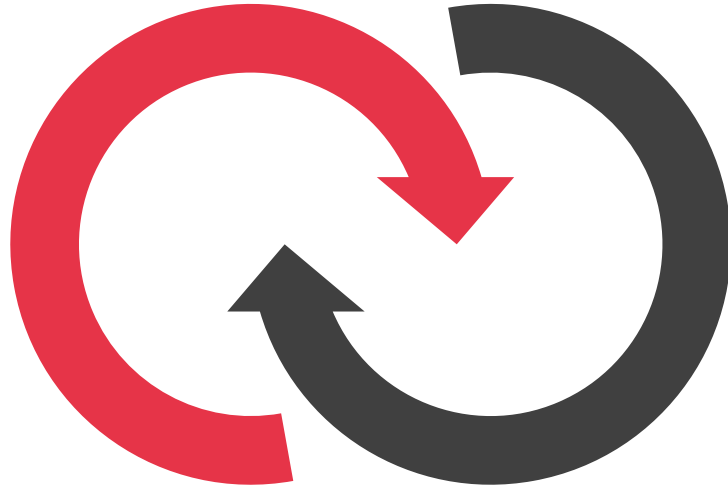
# Difference between Compoundable and Non-compoundable

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## Compoundable

Offences punishable:

- With fine only;
- With fine or imprisonment or both are compoundable.



## Non-compoundable

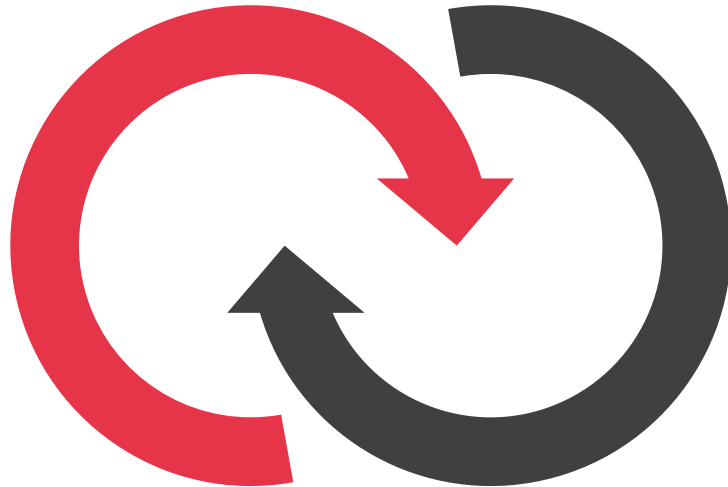
Offences punishable with fine and imprisonment are non-compoundable.

# Difference between Cognizable and Non-cognizable Offences

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## Cognizable

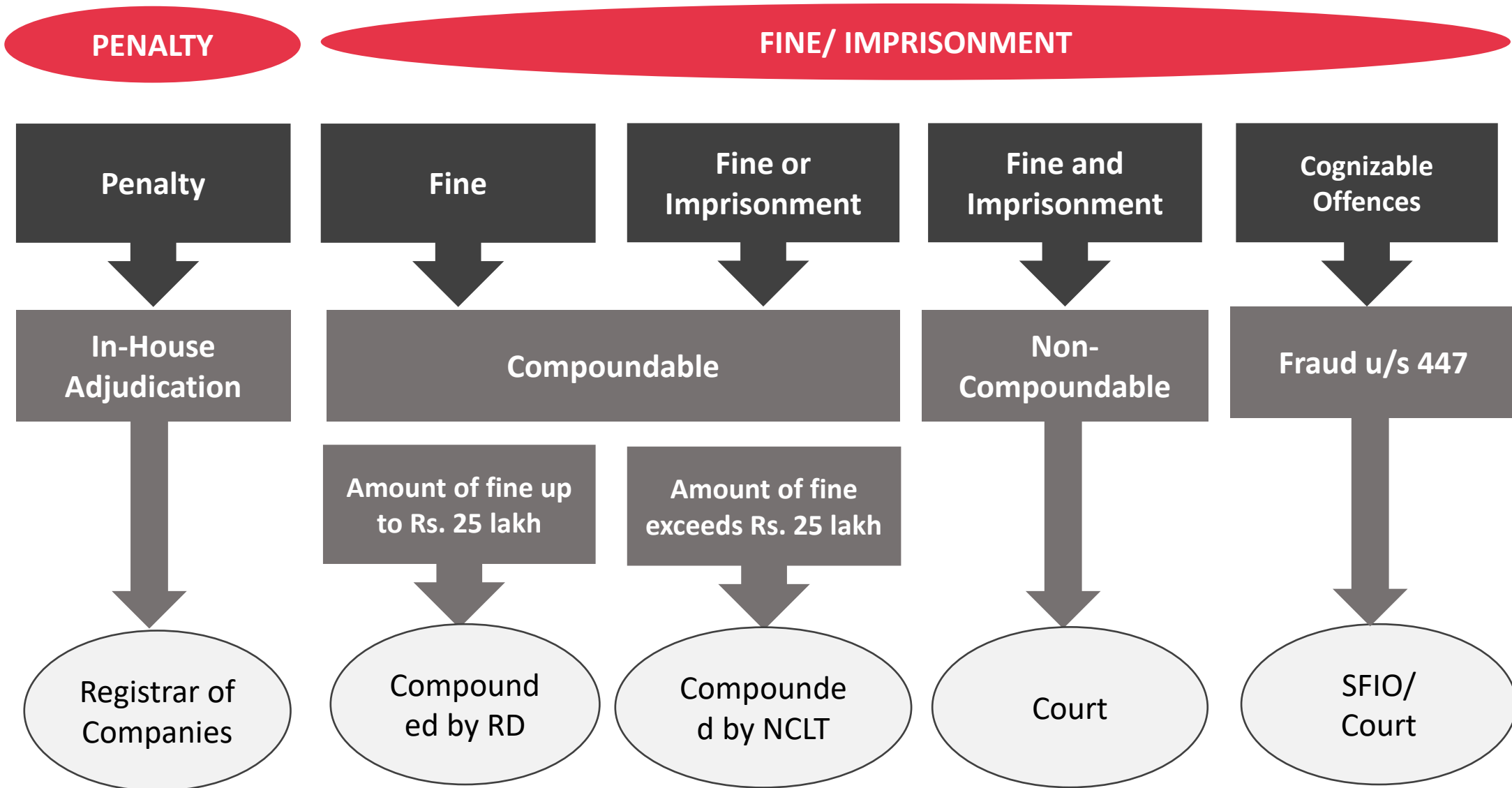
All offences which amount to fraud (punishable under section 447) are cognizable offences.



## Non- cognizable

All offences under the Companies Act except offences which tantamount to fraud (section 447) are non-cognizable.

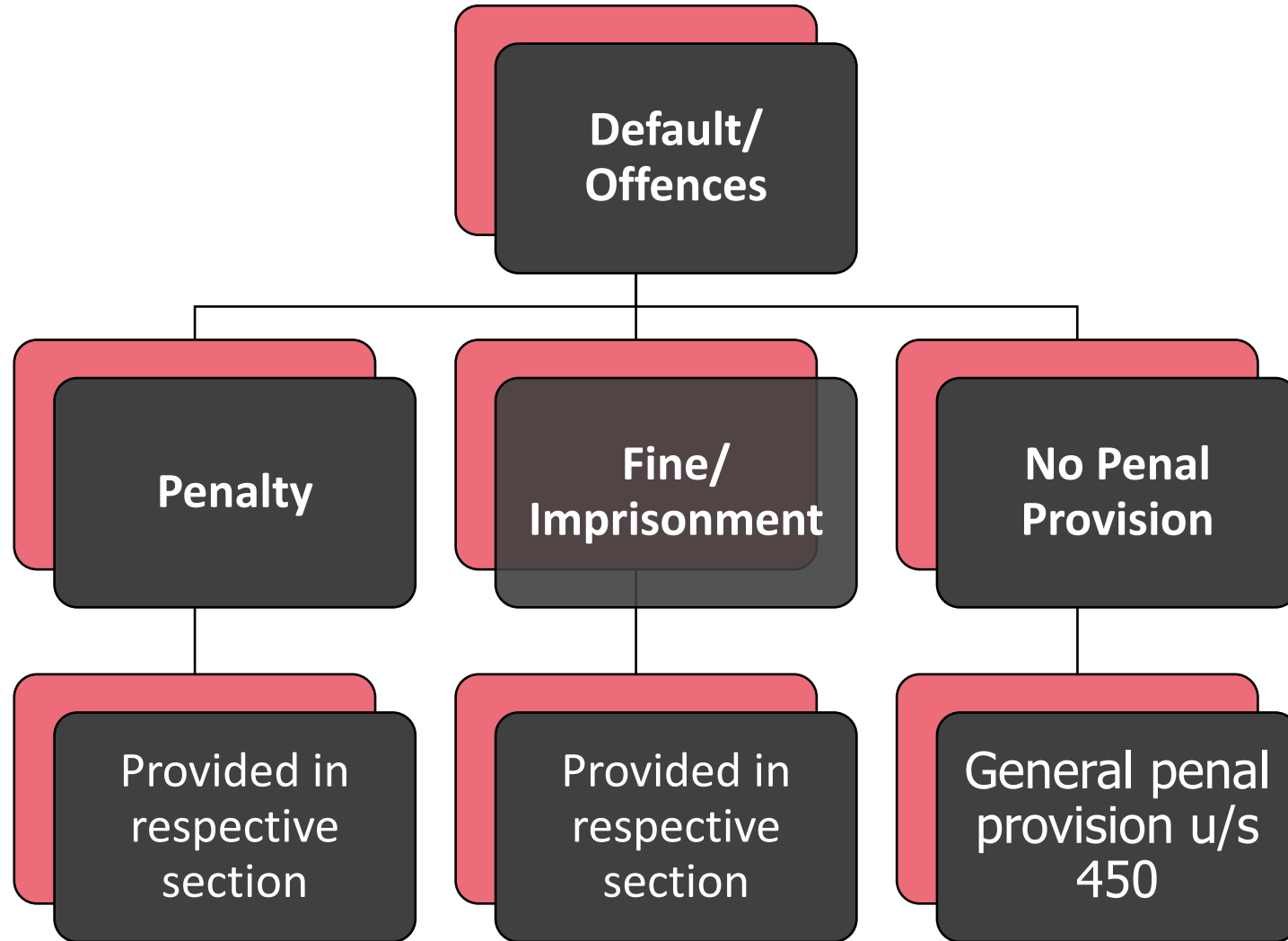
# Categorization of Offences under the Companies Act, 2013





# Categorization of Offences under the Companies Act, 2013

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# Adjudication under the Companies Act



# Adjudication of Penalties (section 454)

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- ✗ Adjudication can be done through the Registrar of Companies (RoC);
- ✗ The Act envisages a natural justice-based mechanism of adjudication of penalties whereby the ROC has been mandated to provide reasonable opportunity of being heard to the Company and Officer in default before imposing any penalty;
- ✗ In case any person is aggrieved by order of the ROC imposing penalties, he may prefer an appeal to the concerned regional director within a period of 60 days and the decision of regional director on the matter shall be final and binding.

## Adjudication of Penalties (section 454)

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- ✍ In case of OPC, Small Company, Start-up Company and Producer Company, penalty shall not be levied more than one-half of the penalty specified.
- ✍ In case the default related to non-compliance of filing of **Annual Return** or filing of **financial statements** and such default has been rectified either prior to, or within 30 days of, the issue of the notice by the AA, then no penalty shall be imposed and all prosecutions in respect of such default shall be deemed to be concluded.

# Procedure for Adjudication under section 454

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Issue of show cause notice to company/officer who is in default as to why penalty should not be imposed

Reply within 15 to 30 days as specified in the notice by ROC (Reply only in electronic mode and Physical appearance if so opined by ROC)

Where the person to whom notice is issued, while submitting electronic reply, has indicated that he wants to make oral representation – himself or through authorized representative.

Order with reasons within:

- a. 30 days where physical presence not required
- b. Within 90 days, where the person appeared.

# Procedure for Adjudication under section 454

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Copy of order to person concerned, the Central Government and upload on the website

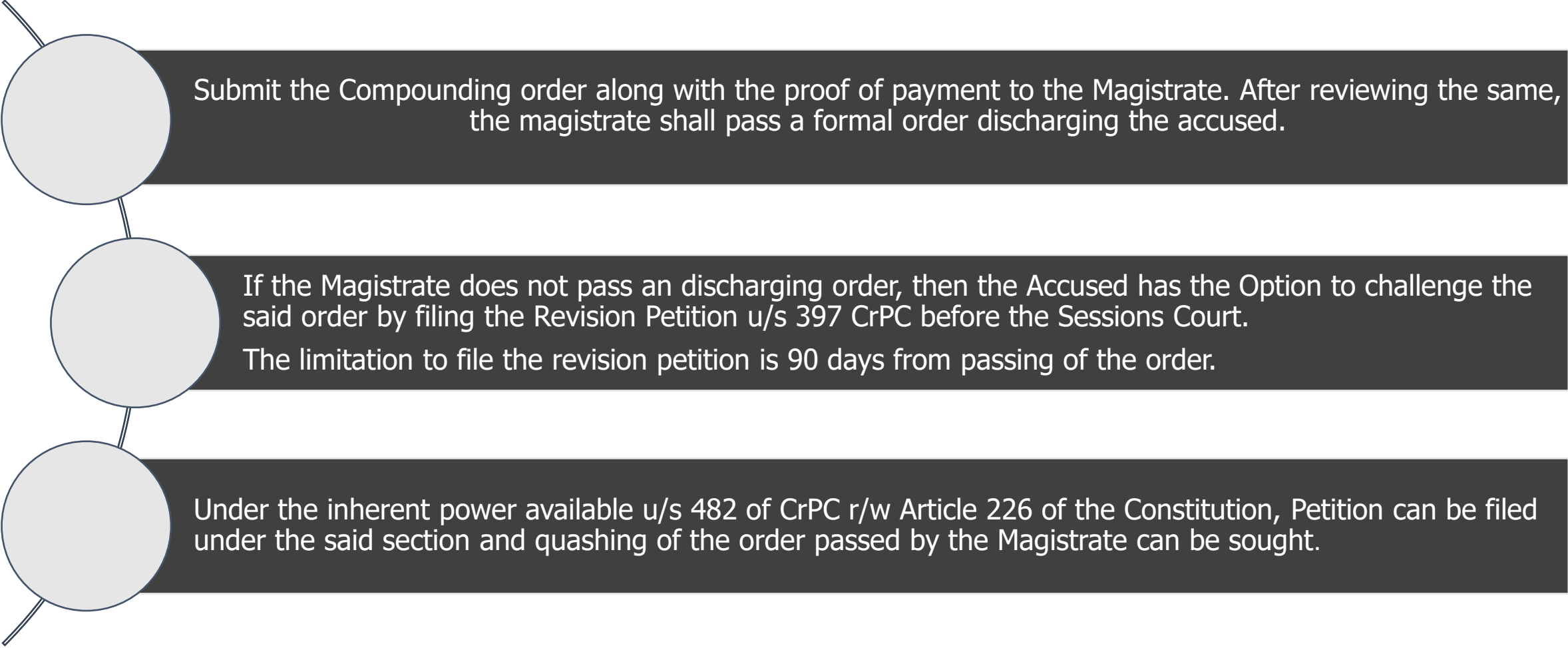
Factors to decide quantum of penalty is Size of the company, Nature of business carried on by the company, Injury to public interest, Nature of default, Repetition of default, amount of disproportionate gain or unfair advantage and amount of loss caused to the investor/creditor.

Cannot be less than the minimum penalty under the section

Must be paid through MCA portal and Order appealable to RD within 60 days.

# Options available with the Company after the payment of the Compounded amount

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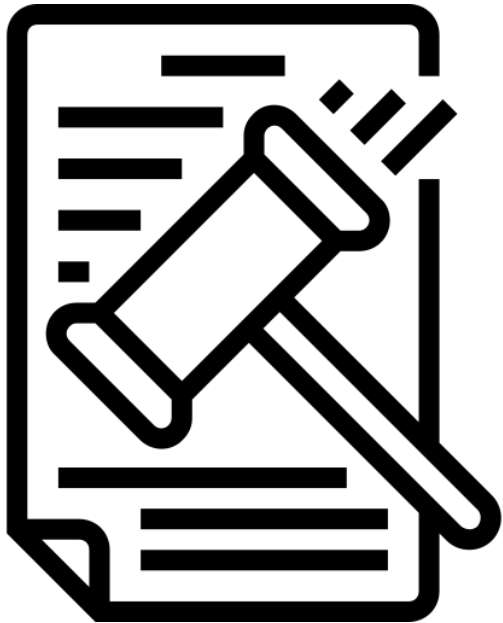
Submit the Compounding order along with the proof of payment to the Magistrate. After reviewing the same, the magistrate shall pass a formal order discharging the accused.

If the Magistrate does not pass an discharging order, then the Accused has the Option to challenge the said order by filing the Revision Petition u/s 397 CrPC before the Sessions Court.  
The limitation to file the revision petition is 90 days from passing of the order.

Under the inherent power available u/s 482 of CrPC r/w Article 226 of the Constitution, Petition can be filed under the said section and quashing of the order passed by the Magistrate can be sought.

## Advantages of Adjudication of Penalties (section 454)

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- ✍ This mechanism is simple, quick and fast and not riddled with Court procedures;
- ✍ Adjudication can be done only after issue of notice by the Registrar;
- ✍ The framework helps in de-clogging the Courts and NCLT.



## Issues under the Adjudication of Penalties (section 454)

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Whether adjudication application can be filed suo-moto?

## Issues under the Adjudication of Penalties (section 454)

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Whether adjudicating officer has a power of levy penalty less than what is provided under the relevant penal provisions?

## Issues under the Adjudication of Penalties (section 454)

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Whether order of RD with respect to appeal filed against order of adjudicating officer, can be challenged?

## Issues under the Adjudication of Penalties (section 454)

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Whether in case of appeal, RD can reduce the quantum of penalty?

## Issues under the Adjudication of Penalties (section 454)

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Penalty provisions which were earlier subject to fine, compounding or adjudication, which one to opt?

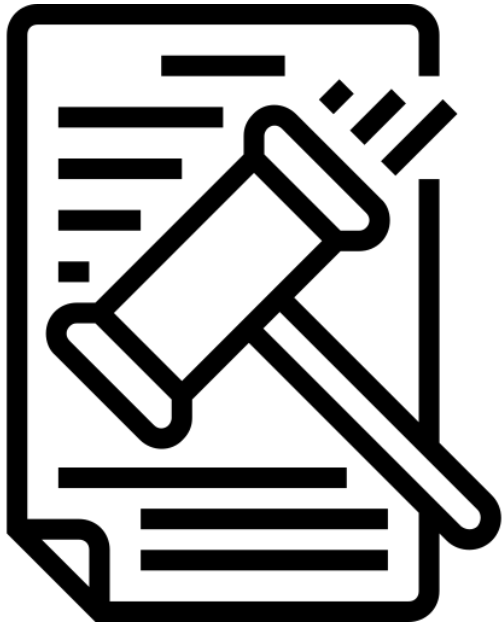


# Compounding of Offences under the Companies Act



## Compounding of Offences (section 441)

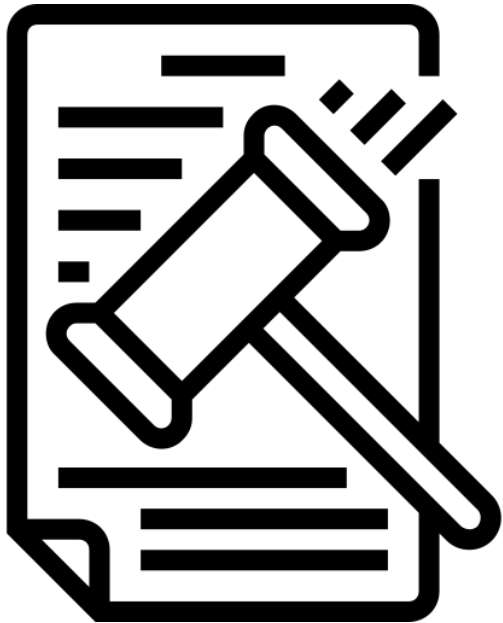
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- ✍ Compounding of an offence is a **settlement mechanism**, by which, the offender is given an option to pay fine in lieu of his prosecution, thereby avoiding a litigation;
- ✍ The authority for compounding of offences under the Act lies with National Company Law Tribunal (NCLT) or the Regional Director (RD) depending on the maximum amount of fine that may be imposed.
- ✍ An offence cannot be compounded if investigation against the company has been initiated or is pending under the Act;
- ✍ Similar offence can be compounded only once in 3 years.

## Compounding of Offences (section 441)

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- ✍ Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, against the offender in relation to whom the offence is so compounded.
- ✍ Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by ROC in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.




# Procedure for Compounding

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File an application to ROC for the compounding of offence.



ROC shall forward the same, together with his comment/report thereon, to NCLT or RD, as the case may be, after considering the pecuniary jurisdiction



RD or NCLT, as the case may be, shall scrutinize the application and give date of hearing to the applicant.



After hearing and obtaining the compounding order, follow the directions given in the order, pay the compounding fee and file the copy of order with ROC within 7 days from the date of receipt of order.

# Issues under the Compounding of Offences

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Whether the Act bars filing of a Joint Application for compounding of offence by a defaulting company along with its Officers in Default?

# Issues under the Compounding of Offences

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Whether the Act bars filing of a Joint Application for compounding of the same offence committed in different years?

## Issues under the Compounding of Offences

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Whether the Tribunal has jurisdiction to compound offences where the fine prescribed for such offence are less than its monetary jurisdiction?

# Issues under the Compounding of Offences

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How to quantify the limit of Rs. 25 lacs in order determine the jurisdiction of RD?

# Issues under the Compounding of Offences

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Whether officers in default can escape prosecution without applying for compounding merely on the ground that company has obtained an order for compounding?

## Issues under the Compounding of Offences

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Whether making good the default before filing a compounding application is mandatory?

# Issues under the Compounding of Offences

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Whether compounding amounts to relief from other consequences?



# Issues under the Compounding of Offences

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Whether an officer in default, which has got an offence compounded, can get the same offence compounded in another company within three years from the last compounding?

## Issues under the Compounding of Offences

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Whether compounding of NEDs is required, where the Company has EDs but NEDs too have received the SCN?



# Prosecutions under the Companies Act



# Prosecution

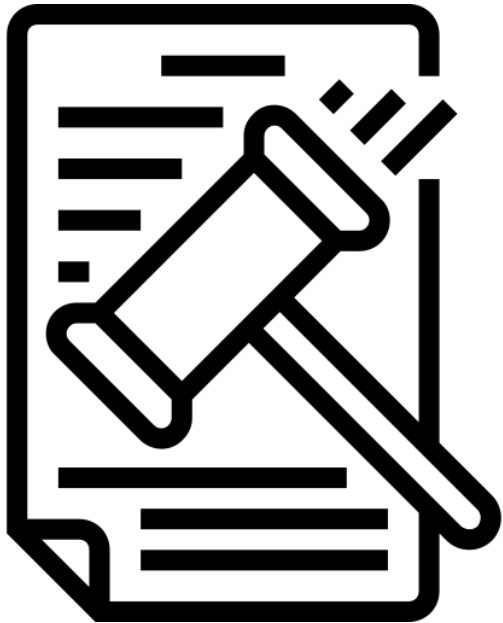
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- ✗ Pursuant to provisions of section 439, all the offences involving frauds are '**cognizable offences**' within the meaning of CrPC, 1973. All other offences are non-cognizable.
- ✗ Court shall take cognizance of an offence on application filed in writing by the Registrar, a shareholder or a member of the company, or of a person authorised by the Central Government in that behalf;
- ✗ In case of issue and transfer of securities and non-payment of dividend, complaint can be filed in writing, by a person authorised by the SEBI also.

# Prosecution

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- ✎ Special Courts under Section 435 has been established across the country to take cognizance of all offences under the Act except offence related to wrongful withholding of the property.

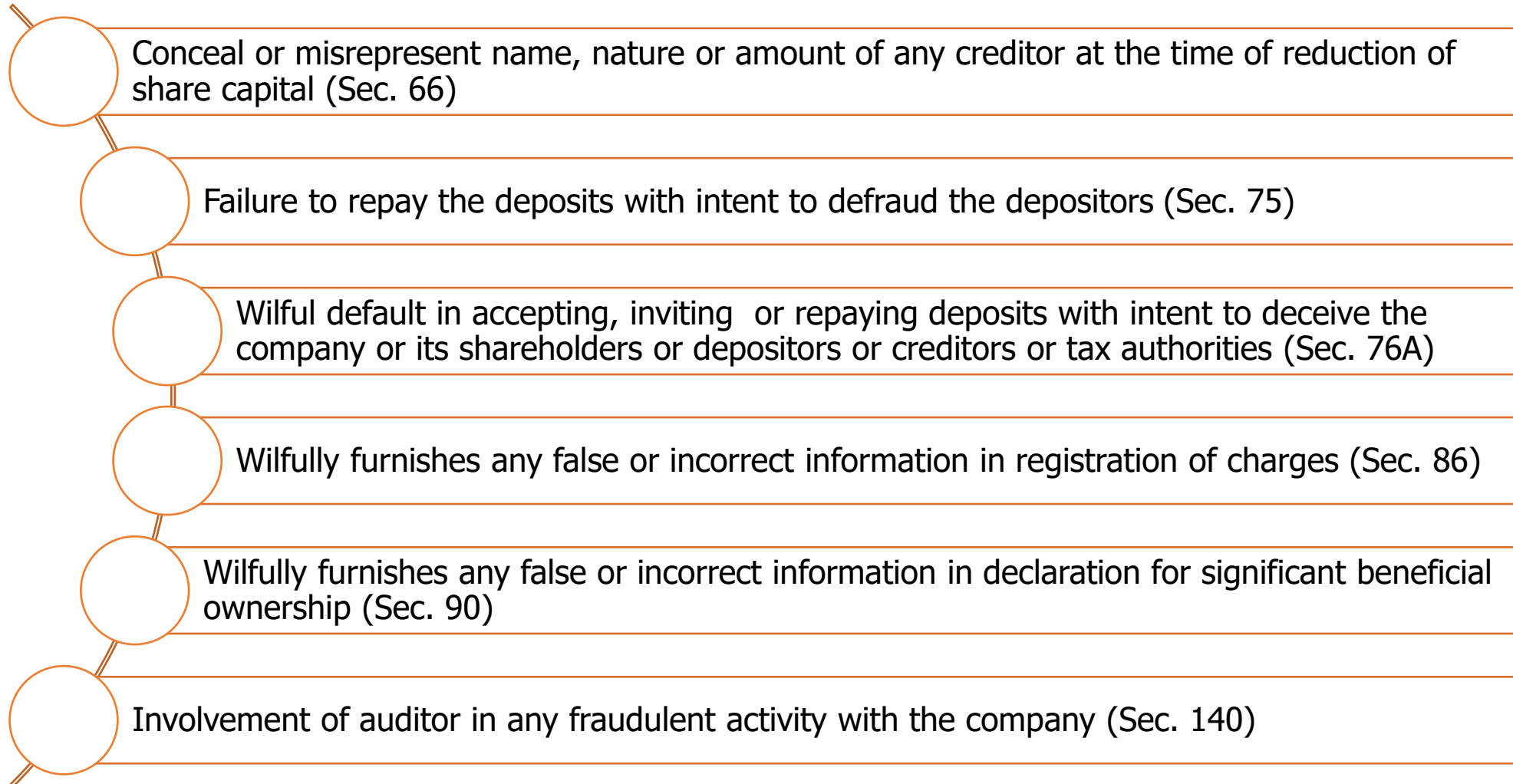
# Offences Liable for punishment for fraud under section 447 (Cognizable)

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- Furnishing any false or incorrect information at the time of incorporation (Sec. 7)
- Conduct the affairs of Section 8 Company in a fraudulent manner (Sec. 8)
- Criminal liability for mis-statement in prospectus (Sec. 34)
- Fraudulently inducing persons to invest money (Sec. 36)
- Personation for acquisition, etc., of securities (Sec. 38)
- Issue duplicate share certificates with intent to defraud (Sec. 46)
- Transfer of shares with intent to defraud (Sec. 56)

# Offences Liable for punishment for fraud under section 447 (Cognizable)

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# Offences Liable for punishment for fraud under section 447 (Cognizable)

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- If a company carried out the business in fraudulent manner (Sec. 206)
- If a company carried out its business to defraud its creditors, members or any other persons (Sec. 213)
- If any person fraudulently destroys or tampers with any document of the company (Sec. 229)
- Applying for removal of name of company with intent to deceive the creditors or to defraud any other persons (Sec. 251)
- False statement in any return, report, certificate etc. (Sec. 448)



# Issues under the Prosecutions for cognizable offences

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Where the complaint can be filed for prosecution of cognizable offences?

# Issues under the Prosecutions for cognizable offences

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Where the appeal can be filed against the order of prosecution of cognizable offences?

# Issues under the Prosecutions for cognizable offences

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What remedies are available to the accused in case a prosecution is filed?

# THANK YOU

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