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INTRODUCTION OF COMPANY

History of Company Law in India

1844 + 1882 + 1912 + 1936 + 1956+2013+2015+2017

Structure of Co. Act 2013

- New Company Law has been framed on **Skelton Approach**
- It consist of **29 chapters, 470 Sections, 7 schedules, 95 definitions.**

Applicability of Co. Act 2013 (Sec 1)	
Sec 1(2)	It applies to **Whole** of India
Sec 1(4)	It applies on – ❖ Companies as per co. Act 2013 ❖ Banking Co. ❖ Insurance Co. ❖ Electricity Co. ❖ Other Co. by Special Act ❖ Notified body Corporate

Meaning of Company

- The word **"Company"** is the combination of two words **"Com"** and **"Panies".** The word "**Com"** means with or **together** and the word "**panies"** means **bread.**
- The word Company can be referred as an **association** of person **who took their meals together.**
- It is an association of persons for some **common objects.**
- In simple terms Company may be described to means **voluntary association** of persons who come together for carrying on some business and **sharing of money** there from.
- In the words of **Lord Justice Lindley,** "A Company is an association of many persons who contribute money or monies worth to a common stock and employed in some trade or business and who share the profit and loss arising there from. The **common stock so contributed is the share capital** of the Company.

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Definition

- ***Section 2(20)*** of the Companies Act, 2013, provides that a 'company' means a company **incorporated under this Act** or under any **previous company law.**

CHARACTERISTICS/ FEATURES OF A COMPANY

(1) Incorporated Association

A Company is a **registered group** of persons. Minimum 7 members are required in case of Public Company, 2 in case of Private Company and 1 in case of OPC.

(2) Artificial Person

A Company is artificial legal person **created with the sanction of law**. It is not a human being but it acts through human beings. Thus, a Company is artificial person but not fictitious. It is called an artificial person since it is invisible, intangible, existing only in the contemplation of law.

Case Law	***Union Bank of India* v. *Khader International Construction and Other***

In this case, the question which arose before the Court was whether a company is entitled to sue as an indigent (poor) person under CPC, 1908. The aforesaid Order permits persons to file suits as pauper/indigent persons if they are unable to bear the cost of litigation. The appellant in this case had objected to the contention of the company which had sought permission to sue as an indigent person. The point of contention was that, the appellant being a public limited company, it was not a 'person' within the purview of Code and the 'person' referred to only a natural person and not to other juristic persons. The Supreme Court held that the word 'person' mentioned in CPC, 1908, included any company as association or body of individuals, whether incorporated or not. The Court observed that the word 'person' had to be given its meaning in the context in which it was used and being a benevolent provision, it was to be given an extended meaning. Thus a company may also file a suit as an indigent person.

(3) Separate Legal Entity

Incorporation of a company renders it a separate legal entity. A company is a legal person entirely **distinct and independent** from its members. It has its own rights and obligations. **(Salomon v Salomon & Company Ltd- 1897)**

	Questions	
1	June 2008	Two companies are incorporated with the same set of shareholders. Are they same or distinct under company's act 2013? Discuss.
2	June 2014	Separate personality of a company is a special privilege. In case of dishonest or fraudulent use of this privilege, corporate veil can be lifted. Discuss.
3	June 2012	A shareholder who holds 99% of the share capital of a company can be held liable for the acts of the company.
4	Dec 2013	A shareholder is held personally liable for the acts of the company, if he holds virtually the entire share capital of the company.

Case Law 1	**Salomon v Salomon & Co. Ltd. (1897)**

The case of Salomon VS. Salomon & Co. ltd. has clearly established the principle of separate legal entity. Salomon had, for some years, carried on a prosperous business as a leather merchant and boot manufacturer. He formed a limited company consisting of himself his wife and a daughter, and his four sons as the shareholders, all of whom subscribed for one share of 1 pound each. Salomon was the

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managing director and two of his sons were other directors.

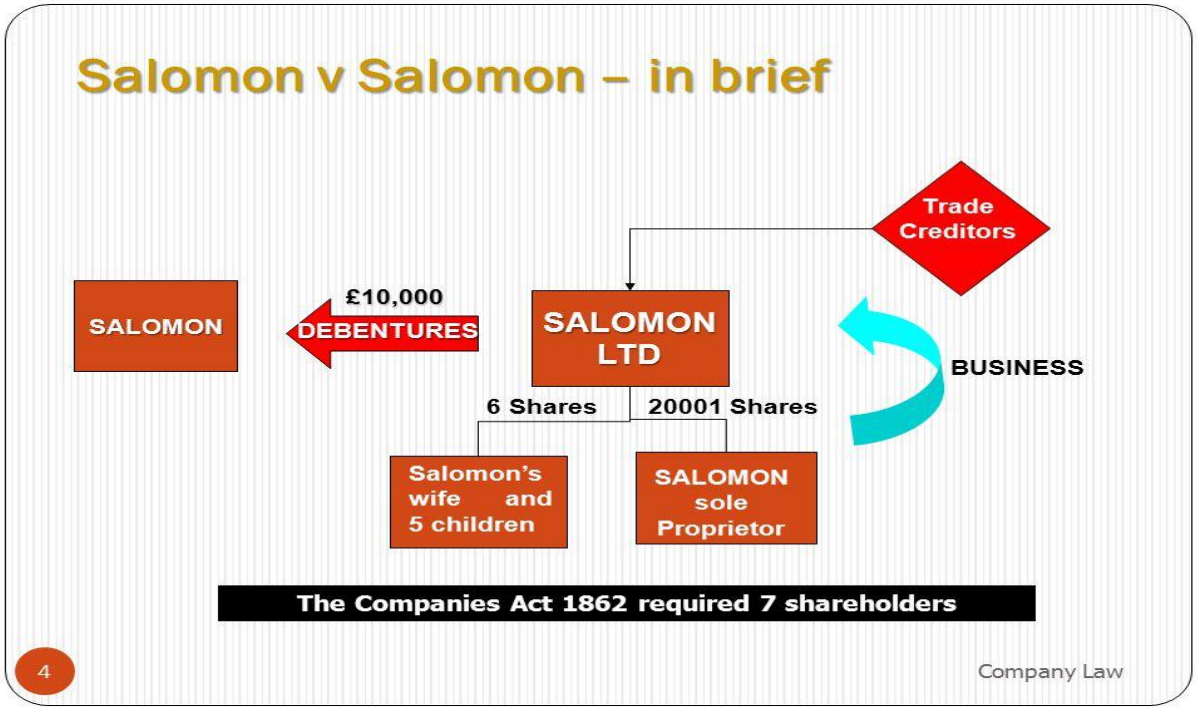
Salomon sold his business (which was perfectly solvent at that time) to the Company for the sum of 38,782 pounds. He got the following payments:

10,000 Secured Debentures of 1 pound each	10,000 pounds
20,000 F1 lly – paid Shares of 1 pound each	20,000 pounds
Cash	8,782 pounds

The company soon ran into difficulties and the debenture holders appointed a receiver and the company went into liqui4ation. The total assets of the company amounted to 6,050 pounds its liabilities were 10,000 pounds, secured 'debentures and 8,000 pounds owing to unsecured trade creditors,

The unsecured trade creditors claimed the whole of the company's assets, viz. 6,050 pounds on the ground that as the company was a mere agent for Salomon and thus they were entitled to payment of their debts in priority to Debentures.

The House of Lords rejected these contentions and held that a company, on registration, has its own existence or personality separate and distinct from its members and, as a result, a shareholder cannot be equated with a company even if he holds virtually the entire share capital-of the company.



Case Law 2 **Lee v Lee Air Farming Ltd. (1961)**

- In this case, a company was formed for the purpose of aerial top-dressing.
- Lee, a qualified pilot, held all except one of the share the company.
- He voted himself the managing director and got himself appointed by the articles as chief pilot at a salary.
- He was killed in an air crash while working for the company.
- His widow claimed compensation for the death of her husband in the course of his employment. The company opposed the claim on the ground that Lee was not a worker as the same person

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could not be the employer and the employee.

- The Privy Council held that Lee and his company were distinct legal persons which had entered into contractual relationships under which he became the chief pilot and a servant of the company.
- In his capacity of managing director he could, on behalf of the company, give himself orders in his other capacity of pilot, and the relationship between himself as pilot and the company, was that of servant and master, Lee was a separate person from the company he formed and his widow was held entitled to get the compensation.
- In effect the magic of corporate personality enabled him (Lee) to be the master and servant at the same time and enjoy the advantages of both.

Case Law 3 **Kondoli tea co. Ltd. (1886)**

The decision of the Calcutta High Court recognised the principle of separate legal entity even much earlier than the decision in *Solomon* v. *Salomon* & *Co. Ltd case.*

Certain persons transferred a Tea Estate to a company and claimed exemptions from ad-*valorem* duty on the ground that they themselves were also the shareholders in the company, it was nothing but a transfer from them in one name to themselves under another name.

Calcutta High Court rejected this and observed: "The company was a separate person, a separate body altogether from the shareholders and the transfer was as much a conveyance, a transfer of the property, as if the **shareholders had been totally different persons.**

(4) Separate property

A Company is a legal person in the eyes of law. A Company can hold **property in its own name**. Thus, the property of the company belongs to the company itself and not to its members.

Case law 4 **Macaura Vs. Northern Assurance company limited.**

The undertaking is something different from the totality of shareholders.

(5) Capacity to sue and to be sued

A Company is a legal person with an independent existence. A Company acts in its own name. Thus, a Company **can sue others and be sued in its own name**. The creditors can make their claim only against the Company and cannot proceed against the shareholders of the company.

Case Study **Abdul Haq Vs. Das Mal**

An employee was not paid salary for several months. He filed a suit against the director of the company for the recovery of the amount of salary due to him. It was held that he will not succeed because the remedy lies against the company and not the directors or members of the company.

	Questions	
5	Dec 2015	A company incorporated under the company's act 2013, being an artificial person, is not entitled to sue a natural person or to sue another company incorporated under the same act.
6	Dec 2015	A company incorporated under the company's act 2013, never dies except when it is wound up as per the law.

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7	Dec 2009	The managing director and other directors of the company are not liable to be sued for dues against company.

(6) Separate Ownership & Management

The members of a Company do not participate in the day to day affairs of the Company. The Company is managed by **elective representatives** of the shareholders known as Board of Directors. The directors are appointed as well as removed by the shareholders.

(7) Common Seal

Need to have common seal, has been abolished in any company (w.e.f 25th May 2015)

In Section 9, of the Principal Act, the words 'and a common seal' has been omitted. In Section 22(2) of the Principal Act, the words "under its common seal" has been substituted by **"**under its common seal, **if any**".

If the company has no common seal then, authorisation under this sub section shall be made by-

- 2 Directors or
- By a director and the Company Secretary where company has appointed one.

If a company has common seal, then the following documents are required to have upon it the common seal of the company:

- Power of Attorney
- Share Certificate
- Share Warrant

	Questions	
8	June 2014	Common seal acts as the official signature of a company.
9	Dec 2013	Common seal can be used by any employee of the company irrespective of his designation.
10	Dec 2008, Dec 2009	Common seal have to be affixed on all letters and documents of the company. Discuss.

(8) Transferability Shares

The shares (movable property) of a Company are **freely transferable** in the manner provided in the Articles of the Company. However, in case of Private Company there are certain restrictions but not prohibition on transfer of shares.

(9) Perpetual Succession

The term perpetual succession means **continued existence**. A Company has a perpetual succession. Thus, death, insolvency or insanity of the members does not affect the existence of the Company. Life of the company does not depend upon the life of its members.

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Questions:		
11	Dec 2014	In an AGM of Amar Pvt. Ltd. All the shareholders were killed in a bomb blast. State whether the company is still in existence. If so, how?
12	Dec 2006	Prof. Grower rightly said members may come and go, but the company can go on forever.

Case Study

XYZ Ltd., Company is a Company having seven members only. All the members of the company were attending meeting in New Delhi in relation to some business. A bomb blast took place and all of them died. Answer with reasons, under the Companies Act, 2013 whether existence of the company has also come to the end?

Answer:

- The existence of the company does not come to an end
- Since the existence of the company does not depend upon the life of any or all the members of the company. Since the existence of the company can come to an end only in accordance with the provisions of law, viz. dissolution of the company.
- Since one of the characteristics of the company is 'perpetual succession'.

(10) Limited Liability

a) **Company limited by shares**
Limited to the amount remaining unpaid on the shares held by them.

b) **Company limited by Guarantee without share capital**
Limited to the amount guaranteed by them.

c) **Company limited by Guarantee having share capital**
Limited to the aggregate of the amount remaining unpaid on the shares and the amount guaranteed by them.

d) **Company with Unlimited Liability**
Unlimited i.e. they have to contribute till the entire debt of the Company is paid.

(11) One-man Company

One-man company is a company in which almost the entire share capital of a company is held by one person. The case of Salomon Vs. Salomon & Co. Ltd. has clearly established this concept.

Note: - One Man Company is different from One Person Company

Case Law 5 **T.R.Pratt (Bombay) Ltd. Vs. E.D. Sasson & Co. Ltd**

It was held that "Under the law, an incorporated company is a distinct entity, and although all the shares may be practically controlled by one person. In law a company is a distinct entity and it is not permissible or relevant to enquire whether the directors belonged to the same family or whether it is as compendiously described a one-man company".

(12) Experience of a Shareholder as Experience of a Company

Case Law 6 **New horizons ltd. Vs. Union of India. (1994)**

The experience of a shareholder of a company can be regarded as experience of a company. The tender of the company, New Horizons Ltd., for publication of telephone directory was not accepted by the Tender Evaluation Committee on the ground that the company had nothing on record to show that it had the technical experience required to be possessed to qualify for tender. On appeal the rejection of tender was upheld by the Delhi High Court.

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The judgement of the Delhi High Court was reversed by the Supreme Court which observed asunder: "Once it is held that NHL (New Horizons Ltd.) is a joint venture, as claimed by it in the tender, the experience of its various constituents namely, TPI (Thomson Press India Ltd.), LMI (Living Media India Ltd.] and WML (World Media Ltd.) as well as IIPL (Integrated Information Pvt. Ltd.) had to be taken into consideration, if the Tender Evaluation Committee had adopted the approach of a prudent business man."

"Seeing through the veil covering the face of NHL, it will be found that as a result of re-organisation in 1992 .the company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr. Aroon Purie holds 60% shares and the Singapore based company (NPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field."

The company is in the nature of partnership between the Indian groups of companies and. Singapore based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risk. In respect of such a joint venture company, the experience of the company can only mean the experience of the constituents of the joint venture i.e. the Indian group of companies (TPI, LMI and WML) and the Singapore based company (IIPL).

(13) Contractual Rights

A company, being a **legal entity** different from its members, can **enter into contracts** for the conduct of the business in its own name.

Case Law 7 **British Thomson-Houston company Vs. Sterling accessories Ltd.**

A **member** of a company **cannot sue** in respect of **torts committed against it,** nor can be sued for **torts committed by the company.**

(14) Limitation of Action

A company **cannot go beyond the powers** of its Charter - the **Memorandum of Association. The action and objects** of the company are **limited** within the scope of its memorandum of association.

(15) Voluntary Association for Profit

A company is a voluntary association for profit, It is formed for the **accomplishment** of some **public goals** and whatsoever profit is gained is divided among its shareholders.

(16) Termination of Existence

It has the **existence** only in **contemplation of law. It** is created by law, carries on its affairs according to law throughout its life and ultimately is dissolved by law. Generally, **existence of a company is terminated by means** of winding **up.**

Advantages of Company

1. A company is **a legal entity**, **distinct** and **independent** of those persons who from time to time are called its members.
2. The **liability** of the company's members are **limited** to the extent they have agreed to contribute towards the capital of the company with reference to the number of shares and/or the amount of guarantee respectively undertaken by them.
3. As the company is having an independent personality of its own, its members are **not personally liable** for any act or omission on the part of the company, unless the law expressly provides otherwise.

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4. The company being a juristic person, distinct from the members constituting it, a company can **acquire, own, enjoy and alienate property** in its own name. As such the property would be that of the company and no member can make any claim upon it so long as the company is a going concern.
5. The company being a legal entity **can sue** and **also be sued** in its own name.
6. The continuity of the company and its functioning-is **not effected** by the **death, disability** or **retirement** of any of its members. The company continues to exist, irrespective of change in its membership. It is commonly referred to as "perpetual succession"
7. **Transfer of member's interest** in the company can be readily attained without in any way adversely affecting its property, business, or existence.
8. Transferability of the company's shares provides an **element of liquidity** to the investors in respect of their investment in the shares of the company and thus facilitates increased investment in the company's funds without, in any way, adversely affecting its economic stability.
9. The members of the company equitably **share the profit** by way of dividend and the company's assets in the event of its winding up distributed in proportion of its capital respectively contributed by them.
10. Shares of small denomination afford an **opportunity to the small investors** to invest according to their capacity.
11. **Increased investment** in the company's funds is further ensured by permitting large number of persons to subscribe to the company's shares.
12. Incorporation of a company affords better opportunity for **strengthening capital resources**, **growth** and **development** of the enterprise.
13. The corporate form of business organisation affords opportunity for **professionalization** of its **management** and entrusting the administration of its affairs to persons of professional competence and standing.
14. Incorporation of company provides **better borrowing facilities** as the company can raise large amount, on comparatively easier terms, by issue of debentures, especially those secured by a floating charge or by accepting deposits from the public. Even banking and financial institutions prefer to render financial assistance to incorporated companies.
15. In certain cases, an incorporated company comparatively stands in a better position from the point of view of **taxation** on its income.
16. Once the company is brought into existence on its incorporation, it can only be **dissolved** with the provisions of the law.

Disadvantages of Company

1. **Formalities and expenses:** Incorporation of Company is coupled with many complexes and legal formalities. Even after the Company is incorporated, it has to comply with the various legal provisions. Various documents and returns have to be filed with various government agencies from time to time, which lead to heavy expenditure.
2. **Corporate disclosure:** Various corporate information has to be disclosed from time to time to the members of the Company, hence no secrecy.
3. **Separation of control from ownership:** Members of the Company do not have the control over the Company. Although they have interested in money and are the owner of the Company but still they do not have active control over the Company.
4. **Greater social responsibility:** The Companies have the great impact on the society, due to this reason the Companies are called to show greater social responsibility in their working.
5. **Greater tax burden:** Tax burden in case of the Company is more than any other form of business organisation. A Company is liable to pay tax without any minimum taxable limit and it has to pay tax on its whole income in other words Basic exemption limit for Companies is Nil.
6. **Detailed winding-up procedure:** The Act provides for a very detailed and lengthy procedure to wind up the Company, which is more expensive and time consuming.

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Difference between Company and Partnership Firm

Basis	Company	Partnership
1. Distinct	Distinct legal person	Not distinct from persons who form partnership
2. Property	Belong to company not to individual	Is of individual
3. Creditors	Can only proceed against company not against the	Creditors of individual partners
4. Agents	Members are not agents of company	Partners are agents
5. Disposal of property	Member has no such power	Partners have
6. Transfer of shares	Member of company can transfer shares (freely or restricted)	Partners generally cannot transfer (always restricted)
7. Liability	Limited or unlimited	Unlimited
8. Perpetual succession	Death or insolvency does not effect	Partnership may be dissolved
9. Accounts	Audited by Chartered Accountant (mandatory)	At discretion of partners (mandatory if turnover Exceeds Rs.1crore)
10. Dissolution	Dissolved by operation of law	Can be dissolved by agreement among partners
11. Regulating Act	Companies Act, 2013	Indian Partnership Act, 1932
12. Mode of creation	Registration is compulsory	Registration is optional

Question:

13 Dec 2013, Dec 2015 **Difference between Company and Partnership Firm**

Difference between Company and HUF

Basis	Company	HUF
1. Members	Heterogeneous	Family Members
2. Authority	BOD or members	Karta
3. Membership	No provision	By virtue of birth

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4. Registration	Compulsory	Not Compulsory
5. Stakeholders	Members	Coparceners

Difference between Company and LLP

Basics	Company	LLP
1.Act	Company Act, 2013	LLP Act, 2008
2.Number of Members	Private Min = 1, Max = 200 Public Min = 7, Max = Unlimited	Min = 2, Max = Unlimited
3.Management	BOO - Management	Designated Partners - Management
4.Documents	AOA	LLPA
5.	DIN	DPIN
6.Liability	Limited or unlimited liability	Limited liability
7.Audit	Audit – Mandatory	If its annual turnover in a financial year exceeds Rs.40 lakhs OR its contribution exceeds Rs.25 lakhs.
8.Meetings	Quarterly BM and AGM are mandatory.	No such meeting is required.

Question:

June 2015 **Difference between Company and LLP**

LEGAL STATUS OF A COMPANY

Citizenship of a Company

Although, a company is regarded as a legal person (though artificial), it is not a citizen either under the Constitution of India or the Citizenship Act, 1955. This is also the conclusion of the special bench of the Supreme Court in **State Trading Corporation of India Ltd. Vs. Commercial Tax Officer.**

One of the contentions put forth on behalf of STC was that if the corporate veil is pierced, one sees three persons who are admittedly the citizens of India and therefore the corporation should also be regarded as a citizen.

But is was held that neither the provisions of the Constitution of India nor The Citizenship Act,

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1955, either confer the right of citizenship on or recognize as citizen any person other than a natural person

In the words of Justice **Hidayatullah:** "If all of them (the members) are citizens of India, the company does not become a citizen of India, any more than, if all are married, and the company would be a married person:'

The Supreme Court further stated in this case that a company is however, a person in the eyes of law and it can claim the protection of such fundamental rights as are guaranteed to all persons, whether citizens or not.

For instance, "Right to Equality" under Article 14 of Constitution of India. A company cannot claim the protection of such fundamental rights as are expressly granted to citizens only. For instance, "Right to Freedom" under Article 19 of Constitution of India.

However, where shareholder rights are equally affected if the rights of the company are affected, it can claim the protection of all such rights, which are guaranteed to citizens through shareholders or directors of the company.

Is Company a National or a Residence?

A joint stock company resides where its place of incorporation is, where generally the meetings of company are held and where its governing body meets in bodily presence for the purposes of the company. Residential status of company is to be determined for the purpose of Income Tax liability.

Body Corporate (or) Corporation (or) Corporation [Sec 2(11)]

Body corporate or corporation includes a company incorporated outside India, but does not include-

i. A co-operative society registered under any law relating to co-operative societies; and
ii. Any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

Body corporate includes a private company, public company, one person company, small company, limited liability partnership, foreign company etc.

CASE LAW 8 **BOARD OF TRUSTEE Vs. STATE OF DELHI**

A society registered under the Societies Registration Act, 1860 has been held by the Supreme Court not to come within the term 'body corporate' under the Companies Act.

Thus, the term body corporate includes not only companies within the meaning of Companies Act, 2013 and corporations established under Special Acts of Parliament but also foreign companies. It will further include all public financial institutions as well as nationalized banks. Thus, the term 'body corporate' is wider than the expression company.

Note: A company is a body corporate but bodies corporate need not be a company

CASE LAW 9 **MADRAS CENTRAL URBAN BANK Ltd. Vs. CORPORATE OF MADRAS (1932)**

An incorporate company is a body corporate but many bodies corporate are not incorporate companies.

Question:

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14	June 2010, June 2011	Distinguish between company and corporation

ILLEGAL ASSOCIATION

Sec 464 read with Rule 10 of Co. (Miscellaneous) Rules 2014
No association or partnership consisting of more than such number of persons as may be prescribed (i.e. 100 as per the Sec 464 but 50 as per Rules, (Rules shall be prevailed here)) shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the Individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force.

However the restrictions shall not apply to

- Hindu Undivided Family carrying any business OR
- An Association or Partnership formed by professionals who are governed by special Acts.

	Question:	
15	Dec 2007, June 2013	What is illegal association?
16	Dec 2008,	What do you understand by the term illegal association? What are the rights and liabilities of a member of illegal association?

TEST OF ILLEGAL ASSOCIATION

The sole test to determine an illegal association is whether it carries on business for the **purpose of gain.**

Case Law 10 **Jennings vs. Hammond**
Associations like charitable, religious or scientific, which are not formed for the purpose of gain, are excluded from the scope of this section.

Case Law 11 ***Kumara Swamy Chattiar* v. *Income Tax Officer***
an illegal association is liable to be taxed

Case Law 12 ***Wilkinson* v. *Levison***
The members of an illegal association are individually liable in respect of all acts or contracts made on behalf of the association; they cannot either individually or collectively, bring an action to enforce any contract so made, or to recover any debt due to the association

LIABILITY OF MEMBERS

Every member of an illegal association is:
a) **Personally liable** for all liabilities incurred in carrying on the business of, or by, the illegal association; and
b) Punishable with fine **up to Rs.1,00,000/-**

Case Law 13 **Gangayya vs. Venkatramiah**
KARTAS ENTERING INTO PARTNERSHIP IN INDIVIDUAL CAPACITY

If the Kartas of 2 HUFs form a partnership to carry on business for the acquisition of gain and their families consist more than 25 adult members. The partnership shall be treated as legal as it consists of only two partners.

When the Karta of HUF enters with outsiders in business, the other members of such family do not ipso facto become partners.

LIFTING OR PIERCING CORPORATE VEIL

A company is formed by the members and managed by the Board of Directors with the assistance of officers and employees. On incorporation, law gives separate legal entity to the company. Thus, a fiction is created by law by which the rights, powers, duties, functions, liabilities and property of a company is differentiated from the rights, powers, duties, functions, liabilities and property of the members, Directors, officers and employees of the company. This fiction of law is called **Veil of Incorporation or Corporate Veil**.
Or
"Lifting of Corporate Veil" means ignoring the separate legal entity of the company and looking behind the company to identify the real persons who controls the company.

Effect of Corporate Veil

The effect of this Corporate Veil is that only Company can be held liable for the acts and defaults done in the name of the company, even though members, Directors, officers or employees had acted on behalf of the company.

When a Company has been formed and registered under the Act, all dealings with the Company will be in the name of the Company and the persons behind the Company will be disregarded, however important they may be. This principle is called "Veil of Incorporation".
The advantages of incorporation are allowed to be enjoyed only by those who honestly use the veil of Company for the collective benefit of the Company and its members. In case of dishonest and fraudulent use of the facility of incorporation, the law can remove/lift the **"Corporate Veil".**

Lifting of Corporate Veil under Companies Act

Corporate veil can be ignored under:

A. Statutory provisions
B. Judicial Pronouncements

A. STATUTORY PROVISIONS UNDER WHICH CORPORATE VEIL IS REMOVED.

(1) Reduction of membership

Where the number of members **falls below statutory minimum** and the Company carries on business for **more than 6 months** while the number is so reduced, then every person who is a member of the Company at the time the Company so carries on business after 6 months and is aware of the fact shall be severally liable for the payment of the **whole** debts of the Company contracted during that time **and may be severally sued therefor. (w.e.f. 3/1/18)**

(2) Misrepresentation in Prospectus

In case of misrepresentation in prospectus, every director, promoter and every other person who authorizes the issue of such prospectus incurs liability towards those shareholders who subscribe shares on the faith of such prospectus.

(3) Failure to refund Application money

In case of public issue of shares by a Company, if minimum subscription, as stated in the prospectus, has not been received within 30 days of the date of issue of the prospectus or with in such time as may be prescribed by SEBI, the Company must refund the entire application money within such time as may be prescribed.

(4) Mis-description of Company's name

Where an officer of a Company signs on behalf of Company, any contract, bill, promissory note, hundi, cheque or orders for money or goods, such person shall be personally liable to the holder if the name of the Company is either not mentioned or is properly not mentioned.

(5) Holding and Subsidiary

Every holding Company shall attach to its Balance Sheet, copies of Balance Sheet, Profit & Loss Account, Director's Report and Auditor's Report etc. of **Company** each of its subsidiary Company. Though holding Company and its subsidiary Company have separate legal entities, Court may treat a subsidiary Company as a branch or department of its holding Company.

(6) Fraudulent Conduct

Where in the winding up of the Company, it appears to the Court that any business of the Company has been carried on with intent to **defraud the creditors of the Company or any other person**, then, the Court may declare that any of the Directors or officers who are parties to the fraud shall be personally liable.

(7) Liability under other Statues

Besides the Companies Act, the directors and other officers of the Company may be held personally liable under the provisions of other Statutes. For example, where any private Company is wound up and if tax arrears of the Company in respect of any income of any previous year cannot be recovered, every person who was director of the Company at any time during the relevant previous year shall be jointly and severally liable for the payment of tax.

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(8) Ultra Vires Act Directors and other officers of Company shall be personally liable for all those acts which they have done on behalf of the Company and which are Ultra Vires the Company.

B. Lifting of Corporate Veil under Judicial interpretation

1. Protection of Revenue

The Court may ignore the Separate Legal Entity status of a Company, where it is used for tax evasion.

Case Law 14 ***Sir Dinshaw Maneckjee Petit***

One person was receiving huge dividend and interest income on some investments and had to pay huge tax on that.

He formed 4 private companies and transferred whole of his investments to these 4 companies. The dividend and interest received by these companies were within the exempted limits of tax. Except these investments no other business was run by these companies and had no other assets. The income received in the form of interest and dividend, was transferred to that person in the form of loan and was never returned.

It was held that these companies were created only to evade taxes and therefore court ignored the separate legal entity status of the company and whole of interest and dividend earned by the company was treated as income of that person.

2. Determination of enemy character of the Company

A company may assume an enemy character when persons in DE-FACTO control of its affairs are residents in an enemy country.

Case Law 15 ***Daimler Co. Ltd. Vs. Continental Tyre & Rubber Co. Ltd***

A company was formed in England for the purpose of selling tyres made by a German Company.

This German company held almost all the shares of this new company formed in England. Moreover all the directors of this company were German. During the First World War, The English Company filed a suit against another English company for recovery of a debt. Court ignored the separate legal entity of the company and held that the persons who had the ultimate control of the company were enemies and therefore suit was set aside.

3. Prevention of fraud

Where a Company is used for committing frauds or improper conduct, Court may lift the corporate veil and look at the realities of the situation.

Case Law 16 ***Gilford Motor Company vs. Horne***

An employee entered into a contract with his employer not to solicit the customers of the company after leaving the employment. After leaving the employment he created a company and started soliciting the customers of the employer. It was held that this company was created to avoid the legal obligation arising out of contract. Therefore that employee and company created by him was treated as one and thus the veil between the company and that person was lifted.

4. Avoidance of Welfare Legislation

Where a Company tries to avoid its legal obligations, the corporate veil shall be lifted to look at the real picture.

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Case Law 17	***Workmen of Associated Rubber Industry Ltd. Vs. Associated Rubber Industry Ltd.***

A company was earning huge profits and thus had to pay huge bonus to its employees. It created a subsidiary company and transferred some of its investments to it so as to reduce some of its profits. This subsidiary company had no other business. It was held that this new company was formed just to avoid the liability of bonus under the Payment of Bonus Act. Hence profits earned by subsidiary company were held as profits of holding company and had to give bonus on that profits also.

5. To punish for contempt of Court

Company being an artificial person cannot disobey the orders of the Court. Therefore, the persons at fault should be identified.

6. **Subsidiary to act as an agent**.

Case study	Merchandise Transport Limited vs. British transport commission.

In the above case, a transport company wanted to obtain license for its vehicles but it could not do so if it made the application in its own name.
It, therefore, formed a subsidiary company and the application for licenses was made in the Name of the subsidiary.
The vehicles were transferred to the subsidiary.
Held, the parent and the subsidiary company were one commercial unit and the application for licenses was rejected.

	Question	
17	Dec 2015	Explain the meaning of lifting corporate veil in relation to a company incorporated under the company's act 2013. Examining the judicial pronouncement, state whether corporate veil can be lifted in the following cases. a) Where the corporate veil has been used for improper conduct; and b) Where the acts of a company are opposed to workmen?
18	Dec 2007,	What is corporate veil? State the circumstances when it can be lifted.
19	Dec 2014	Piercing through corporate veil.
20	June 2010	Rani is a wealthy lady enjoying large dividend and interest income. She has formed three private companies and agreed with each of them to hold a block of interest as an agent for it. Income received was credited in the accounts of the company but the company handed back the amount to her tax liability. Discuss the legality of the purpose for which the three companies were formed.

Applicable Rules

Chapter	Rules	Forms
I	Co. (specification of definition details) Rules 2014	
II	Co. (incorporation) Rules 2014	INC 1 (**RUN**) – INC 34
III	Co. (prospectus & allotment of securities) rules 2014	PAS 1 – PAS 5
III	Co. (Issue of GDR) Rules 2014	

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IV	Co. (Share capital & Debenture) Rules 2014	SH 1 – SH 15 RSC 1 – RSC 7
IV	NCLT (procedure for reduction of share capital of co.) Rules 2016	
V	Co. (acceptance of deposit) Rules 2014	DPT 1 – DPT 4
VI	Co. (registration of charge) Rules 2014	CHG 1 – CHG 9
VII	Co. (management & administration) Rules 2014	MGT 1 – MGT 15
VIII	Co. (Declaration & payment of Dividend) Rules 2014	IEPF 1 – IEPF 6
VIII	IEPFA (appointment of chairperson & members holding of meeting & provision for offices and officers) Rules 2016	
IX	Co. (accounts) Rules 2014	AOC 1 – AOC 5
IX	Co. (corporate social responsibility policy) Rules 2014	
IX	Co. (Indian Accounting Standard) Rules 2015	
IX	NFRA (composition & manner of selection of chairperson & member) rules 2014	
X	Co. (audit and auditors) Rules 2014	ADT1 – ADT4
X	Co. (cost records and audit) Rules 2014	CRA 1 – CRA 4
XI	Co. (appointment and qualification of directors) Rules 2014	DIR 2 – DIR 12
XII	Co. (meeting of board and its powers) Rules 2014	MBP1 – MBP 4
XIII	Co. (appointment & remuneration of Managerial person) Rules 2014	MR1 – MR3
XIV	Co. (inspection, Investigation & Inquiry) Rules 2014	
XV	Co. (compromise, arrangement &amalgamation) Rules 2016	CAA 1 – CAA15
XVI	Companies (winding up) rules 2014	
XXI	Co. (authorized to register) Rules 2014	URC1-URC2
XXII	Co. (Registration of foreign co.) Rules 2014	FC1 – FC5
XXIV	Co. (Registration offices and fees) Rules 2014	GNL1- GNL 4
XXIV	Co. (filing of documents and forms in XBRL) Rules 2014	
XXVI	Nidhi Rules 2014	NDH 1 – NDH 3
XXVII	NCLT (Salary, allowances & other terms and conditions of services of president & other members) Rules 2015	
XXVII	NCLAT (Salary, allowances & other terms and conditions of services of president & other members) Rules 2015	
XXVII	NCLT Rules 2016	NCLT 1 – NCLT 18 NCLAT 1 – NCLAT 9
XXVII	Co. (transfer of pending proceedings) Rules 2016	
XXVIII	Co. (mediation and conciliation) Rules 2016	MDC 1 – MDC 2
XXIX	Co. (Miscellaneous) Rules 2014	MSC1- MSC 5
	Co. (adjudication & penalties) Rules 2014	ADJ
	Draft rules of prevention of oppression and mismanagement rules	
	Draft rules for registered valuer	
	Draft rules for removal of name from the register of companies	
	Draft rules for rehabilitation and revival of sick companies	

Categories of Forms to be filed with ROC and other authorities of MCA

Form	Description

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AGILE	Application for GSTIN, ESIC, EPFO numbers.
CG 1	Form for filing application or documents with Central Govt.
INC 1 (RUN)	Application to Reserve of **Unique** Name
INC 2	OPC – Application for incorporation
INC 3	OPC – Nominee consent form
INC 4	OPC – Change in member/ nominee
INC 5	OPC – Intimation of exceeding threshold
INC 6	OPC – application for conversion
INC 7	Application for incorporation of company (other than OPC)
INC-12	Application for grant of License under section 8
INC – 18	Application to regional director for conversion of sec 8 company into company of any other kind
INC 20	Intimation to ROC of revocation/ surrender of license issued under sec 8
INC 21	Declaration prior to the commencement of business or exercising borrowing power
INC 22	Notice of situation or change of situation of registered office
INC 22A	Active Compliant Form "ACTIVE"
INC 23	Application to RD for approval to shift the Registered office from one state to another state or from jurisdiction of one ROC to another ROC within the same state.
INC 24	Application for approval of CG for change of name
INC 27	Conversion of public company into private company or private co. into public company
INC 28	Notice of order to the court or any other competent authority
RD 1	Application to RD
RD 2	Form for filing application to CG (RD)
MSC 1	Application to ROC for obtaining the status of dormant company
MSC 4	Application for seeking status of active company
GNL 1	Application made to ROC
GNL 2	ROC document – schedule IV, Schedule II, MOA and AOA
GNL 3	Details of persons/ directors/ charged/ specified.
GNL 4	Addendum for rectification of defects or incompleteness.
FTE	Application for striking off the name of company under the Fast track exit mode
FC 2	Return of alteration in the documents filed for registration by foreign company
FC 3	Annual accounts along with the list of all principal places of business in India established by foreign company
Form 14	Form for intimating to ROC of conversion of the co. into LLP
CHG 1	Application for registration of creation, modification of charge (other than those related to debentures)
CHG 4	Particulars for satisfaction of charge thereof
CHG 6	Notice of appointment or cessation for receiver or manager
CHG 8	Application to CG for extension of time for filling particulars of registration

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	of creation of creation / modification/ satisfaction of charge Or For rectification of omission or misstatement/ of any particular in respect of creation/ modification / satisfaction of charge.
CHG 9	Application for registration of creation or modification of charge for debentures or rectification of particulars filed in respect of creation or modification o charge for debentures
SH 7	Consolidation, diversion, increases in share capital or members.
SH 8	Letter of offer
SH 9	Declaration of Solvency
SH 11	Return in respect of buy back of securities
DIR 3	Application for allotment of director identification number
DIR 3 KYC	Application for Active DIN of Directors.
DIR-3C	Intimation of Director Identification Number by the company to the Registrar DIN services
DIR 5	Application for surrender of DIN
DIR 6	Intimation of change in particulars of directors to be given to the CG
DIR-9	A Report by a company to ROC for intimating the disqualification of the director
DIR 10	Application for removal of disqualification of director
DIR 11	Notice of resignation of a director to the ROC
DIR 12	Particulars of appointment of directors and the KMP and the changes among them
URC 1	Application by company for registration u/s 366
FC 1	Information to be filed by foreign company
FC-2	Return of alteration in the documents filed for registration by foreign company
FC 3	Annual accounts along with the list of all principal places of business in India established by foreign company
FC 4	Annual Return of a foreign company
1 INV	Statement of amounts credited to IEPF a/c
PAS 2	Information Memorandum
PAS 3	Return of allotment
PAS 4	Private Placement Offer Letter
MGT 3	Notice of situation or change of situation or discontinuation of situation of place where foreign register shall be kept
MGT 6	Persons not holding beneficial interest in shares
MGT 7	Form for filing annual return by a company
MGT 14	Filing of resolution and agreements to ROC
MGT 15	Form for filing Report on Annual General Meeting
MGT 10	Changes in shareholding position of promoters and top ten shareholders
AOC 5	Notice of address at which books of account are maintained
MR 1	Return of appointment of MD or WTD or Manager
MR 2	Form of application to the CG for approval of appointment or re appointment and remuneration or increase in remuneration or waiver for excess or over

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	payment to MD or WTD or Manager and commission or remuneration to directors.
MSC-1	Application to Registrar for obtaining the status of dormant company
MSC 3	Return of dormant companies
MSC-4	Application for seeking status of active company
ADT-1	Information to the Registrar by Company for appointment of Auditor
ADT 2	Application for removal of auditor(s) from his/their office before expiry of term
ADT-3	Notice of Resignation by the Auditor
5 INV	Statement of unclaimed and unpaid amounts
DPT 1	Circular or circular in the form of advertisement inviting deposits
DPT-3	Return of deposits
DPT-4	Statement regarding deposits existing on the commencement of the Act
22	Statutory report
CRA 2	Form of intimation of appointment of cost auditor by the company to Central Government.
CRA-4	Form for filing Cost Audit Report with the Central Government.
I- XBRL	Form for filing XBRL document in respect of cost audit report and other document with the CG
A-XBRL	Form for filing XBRL document in respect of compliance report and other documents with the CG
35A	Information to be furnished in relation to any offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company
ICP	Investor Complaint Form Form for filing complaint against the company
ADJ	Memorandum of appeal
SCP	SERIOUS COMPLAINT FORM
AOC 4 (XBRL)	Form for filing XBRL document in respect of financial statement and other documents with the Registrar
AOC 4	Form for filing financial statement and other documents with the Registrar
AOC 4 (CFS)	Form for filing consolidated financial statements and other documents with the Registrar
Refund	Application for requesting refund of fees paid.
23C	Form of application to the Central Government for appointment of cost auditor.
23D	Information by cost auditor to Central Government
23AC	Form for filing XBRL document in respect of balance sheet and other documents with the Registrar.
23 ACA	Form for filing XBRL document in respect of Profit and Loss account and other documents with the Registrar.
20B	Filing annual return by a company having a share capital with the Registrar.
21A	Particulars of annual return for the company not having share capital
66	Form for submission of compliance certificate with the Registrar
NDH 1	Return of Statutory Compliances
NDH 2	Application for extension of Time

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NDH 3	Half Yearly Return

Schedules

Schedule 1	Formant of MOA and AOA
Schedule 2	Useful life to compute depreciation
Schedule 3	General instruction for preparation of balance sheet and statement of profit and loss of a company
Schedule 4	Code for independent directors
Schedule 5	Conditions to be fulfilled for the appointment of a MD, WTD or a Manager without the approval of the central Govt.
Schedule 6	Infrastructural projects or infrastructural facilities
Schedule 7	Activities which may be included in CSR policy.

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PROSPECTUS AND ALLOTMENT

INTRODUCTION

Section 23 provides the methods of issue of securities by a public company and a private company.

A. Public company may issue securities in the following modes:

1. **PUBLIC OFFER:**

   'Public offer' through issue of prospectus. Public offer includes initial public offer (IPO) or further public offer (FPO) of securities to the public by a company, or an offer for sale of securities to the public by an existing shareholder, through issue of a prospectus;

2. **PRIVATE PLACEMENT:**

   Private placement by complying with the provisions of Section 42 of Companies Act, 2013. The term 'private placement' means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the specified conditions;

3. **RIGHT OR BONUS ISSUE:**

   Rights or bonus issue in accordance with the provisions of the Companies Act and in case of a listed company or a company which intends to get its securities listed, also in accordance with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made there under.

B. A private company may issue securities in the following modes:

1. **Private placement** by complying with the provisions of Section 42 of Companies Act, 20l3;
2. **Rights or bonus issue** in accordance with the provisions of the Companies Act.

Basic concepts and Provisions of Prospectus

Definition: Sec 2(70)

"Any document described or issued as a prospectus and includes a red herring prospectus, shelf prospectus or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate".

Ingredients of Prospectus:

a) There must be an **invitation** offering to the public; (General Public)
b) The invitation must be made "**by or on behalf of the company** or in relation to an intended company";
c) The invitation must be "**to subscribe or purchase**";
d) The invitation must relate to **shares or debentures or such other instrument.**

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Prospectus is Invitation to make offer:

Prospectus is not an offer in itself but an invitation to make an offer.

Application for purchase of shares or debentures or making a deposit constitutes an offer by the subscriber to the company andIt is only on acceptance by the company i.e. allotment that a binding contract comes into existence.

Case law **Immugan Vs. Ranga Ram**

In essence, it means that a prospectus is an invitation issued to the public to offer for purchase / subscribe shares or debentures of the company.

Case law **Nash Vs. Lande**

But to be a prospectus, it must be 'issued to the public. A single private communication does not satisfy the term "issue".

Case law **South of England natural gas and petroleum Co. Ltd.**

"Public" is a generalwordandincludes any sectionof the public this means that if a document inviting person to buy shares is issued, for example, toall advocates or to all doctors, or to all foreigners living in India, or to all Indian citizens, or to all shareholders in a particular company it will still be issuedto the public within the meaning of the Act.

A document is deemed to be issued to the public, if the invitation to subscribe for share capital is such as-to be open to anyone who brings his money and applies on prescribed form, whether the prospectus was addressed to him or not. The test is not who receives the document, but who can apply for shares in response tothe invitation contained in it.

Case Law **PramathaNathSanyal v. Kali Kumar Dutt**

Advertisement in newspaper to invite application for purchase of remaining shares of a company is prospectus.

In this case, the directors were penalized for not complying with the requirements of filing a copy thereof with Registrar of Companies.

Case Law **Government Stock and Other Securities Investment Co. Ltd v. Christopher**

It was held that, a circular issued by a company to the shareholders of other companies to acquire their shares held in those companies and issue its own shares in exchange of those shares did not amount to be prospectus, as there is no public issue. It was pointed out that the circular did not involve an offer for the purchase of any shares. The shares in question were unissued shares of a new company, so that they could not be the subject of an offer for purchase. Thus, the circular was not a prospectus, but only the communication of an offer to exchange shares in the new company for the shares in the other existing companies.

Case Law **South of England Natural Gas and Petroleum Co. Ltd,1911**

It was held that “Public” is a general word, and includes any section of the public. If a document inviting persons to buy shares is issued, for example, to all advocates, or to all doctors or to all Indian citizens, or to all shareholders in a particular company, it will be deemed to be issued to the public within the meaning of the Act. In the above case, 3000 copies of a document in the form of

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a prospectus were sent out and distributed among the members of certain gas companies only. It was held that the documents so sent and distributed was a prospectus issued to the public.

When prospectus is not required to be issued:

1. When shares/debentures are issued to existing shareholders /debenture holders.
2. When issue relates to shares or debentures uniform in all respect with in or quoted in a RSE.
3. When person is bonafide invitee to enter an underwriting agreement.
4. Where shares are not offered to public.

Dating of Prospectus Section 26

The prospectus must be **dated**. The date on the prospectus shall, unless the contrary is proved, be taken as the date of the **publication of the prospectus**.

Contents of Prospectus

1) Every prospectus issue by or on behalf of a public company either with reference to its formation or subsequently or by on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the SEBI in consultation with the CG:

   Provided that until the SEBI specifies the information and reports on financial information under this sub section, the regulation made by the SEBI under SEBI Act 1992, in respect of such financial information or reports on financial information shall apply.

   a) Omitted
   b) Omitted
   c) Make a declaration about the compliance of the provisions of this act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this act, SCRA 1956 and SEBI act 1992 and rules and regulations made thereunder;
   d) Omitted

Expert to be an Independent Person Section 26

A prospectus shall not include a statement purporting to be made by an expert, unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion, or in the management, of the company and give his consent to issue of prospectus.

Registration of Prospectus

A copy of prospectus must be filed with the **ROC** on or before its publication for registration. The copy sent for registration must be signed by every person who is named in the prospectus as a **director or a proposed director** of the company or by his **duly authorized agent.**

The following documents must be attached to the copy of prospectus filed with the **ROC**:

i. The **consent of the expert** mentioned in the prospectus, if his report is included in the prospectus;
ii. The consent in writing of the persons**,** if any, named in the prospectus as the **auditor, legal advisor, attorney** etc., to the issue or broker of the company to act in that capacity; and

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iii. A copy of the **underwriting agreement,** if any.

The prospectus must contain a statement that a copy has been delivered for registration, also indicating the requisite documents (giving names) delivered with it.

The prospectus must be issued **within 90 days** of delivery of a copy of the same to the ROC, either by newspaper advertisement or otherwise.

When Registrar must refuse registration of Prospectus

Section 26 provides that the ROC shall not register a Prospectus, if –

a) It is not dated;
b) It does not have the prescribed contents, reports and declarations;
c) It contains statements or reports of experts engaged or interested in the formation or promotion or management of the company;
d) It includes a statement purported to be made by an expert without a statement that he has given has not withdrawn his consent to the manner of its inclusion therein;
e) It does not contain consent in writing of directors;
f) It is not accompanied by the consent in writing of the auditor, legal advisor, attorney, etc. To the issue or broker, if named in the prospectus to act in that capacity.

ASSOCIATED TERMS OF PROSPECTUS

Voluntary Statement in Prospectus

- In addition to the compulsory particulars, any other information may be, and usually is, volunteered in the prospectus. Thus any statement, which is given at the **volition of the company without the requirement of law**, is known as voluntary statement in prospectus.
- The intending buyer of shares is entitled to all true disclosures in the prospectus. A prospectus must therefore, tell the truth, the whole truth and not but the truth.
- Also, it must not conceal any fact, which ought to be disclosed. In brief, the true nature of the company's venture and the position should be disclosed. This is called the **golden rule** as to the framing of prospectus.
- It is the responsibility of those who issue the prospectus to be truthful in all respects for framing a prospectus, the golden rule has been laid down by Justice Kindersely in **New Brunswick and Canada rly. And land Co. vs. Muggeridge.**
- Those who issue a prospectus hold out to the public great advantages which will accrue to the person who will take shares in the proposed undertaking. Public is invited to take shares on the faith of the representation contained in the prospectus. The public is at the mercy of the company promoters.
- In the case of **R.V. vs. Kylsant 1932**, the prospectus declared that dividends of 5% to 8% has been regularly paid over a long period. The truth was that the company has been incurring substantial

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- Losses during the last 7 years preceding the date of the prospectus and dividends had been paid out of the realized capital profits.
- It is thus obligatory on the part of those responsible for the issue of prospectus not only to state accurately all the relevant facts but also not to omit any fact, which may be relevant for the prospective investor to know about the company.

Abridged Prospectus Section 2(1)

A memorandum containing such salient features of the prospectus as may be specified by SEBI by making regulation in this behalf.

Section 33➔ No application forms can be issued by a company inviting subscription for any securities unless it is accompanied by an 'abridged prospectus'.

Exceptions:

a) The form of application is issued to the **existing security holders** of the company, by way of Rights Issue;
b) The form is issued in connection with an invitation to a person to agree **to underwrite** the securities; and
c) The form is issued in relation to securities which are **not offered to the public** (private placement cases).

It may be noted that a copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.

Deemed Prospectus or Prospectus by Implication [Section 25]

Any document by which the offer or sale of shares or debentures to the public is made shall for all purposes be treated as prospectus.

The document 'Offer for Sale', is **invitation to the general public** to purchase the shares of a company **through an intermediary**, such as an issuing house or a merchant bank. A company may allot or agree to allot any shares or debentures to an 'Issue house' without there being any intention on the part of the company to make shares or debentures available directly to the public through issue of prospectus. This issue house in turn makes an 'Offer for Sale' to the public.

In order to constitute 'offer for sale', either of the two conditions must be satisfied:

- 'Offer for Sale' to the public was made **within 6 months after the allotment** or agreement to allot; **or**
- At the date when the offer was made, the **whole consideration** to be received by the company in respect of the securities had not been received by it.

It is an exception to the issue of prospectus. Here, the Company allots the shares to Issue House, which in turn makes an "offer for sale" to the public. The document by which an "offer for sale" is made by Issue House, although not being issued by the company, shall be deemed to be a prospectus issued by the company. That is why the document by which an Issue House makes an offer for sale is

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known as deemed prospectus or prospectus by implication.

Further, Section 28 permits certain members of a company, in consultation with Board of Directors, to issue the whole or a part of their holdings of shares to the public. The document by which the offer of sale to the public is made shall be deemed as prospectus issued by company.

Shelf Prospectus [Section 31]

Meaning: A prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

This section permits any class or classes of companies as prescribed by SEBI to file a shelf prospectus with the Registrar at the stage of the first offer of securities for a period of one year. Thus, where a company wishes to access capital market more than once during a year, it need not issue further prospectus in respect of a second or subsequent offer of securities included in such prospectus for a period of one year.

A company filing a shelf prospectus, however, is also required to file information memorandum containing all material facts of new charges created, and changes in financial position of the company with the Registrar which occurred within 1 month prior to the issue of a 2nd or subsequent offer under shelf prospectus.

Where a company has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company shall intimate the changes to such applicants. If the applicant expresses a desire to withdraw their application, the company shall refund all the monies received as subscription within 15 days thereof.

The concept of 'shelf prospectus' will save company's expenditure and time in issuing a new prospectus, every time they wish to issue securities to the public within 1 year.

Red Herring Prospectus [Section 32]

A company can issue red-herring prospectus prior to issue of a prospectus. The expression "red-herring prospectus" means a prospectus which does not include complete particulars of the **quantum or price** of the securities included therein.

A company proposing to issue a red herring prospectus shall file the same with the ROC at least 3 days prior to the opening of the subscription list and the offer. Upon the closing of the offer of securities, the company is required to file with the ROC of Companies and the SEBI, prospectus stating therein the total capital raised, and the closing price of the securities and any other details as are not included in the red herring prospectus.

'Red Herring Prospectus concept has been introduced to facilitate Book Building method for public issue of securities. Red herring prospectus includes either the floor price of the securities offered or a price band along with the range within which the bids can move. The applicants bid for the shares quoting the price and the quantity that they would like to bid at.

Disclosures required in prospectus:

Section 26 itself contains disclosures requirements. Further disclosures requirements are specified in rules 3,4,5 and 6 of companies (prospectus and allotment of securities) rules 2014.
Rule 3: information to be stated in prospectus.
Rule 4: reports to be set out in prospectus.
Rule 5. Other matters and reports to be stated in prospectus.
Rule 6: period for which information to be provided in certain cases.

Disclosure regarding CFO and sources of promoter's contribution:

The 2013 act requires disclosure in prospectus of names and address of CFO, about source of Promoter's contribution.

Disclosures of related party transactions:

Related party transaction entered during the last 5 years to be disclosed in the prospectus. (Rule 5(6) of companies (prospectus and allotment of securities) rule 2014.

Disclosures of Audit qualifications:

Summary of reservations, qualifications or adverse remarks of auditors in last 5 financial years and corrective steps taken on proposed to be disclosed in prospectus. (Rule 5(7) of companies (prospectus and allotment of securities) Rule 2014).

Disclosure of material facts:

Details of acts of material frauds committed against the company in last 5 years (Rule 5(9) of companies (Prospectus and allotment of securities) Rule 2014).

Remedies for Misrepresentation in the Prospectus

(a) Remedies against the Company

- The 1st remedy against the company is to **rescind the contract.**

  A person, who takes shares on the faith of a prospectus, containing false statements, may apply to the NCLT for the contract to be set aside, and his name to be struck off from the register of members. He may also claim his money back. But the allottees must act within reasonable time, before any proceedings to wind up the company have been commenced. He will lose his right-to rescind if he attempts to sell the shares or attends a general meeting of the company, or receives dividends.

- The 2nd remedy against the company is **to sue** the company for damages for deceit.

(b) Remedies against Directors/ Promoters/Expert

Where a mis-statement or untrue statement occurs in a prospectus, there may arise **civil as well criminal liability** for the directors, promoters, expert, etc.

Criminal Liability for Mis-statement in Prospectus [Section 34]

Where a prospectus, issued, circulated or distributed, includes any statement which is untrue or misleading, every person who has authorised the issue of such prospectus shall be held guilty for **fraud** punishable with imprisonment and fine under section 447.

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Section 36 ➔Punishment for any person who fraudulently induces persons to invest money by making statement which is false, deceptive, misleading or deliberately concealing any material facts. He will be held guilty for fraud punishable with imprisonment and fine under section 447, an offence which is non-compoundable.

Section 447 ➔ Penalty for fraud
If the fraud involves an amount less than Rs. 10 lakh or less than 1% of T.O. of the co, (w.i.l) and does not involve public interest → imprisonment up-to 5 years OR with Fine upto Rs. 20 Lakhs OR with both.

If fraud involve an amount of at least Rs. 10 Lakh or 1% of the T.O. of the company (w.i.l)→Imprisonment →Minimum**6 months up-to 10 yrs. AND** Fine →Minimum **Amt involved in the fraud**, up to **3 times** the amount involved in the fraud.

If fraud involves public interest➔the term of imprisonment →Minimum3 years and Maximum 10 years.

Civil Liability for Mis-statement in Prospectus

Section 35 makes the following persons liable to pay compensation for loss or damage sustained by reason of mis-statement/untrue statement or inclusion or omission of any matter in the prospectus:

1. Every person who is a director of the company at the time of issue of prospectus;
2. Every person who has authorized himself to be named and is named in the prospectus as a director [proposed directors];
3. Every person who is a promoter of the company;
4. Every person who has authorized the issue of the prospectus; and
5. Every person who is named in the prospectus as an expert.

Any of aforesaid persons shall not be liable for civil action, if he proves any of the following:

i. That having consented to become a director he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;

ii. That the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent.

iii. That as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent to issue the prospectus and had not withdrawn that consent before filing of a copy of the prospectus with the ROC or the defendant knowledge, before allotment thereunder.

Action by affected Persons [Section 37]

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Any person, group of persons or any association of persons who have been affected by any misleading statement or the inclusion or omission of any matter in the prospectus can file a suit or initiate any other action u/s 34, 35 or 36 of the Act. This is known as **Class Action Suit**
AND
It may be noted that the right to Claim compensation for any loss or damage sustained by reason of any misrepresentation in a prospectus is available only to a person who has "subscribed" for shares or debentures on the faith of the prospectus containing misrepresentation. The word 'subscribed' denotes that the shares were acquired directly from the company by allotment.

Case law **Peek Vs. Gurney**

A subsequent purchase of shares in the open market has no remedy against the company or the directors or promoters.

Case Law **Andrews v. Mockford**

The directors sent to A, a prospectus of the company which they knew would be a sham in order to induce A to purchase shares therein. A did not subscribe for the shares at that time. The prospectus, having produced but a scanty subscription for shares, the directors thereupon fraudulently published a telegram in newspaper. A believing in the truth of the telegram was induced to purchase shares in the open market. The directors were held liable for the systematic fraud.

"the function of the prospectus was not exhausted, and the false telegram was brought into play by defendants to reflect back upon and countenance the false statements in the prospectus"

Miscellaneous Provisions

Powers of SEBI [Section 24]

SEBI shall regulate the matters relating to issue and transfer of securities and non-payment of dividend by listed companies or those companies which intend to get their securities listed. Further, power relating to forward dealing and insider trading has been delegated to SEBI for listed companies or the companies which intend to get their securities listed.

However, the powers relating to all other matters and relating to prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in "the Act, shall be exercised by the Central Government, NCLT or the Registrar of Companies, as the case may be.

Variation in Terms of Contract or Objects in Prospectus [Section 27]

Section 27 provides that where the company has raised the money from public through prospectus and has any unutilized amount out of the money so raised, it shall vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued only by passing a special resolution through postal ballot and providing exit opportunity to the dissenting shareholders.

Public Offer of Securities to be in Dematerialized Form [Section 29]

This section mandates that every company making public offer and such other class or classes of companies as may be prescribed, shall issue the securities only through dematerialized form. Other companies may issue securities in physical or in dematerialized form.

Punishment for Impersonation [Section 38]

This section provides punishment for those persons who apply in fictitious name or make multiple applications in different names or different combination of surnames or otherwise induces companies to allot shares in fictitious name. Such persons will be held guilty of fraud under section 447, an offence which is non- compoundable.

Where a person has been convicted, the court has been empowered to order disgorgement of any gains made by and disposal of such securities in possession of such person. The amount received through disgorgement or disposal of securities shall be credited to the Investor Education and Protection fund.

Private Placement (Sec 42)

1. A company may, subject to the provisions of this section, make a private placement of securities.
2. A private placement shall be made only to a select group of persons who have been identified by the Board (herein referred to as "identified persons"), whose number **shall not exceed 50** or such higher number as may be prescribed [excluding the QIB and employees being offered securities under a scheme of ESOP], in a financial year **however the proposal has been previously approved by the shareholders of the company, by a special resolution for each of the offers or invitations.**
   - An offer or invitation to subscribe securities under private placement shall not be made to persons more than 200 in the aggregate in a financial year.
   - Offer or invitation made to QIB or employee of co. under ESOP shall not be considered while calculating the limit of 200 persons.
   - Note: the restrictions aforesaid would be reckoned individually for each kind of security that is equity share, preference share or debenture.
3. A company making private placement shall issue private placement offer and application in Form **PAS 4** serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within 30 days of recording the name of such person.

   Provided further that No other person shall be allowed to apply through such application form and any application not conforming to this condition shall be treated as invalid.

   Provided that the private placement offer and application shall not carry any right of renunciation.
4. Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person along with subscription money paid either by cheque or demand draft or other banking channel and not by cash:

   Provided that a company shall not utilize monies raised through private placement unless allotment is made and the return of allotment is filed with the **ROC** in accordance with sub-section (*8*).
5. The payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities and the company shall keep the record of the bank account from where such payment for subscription has been received

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Provided that monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application

Provided further that the provisions of this sub-rule shall not apply in case of issue of shares for consideration other than cash. (2018)

6. No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company:

   Provided that, subject to the maximum number of identified persons, a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

7. A company making an offer or invitation under this section shall allot its securities within 60 days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within 15 days from the expiry of 60 days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of 12% p.a. from the expiry of the 60th day:

   Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilized for any purpose other than—

   a) For adjustment against allotment of securities; or
   b) For the repayment of monies where the company is unable to allot securities.

8. No company issuing securities under this section shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an issue.
9. A company making any allotment of securities under this section, shall file with the ROC a return of allotment within 15 days from the date of the allotment in PAS 3 + Fees, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.
10. If a company defaults in filing the return of allotment within the period prescribed u/s (*8*), the company, its promoters and directors shall be liable to a penalty for each default of Rs. 1,000/- for each day during which such default continues but not exceeding Rs. 25 lakhs.
11. If a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or Rs. 2 Cr, whichever is lower, and the company shall also refund all monies with interest to subscribers within 30 days of the order imposing the penalty.
12. Notwithstanding anything contained in sub-section (*9*) and sub-section (*10*), any private placement issue not made in compliance of the provisions of sub-section (*2*) shall be deemed to be a public offer and all the provisions of this Act and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be applicable.'
13. The company shall maintain a complete record of private placement offers in Form PAS-5.

***Explanation* I: -** "private placement" means any offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in this section.

***Explanation* II: -** "QIB" means the qualified institutional buyer as defined in the **SEBI** (ICDR) Regulations, 2009, as amended from time to time, made under the SEBI Act, 1992.

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***Explanation* III:-** If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognized stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2018 (7th Aug 18)

A company shall not make an offer or invitation to subscribe to securities through private placement unless the proposal has been previously approved by the shareholders of the company, by a special resolution for each of the offers or invitations:

Explanatory statement shall contain following disclosure –

a. Particulars of the offer + date of Board resolution.
b. Kinds of securities offered and its price.
c. Basis or justification for the price.
d. Name and address of concerned valuer.
e. amount to be raised by issue of such securities;
f. material terms of raising such securities, proposed time schedule, purposes or objects of offer, contribution being made by the promoters or directors either as part of the offer or separately in furtherance of objects; principle terms of assets charged as securities.

Provided further that Special resolution shall not be required on to offer or invitation of NCD, if amount to be raised does not exceed limit specified u/s 180(1)(c) and only a Board resolution shall be sufficient.

Provided also that if limit exceeds it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitations for such debentures during the year.

Provisions of Sub rule 2 shall not be applicable to -

A) NBFC
B) Housing finance co.

if they are complying with regulations made by the Reserve Bank of India or the National Housing Bank in respect of offer or invitation to be issued on private placement basis.

Allotment of securities

Meaning

Allotment of securities means an act of appropriation by the Board of directors of the company of the previously un-appropriated capital of a company of a certain number of securities to persons who have made applications for securities. It is on allotment that securities come into existence.

General Principles Regarding Allotment

With regard to the allotment of securities, the following general principles should be observed

in addition to the statutory provisions:

1. The allotment should be made by proper authority i.e., the Board of directors of the company, or a committee authorized to allot securities on behalf of the Board. Allotment made without proper authority will be invalid.
2. Allotment of securities must be made within a reasonable time. An applicant may refuse to take securities, if the allotment is made after a long time.
3. The allotment should be absolute and unconditional.
4. The allotment must be communicated. Posting of letter of allotment will be taken as a valid communication even if the letter is lost in transit or delayed in transit.

Statutory Provisions Regarding Allotment [Sections 39 & 40]

The Companies Act, 2013 lays down the following conditions to be fulfilled before a company proceeds to allot securities:

1. **Application Money:** The company must have received in cash the amount payable on application, which must not be less than 5% of the nominal value of the securities or such other amount or percent as may be specified by SEBI; and deposited the amount received in a separate account (Escrow Account) in a Scheduled Bank before making any allotment. Such money can be utilized only for the following two purposes:
   - For adjustment against allotment of securities, where listing is permitted; or
   - For repayment of money, where the company is for any other reason unable to allot securities.
2. **Minimum Subscription:** The minimum subscription as provided in the prospectus must have been received within 30 days from the date of issue of the prospectus or such other period as may be specified by SEBI. In case of non-compliance, the issue will fail and the entire amount is to be repaid, without interest, within 15 days from the date of closure of issue. Beyond 15 days, the directors of the company, who are officers in default, become liable to repay the money with an interest of 15% p.a.
3. **Listing Permission:** Every company making public offer shall, before making such offer, make an application to one or more recognized stock exchange and obtain permission for the securities to be dealt with in such stock exchange or exchanges. Where a prospectus states that such an application has been made, the name of the stock exchange has to be mentioned where the securities are to be dealt with. Any allotment without permission of the stock exchange shall be void.

Return of Allotment

Section 39 provides that within 30 days of the allotment of securities, a company must send to the Registrar, a report in e-Form No. PAS.3, known as the return of allotment. It must contain the following particulars/ documents:

1. A list of allottees stating their names, address, occupation and number of securities allotted to each of the allottees.
2. Contracts in writing, under which securities have been allotted for any consideration other than cash, must be produced for examination of the Registrar. If the contract is not in writing, its particulars are to be provided in e- Form No. PAS 3. A report of a registered value in respect of the valuation of the consideration shall also be attached.
3. Where bonus securities have been allotted, a copy of the resolution of the shareholders, authorizing the issue of such securities should also be attached with the return.

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UNDEWRITING COMMISSION

When securities are offered to the public, a company would naturally like to ensure success of the issue. It may, therefore, make an agreement with financial institutions, bank, etc., who in consideration of a commission, agree to subscribe for the securities to the extent to which the securities are not taken by the public. The commission so referred to is known as underwriting commission. Thus, underwriting is an insurance against under-subscription.

Section 40 of the Companies Act, 2013 permits a company to pay commission (including underwriting commission), to any person who, subscribes or agrees to subscribe; or procures or agrees to procure subscription for any securities or debentures of the company, on the fulfilment of certain conditions.

The conditions, which must be fulfilled for the payment of underwriting commission, are as follows:

a) The payment of the commission must be authorized by the articles of the company.
b) The rate of the commission must not exceed 5% of the price at which the securities have been issued or any lesser amount prescribed by articles. In the case of debentures, the rate of the commission must not exceed 2.5% or any lesser amount prescribed by articles;
c) Underwriting commission shall not be paid on those securities which are not offered to the public for subscription;
d) Commission may be paid out of the proceeds of issue or profits of the company or both;
e) The name of the underwriter and rate of commission must be disclosed in the prospectus;
f) The prospectus should also indicate the number of securities or debentures which have been underwritten; and
g) A copy of underwriting agreement should be delivered to the Registrar along with the prospectus.

Issue of securities in Dematerialised Form (Rule 9A of PAS amendment rules 2018)

1. Every unlisted public co. shall issue securities only in demat form and facilitate dematerialisation of all its existing securities as per depositories act 1996 and regulations made thereunder.
2. Every unlisted public co. making any offer for issue of any securities or buyback of securities or issue of bonus shares or right offer shall ensure that before making such offer, entire holding of securities of its promoters, directors, KMP has been dematerialised.
3. Every security holder of unlisted public co. –
   a. Who intends to transfer such securities on or after 2nd Oct 2018, shall get such securities dematerialised before the transfer. OR
   b. Who subscribes to any securities of an unlisted public company (whether by way of pvt. Placement or bonus shares or right offer) on or after 2nd Oct, 2018 shall ensure that all his existing securities are held in Demat form before such subscription.
4. Every unlisted public co. shall facilitate dematerialisation of all its existing securities by making necessary application to a depository and shall secure international security Identification Number (ISIN) for each type of security and shall inform all its existing security holders about such facility.

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5. Every Unlisted public company shall ensure that –
   a. It makes timely payment of fees (admission as well as annual) to the depository and RTA as per the agreement executed between parties;
   b. It maintains security deposit, at all times, of not less than 2 years' fees with the depository and RTA, in such form as may be agreed between the parties;
   c. It complies with the regulations or directions or guidelines or circulars, if any, issued by the SEBI or Depository from time to time with respect to dematerialisation of shares of unlisted public companies and matters incidental or related thereto;
6. No unlisted public company which has defaulted in sub rule 5 shall make offer to any securities or buyback its securities or issue any bonus or right shares till the payments to depositories or RTA are made.
7. The provisions of Depository act 1996, SEBI (Depositories and partcipants) Regulations, 1996 and SEBI(RTA) Regulations, 1993 shall apply mutatis mutandis to dematerialisation of securities of unlisted public companies.
8. Every unlisted public company governed by this rule shall submit PAS 6 to the ROC with prescribed fees within 60 days from conclusion of each half year duly certified by a PCS/ PCA.
9. The company shall immediately bring to the notice of the depositories any difference observed in its issued capital and the capital held in demat form.
10. The grievances, if any, of security holders of unlisted public companies under this rule shall be filed before the IEPF authority.
11. This rule shall not apply to an unlisted public company which is: a Nidhi, a Govt. co., or a WOS.

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SHARE CAPITAL OF A COMPANY

INTRODUCTION

In relation to a company limited by shares, the word capital means share capital; the capital or figure in terms of so many rupees divided into shares of fixed amount.

In other words, the contributions of persons to the common stock of the company form the capital of the company.

In Company Law, the "Capital" is the share capital of a company, which is classified as:

a) **Nominal, Authorised or Registered Capital:** As per Section 2(8), "authorised capital" or "nominal capital" means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.

b) **Issued Capital:** As per Section 2(50), "issued capital" means such capital as the company issues from time to time for subscription. It is that part of the authorised or nominal capital which the company issues for the time being for public subscription and allotment. This is computed at the face or nominal value.

c) **Subscribed Capital:** According to Section 2(86), "subscribed capital" means such part of the capital which is for the time being subscribed by the members of a company. It is that portion of the issued capital at face value which has been subscribed for or taken up by the subscribers of shares in the company. It is clear that the entire issued capital mayor may not be subscribed.

d) **Called up Capital:** As per section 2(15), "called-up capital" means such part of the capital, which has been called for payment. It is that portion of the subscribed capital which has been called up or demanded on the shares by the company

e) **Paid-up Share Capital:** As per section 2(64), "paid-up share capital" or "share capital paid-up "means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called.

Reserve Capital

This is that part of uncalled capital of the company, which can be called up, only in the event of its winding up.

A limited company may, by a special resolution, determine that a portion of its uncalled capital shall be called up.

- In the event of winding up
- For the purpose of winding up only.

Reserve capital cannot be turned into uncalled capital without the leave of the tribunal.it is available only for the creditors on the winding up of the company. The company can neither charge reserve capital nor cancel it in a reduction of capital.(Midland Rly Carriage Co.)

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Difference between Reserve Capital and Capital Reserve

Reserve capital	Capital Reserve
It is that part of the uncalled capital which the company cannot demand except company being wound up.	It is created by the accumulation of profits out of capital profit or earning.
Creation of reserve capital is not mandatory.	It is mandatory to create capital reserve in case of profit.
Disclosure of reserve capital is not entertained in the balance sheet of the company.	Capital reserve is disclosed under the head reserve and surplus on the liabilities side of balance sheet.
Reserve capital cannot be used to write off capital losses.	Capital reserve can be used to write off capital losses or for the issue of bonus shares.

DEFINITION AND MEANING OF SHARE: [Section 2(84)]

Share means **share in the share capital of a company**; and **includes stock**. It represents the interest of a shareholder in the company, measured for the purposes of liability and dividend. It attaches various rights and liabilities.

By its nature, a share is not a sum of money but a bundle of rights and liabilities. A share is a right of participation in the profits of a company, while it is a going concern and declares dividend; and a right to participate in the assets of the company, when it is wound up.

Share, debentures or other interest of any member in a company shall be movable property. It shall be transferable in any manner provided for in the articles of association of the company. A member may transfer any "other interest" in the company in the manner provided in the articles. **For example:** rights attached to a member in a guarantee company may be made transferable by making a provision in the Articles of the company.

Kinds of Shares (Section 43)

There are two types of shares:

1. Preference share and
2. Equity share.

Preference Share: A preference share is a share which fulfils the following 2 conditions:

- That in respect of **dividends,** in addition to the preferential rights to the amounts with respect to dividend, it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;
- That in respect of **capital,** in addition to the preferential right to the repayment, on a winding up, of the amounts aforesaid, it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.

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- In simple terms, preference share capital must have priority both regards to dividend a well as capital.

Kinds of Preference share Capital

1. **Cumulative/ Non-Cumulative Preference shares:**
Cumulative preference shares carry the right to receive dividend of the past and current year out of the profits of any particular year.

The accumulated arrears of dividends shall be paid, if any dividend is declared in subsequent years, before any dividend is paid to equity shareholders. All preference shares are presumed to be cumulative unless the contrary is stated in the Articles or in terms of issue. Non-cumulative preference shares are entitled to fixed rate of dividend out of profits of each year. Unclaimed dividend of previous year due to lack of profits cannot be claimed out of profits of subsequent years.

2. **Participating / Non-participating preference shares**
Sometimes, after paying dividend to equity shareholders, a company may be left with surplus profits. Again, in the winding up, after paying back the preference and equity share capital there may be surplus assets. The question that may arise is whether the preference shares are entitled to participate in the surplus profits or surplus assets or both. If the preference shareholders are entitled for either or both, then such preference shares are known as participating preference shares. Otherwise, they are non-participating preference shares. Unless, otherwise stated in the Articles, all preference shares are deemed to be non-participating.

3. **Redeemable /Irredeemable preference shares (Sec 55)**
Redeemable preference shares are to be redeemed i.e. taken back from the shareholder after paying them.
The above Section, read with the Rules, provides that a company, if so authorized by its articles of association, may issue redeemable preference shares, subject to the following conditions:
   a) The issue of such shares has been authorized by passing a **special resolution** in the general meeting of the company;
   b) The company, at the time of such issue of preference shares, has **no subsisting default**, in the redemption of preference shares issued either before or after the commencement of this Act or in payment of dividend due on any preference shares; and
   c) The company cannot issue preference shares which is **redeemable after the expiry of 20 years** from the date of its issue.

   However, a company engaged in the setting up and dealing with of **infra structural projects**, as defined in **Schedule VI** to this Act, may issue preference shares for a period **exceeding 20 years** but **not exceeding 30 years**, subject to the redemption of a minimum 10% of such preference shares per year from the 21st year onwards or earlier, on proportionate basis, at the option of the preference shareholders.

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Note: →A company cannot issue irredeemable preference shares.

Conditions for redemption of Preference share capital:

i. Shares should be **fully paid-up;**
ii. Share may be redeemed **only out of the profits** available for distribution as dividend or out of proceeds of a fresh issue of shares made for the purpose of redemption;
iii. Where the shares are redeemed out of the profits available for distribution as dividend, a sum equal to the nominal amount of the shares redeemed shall be transferred out of profits to the **Capital Redemption Reserve (CRR)Account**, which can be utilized only for the purpose of issuing fully-paid bonus shares, otherwise it shall be deemed to be reduction of share capital; and
iv. If premium is payable on redemption, it must have been provided for **out of profits or out of company's security premium account.**

However, such class of companies as may be prescribed whose financial statements comply with Accounting Standards prescribed for such class of companies cannot utilize securities premium account for providing premium payable on redemption of preference shares or debentures.

It may be noted that where a company is not in a position to redeem its preference shares, it may redeem unredeemed preference shares by issue of further preference shares with consent of holders of 75% in value of such preference shares and the approval of the NCLT.

The NCLT shall while giving, such approval, and order the redemption forthwith of preference shares of such person who have not consented to the issue of further redeemable preference shares.

It may further be noted the fact of redemption of preference shares is required to be intimated to the ROC by filing **Form SH.7within 30 days**.

4. Convertible/ Non-Convertible preference shares

Convertible preference shares carry a right to be converted into equity shares. Preference shares are non-convertible unless otherwise provided in the Articles.

Equity Share

Equity share means share which is not preference share. Following are the important features of equity shares:

- Availability of voting rights.
- No fixed dividend.
- No priority in distribution of surplus assets.

Voting Rights

Section 47 of the Act provides that subject to provision of sec 43, sec 50(2) and Sec 188(1) every

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member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and his voting right on a poll shall be **in proportion to his share** in the paid-up equity share capital of the company.

In case of member of a company limited by shares and holding preference share capital, shall have a right to vote only on -

- Resolutions placed before the company which directly affect the rights attached to his preference shares and,
- Any resolution for the winding up of the company or for the repayment or reduction of its share capital.

Voting right of holder of preference share capital shall be in proportion to his share in the paid-up preference share capital of the company. The proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares. Preference shareholders are entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such class of preference shares are in arrears for a period of **two years** or more.

Further, equity share capital is of two types:

- Ordinary Shares with equal rights
- Shares with Differential Rights

Note: Company may also issue Non-Voting Equity Shares, though such shares are not recognised by Indian Company Law

Equity Shares with Differential Rights [Sec 43(a)]

Equity share capital may be divided on the basis of Equal voting rights and differential rights(DVR) as to dividend, voting rights or otherwise according to the rules.

A DVR share is like an ordinary equity share, but it provides fewer voting rights to the shareholder. The difference in voting rights can be achieved by reducing the degree of voting power. It is ideal for long term investors, typically small investors who seek higher dividend and are not necessarily interested in taking a voting position.

Rule 4 of The Companies (Share Capital and Debentures) Rules, 2014 provide that no company whether it is unlisted, listed or a public company limited by shares shall issue equity shares with differential rights as to dividend, voting or otherwise, unless it complies with the following conditions:

1. There must be an authority in the **AOA** of the company;
2. The company has obtained the approval of the shareholders in a general meeting by way of an **ordinary resolution**. However, in case of Listed company such OR shall be passed by way of Postal Ballot.
3. **The voting power in respect of shares with differential rights of the company shall not exceed 74% of total voting power including voting power in respect of equity**

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shares with differential rights issued at any point of time.;

4. The Company has not defaulted in filing of annual accounts and annual returns for three years; in repaying deposits or paying interest thereon; in redeeming debentures or paying interest there on; or redemption of preference share or paying dividend thereon; or re payment of any term loan or payment of interest thereon to a bank or financial institution; and paying dividend after declaration; and
5. The company has-not been convicted, during the last 3 years, of any offence under SCRA, 1956; SEBI Act, 1992; and FEMA Act, 1999; RBI Act, 1934 or any other special Act, under which such companies being regulated by sectorial regulators.
6. It may be noted that a company cannot convert its equity shares with equal rights into equity shares with differential rights and vice-versa.

AND

According to the Rules the Board's Report for the financial year in which the issue of equity shares with differential rights was completed shall include the following details with respect to DVR shares:

1. The total no. of shares to be issued with differential rights;
2. The details of the differential rights;
3. The percentage of the shares with differential rights to the total post issue paid up equity share capital including equity shares with differential rights issued at any point of time; the reasons or justification for the issue;
4. The price at which such shares are proposed to be issued either at par or at premium; the basis on which the price has been arrived at;
5. In case of private placement or preferential issue -
   - Details of total number of shares proposed to be allotted to promoters, directors and KMP;
   - Details of total number of shares proposed to be allotted to persons other than promoters, director sand KMP and their relationship if any with any promoter, director or KMP;
6. In case of public issue - reservation, if any, for different classes of applicants including promoters, directors or KMP;
7. The percentage of voting right which the equity share capital with differential voting right shall carry to the total voting right of the aggregate equity share capital;
8. The scale or proportion in which the voting rights of such class or type of shares shall vary;
9. The change in control, if any, in the company that may occur consequent to the issue of equity shares with differential voting rights;
10. The diluted Earnings Per Share pursuant to the issue of such shares, calculated in accordance with the applicable AS;
11. The pre and post issue shareholding pattern along with voting rights.

The Rules further provide that the company shall not convert its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice-versa.

Difference between Preference Share and Equity Shares:

Basis	Preference shares	Equity shares
Rate of dividend	Fixed rate of dividend	Rate of dividend on depends upon the amount of profit available.
Preference in	Dividend on the preference shares	Dividend is paid to equity shares after

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payment of dividend	is paid in preference to the equity shares.	payment to preference shares.
Preference in repayment of capital on W/U.	Preference shares have preference to equity shares with regard to the repayment of capital on winding up.	Equity shares are repaid the capital after payment to Preference shareholders.
Redemption	Redeemable preference shares may be redeemed by the company	Equity shares cannot be redeemed.
Voting rights	Preference shareholder can vote only when his special rights as a preference shareholder are being varied.	Equity shareholder can vote on all matters affecting the company

Issue of Shares at a Premium [Section 52]

A company may issue shares at a premium when it is able to sell them at a price above par or nominal value, irrespective of the fact whether the shares are listed on Stock Exchange or not. The rate of premium will be decided by the Board of Directors of a Company.

Section 52 of the Companies Act, 2013 deals with the concept of share or securities premium.

- Security premium cannot be treated as profit and shall not available for distribution as dividend.
- The amount of premium, whether received in cash or in kind must be kept in a separate account, known as the **"Securities Premium Account'**
- The amount of share premium is to be maintained with the same sanctity as the share capital.
- The securities premium account **cannot be treated as free reserves** at it is in the nature of capital reserve.

Section 52(1) The securities premium can be utilized only for the following purposes: -

- Issuing fully-paid bonus shares to members.
- Write-off the preliminary expenses of the company.
- Write-off commission paid or discount allowed, or the expenses incurred on issue of shares or debentures of the company.
- For providing for the premium payable on redemption of any redeemable preference shares or debentures of the Company.
- For the purpose of buy-back of shares or securities **u/s 68.**

Certain class of companies as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies u/s133, can utilise securities premium account only for the following purposes: -

- In paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; **OR**
- In writing off the expenses of or the commission paid or discount allowed on any issue of

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equity shares of the company; **OR**

- For the purchase of its own shares or other securities u/s 68.

Note: If a company proposes to apply share premium for any purpose other than those mentioned above, it must then comply with the requirements of the act with respect to **reduction in share capital.**

Issue of Shares at Discount is prohibited [Section 53]

A company u/s 53 of the Act has been prohibited to issue shares at discount, except in case of issue of sweat equity shares. Any share issued by a company at a **discount ~~discounted price~~** shall be void.

However, 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 as per any guidelines or directions or regulations specified by the RBI under RBI Act 1934 or the banking regulation act 1949.

In case of contravention, the company & every officer in default shall be punishable with **Penalty** which may extend up to an amount equal to an amount raised through the issue of such shares OR Rs. 5 Lakh (whichever is less). And the company shall also be liable to refund all monies received with interest @ 12% p.a. from the date of issue of such shares to the persons to whom such shares have been issued.

Sweat Equity Shares [Section 54]

The concept of 'sweat equity shares' has been introduced in the year 1999by inserting a new amendment in the Companies Act, 1956.

According to **Section 2(88)** of the Act' Sweat Equity Shares' means equity shares issued by the Company to its employees or directors at a discount or for consideration other than cash, for providing know-how or making available rights in the nature of intellectual property rights, or value addition, by whatever name called.

A company may issue sweat equity shares subject to the following conditions: -

1. The shares must be of class already issued.
2. ~~**At least 1 year must have elapsed since the Company get COB**~~ **(Omitted)**
3. The issue must be authorized by a Special Resolution passed by the Company in GM.
4. The resolution must specify number of shares; their current market price; consideration (if any); and the class or classes of directors or employees to whom they are to be issued.

Note: Sweat equity share holders shall be ranked pari passu with other equity shareholders.

Section 53 states that no shares to be issued at discount whereas **Section 54** states that sweat equity shares can be issued at discount. It means that **Section 54** shall override **Section 53**.

For Listed companies, SEBI (Issue of Sweat Equity) Regulations, 2002 shall be applicable, where as for other companies, Companies (Share Capital & Debenture) Rules 2014 shall be

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applicable.

The rules for the purposes of sweat equity has defined 'Employee' so as to mean

1. **A permanent employee** of the company who has been working in India or outside India, ~~for at least the **last** one year.~~ **(w.e.f. 07/05/18)**
2. A **director** of the company, whether a whole time director or not.
3. An **employee or a director** as defined in sub-clauses (a) or (b) above of a **subsidiary,** in India or outside India, or of a **holding company** of the company.

The company shall not issue sweat equity shares for more than 15% of the existing PESC in a year OR shares of the issue value of Rs. 5 Cr. whichever is higher.
Provided that the issue of sweat Equity shares in the company shall not exceed 25% of the PESC of co. at any time.
Provided further that A start-up company may issue sweat equity shares not exceeding 50% of its PSC up to 10 years from the date of its incorporation.

Alteration of Share (Sec 61)

A limited co. having a share capital may, if so **authorized by its AOA**, Alter its share capital in the following manner

- ✓ By increasing the share capital by issuing new shares
- ✓ By consolidating the shares into shares of larger amount.
- ✓ By converting fully paid up shares into stock and vice versa.
- ✓ By sub dividing shares into shares of smaller amount
- ✓ By cancelling shares not taken up

This can be done by an **ordinary resolution** at a general meeting
The ROC has to be notified of the type of alteration made **within 30 days** of such alteration to enable him to make changes in the co.'s MOA and AOA

Where any company fails to comply with the above provisions, such company and every officer who is in default shall be liable to a penalty of Rs. 1000 for each day during which default continues or Rs. 5 Lakh whichever is less.

Reduction of share capital (Sec 66)

A co. limited by share or a co. limited by guarantee and having a share capital may reduce its share capital, subject to confirmation by NCLT, in any of following 3 ways -

1. **Reduction in unpaid capital**
   It may extinguish or reduce the liability on any of its shares in respect of share capital not paid, or

2. **Cancellation of lost paid up capital**
   It may either with or without extinguish or reducing liability on any of its share, cancel any paid up share capital which is lost, or is unrepresented by available assets, or

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3. **Paying off excess paid up capital**
   It may, either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital, which is in excess of the wants of the company.

Procedure for reduction

- There shall be provision in the AOA for reduction of capital
- A special resolution shall be passed in General meeting
- Confirmation of court is also required before affecting the reduction of capital
- Along with NCLT, co. has to make application CG before reduction of capital.
- Similarly, Company has to make application to SEBI before reduction of capital.
- Every creditors of the company shall be entitled to object to the reduction
- The tribunal shall settle a list of the creditors of the company
- The tribunal shall ensure that the creditors objections to reduction-
  - ✓ Have given their consent ; or
  - ✓ Have been discharge ; or
  - ✓ Have been given sufficient security.
- The Tribunal has the discretion to confirm or reject the reduction
- Before sanctioning the reduction, the Tribunal shall satisfy itself that-
  - ✓ The reduction will be fair considering the interest of all the classes of shareholder.
  - ✓ The reduction will not be prejudicial to the interest of creditors.
- The Tribunal may confirms the reduction of capital on such terms as it thinks fit.
- The Tribunal may direct the company to add the word 'and reduction' at the end of the name of the company.
- The company shall delivers to ROC for registration:-
  - ✓ A certified copy of the order of the Tribunal ; &
  - ✓ A certificate copy of the minute approved by the Tribunal
- The registration shall register the order & minute procedure before him. He shall issue a certificate of registration to the company.
- The certificate shall be conclusive evidence that all the requirement of this act with, &respect to the reduction of share capital have been complied with, & that the share capital of the company is such as is started in the minute.
- Reductions shall become effective only on registration of the order & minute of the Tribunal.
- The order of the Tribunal shall be punishable in such manner as may be directed by the court.

Case law **SIEL Ltd. IN re**

The view was that reduction of the share capital of the company is a domestic concern of the company & the decision of the majority would prevail.
If the majority by special resolution decide to reduce the share capital of the company, it has the right to decide to reduce the share capital of the company & it has right to decide how this reduction should be effected. While reducing the share capital, the company can decide to extinguish some of its shares without dealing in the same manner with all other of same class. A selective reduction is permissible within frame work of law for any company limited by shares.

Reduction of share capital without Sanction of NCLT

Surrender of Shares

1. Surrender of shares is equal to and the same as forfeiture

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2. The formalities of forfeiture have to be strictly observed.
3. That is why it is recognized that if circumstances have arisen which would make forfeiture justifiable,
4. The co. may, instead of going to the length of forfeiture, accept from the member a voluntary surrender of his shares
5. The co. act contains no provisions for surrender of shares.
6. Thus, surrender of shares is valid only when AOA provide for the same and:
   i) Where forfeiture of such shares is justified; or
   ii) When shares are surrendered in exchange for new shares of same nominal value

Buy-Back of Shares and securities

A procedure which enables a company to go back to the holder of its shares/ specified securities and offer to purchase from them the shares/ specified securities that they hold.

Purpose

A company would opt for buy - back for the following reasons: -

i. To improve shareholder value - Buy back generally results in higher Earning per share (E.P.S.)
ii. As a defence mechanism - Buy back provides a safeguard against hostile take - overs by increasing promoters' holding,
iii. To provide an additional exit route to shareholders when shares are undervalued or thinly traded.
iv. To return surplus cash to shareholders.

Important Provisions [Section 68]

Following are the important provisions of Section 68:

1. Company may purchase its own shares or other specified securities out of;
   (i) Its free reserves;
   (ii) The Securities premium account; or
   (iii) The proceeds of an earlier issue of shares or other specified securities. However, no buy - back can be done out of proceeds of an earlier issue of same kind of shares/ securities.

2. **For buy - back** purpose, **the following conditions must be fulfilled**-
   (i) Buy-back is authorized by the **AOA** of the Company.
   (ii) A company may, by a **Board Resolution**, buy-back **up to 10%** of the aggregate of paid-up equity capital and free reserves. This Board resolution must be passed at a Board Meeting only and not by circulation.
   (iii) If the company wants to buy-back more than 10% of the aggregate of paid-up equity capital and free reserves but up to 25% of the aggregate of the paid-up capital (equity &preference) and free reserves, then a **Special Resolution** in the general meeting is required.
   Note: The aforesaid limits are to be applied to the amount required for buy-back of such shares/ securities.
   (iv) In the case of buy – back of equity shares only, the buy – back in any financial year shall not exceed 25% of its total paid – up equity capital in that financial year.
   Note: The aforesaid limit is to be applied to the number of shares to be bought back.
   (v) After buy – back, the **debt equity ratio shall be less than or equal to 2:1** i.e., the debt should not be more than twice the equity-after buy – back. Here 'debt' means secured as

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well as unsecured debts; and 'equity' means paid-up share capital and free reserves. However, Central Government may, by order, notify a higher debt equity ratio for a class or classes of companies.

(vi) All the shares or other specified securities for buy-back are **fully paid - up.**

(vii) Buy-back offer shall not be made **within a period of one year** reckoned from the date of the closure of the preceding offer of buy-back, if any.

(viii) If company is listed, then SEBI (Buy-Back of Securities) Regulations; 1998 made by SEBI are complied with; and if the company is not listed, then Companies (Share Capital and Debentures) Rules, 2014 made by Central Government are complied with.

3. The Companies will have to make full and complete disclosure of all material facts in the notice of the meeting at which special resolution is proposed to be passed. These disclosures will include the necessity for buy - back; the time limit for completion of the buy - back; class of securities intended to be purchased; and amount to be invested for buy - back.

4. Every buy - back shall be **completed within one year** from the date of passing the Special-Resolution or Board Resolution, as the case may be. If the company is not able to do so, then the reasons for such failure shall be disclosed in the Directors' Report. Further, in order to pursue the same buy-back, a fresh **Board Resolution** or **Special Resolution**, as the case may be, will be required,

5. The buy - back may be:

(i) From the existing holders on a proportionate basis;

(ii) From the open market; or

(iii) From the employees of the company to whom shares / securities have been issued under a scheme of stock option or as sweat equity.

6. A company can implement buy-back by any of the aforesaid methods but, for a single offer of buy-back, different methods of buy-back cannot be adopted.

7. After passing the special resolution or board resolution and before making buy - back, the company is required to file 'a **declaration of solvency' in Form No. SH.9** with the ROC and also with SEBI, if listed. This declaration of solvency shall be signed by at least 2 directors of the company, one of whom shall be the managing director, if any.

8. The company shall extinguish and physically destroy the shares / securities bought- back within 7 days of the last date of completion of buy - back.

9. The company shall not make any issue of same kind of shares/ securities(including rights shares) within a period of 6 months from the date of completion of buy - back.

Exceptions are: -

i. Bonus issue;
ii. Conversion of warrants;
iii. Stock option scheme;
iv. Sweat equity; and
v. Conversion of preference shares / debentures into equity shares.

10. The Company shall maintain a register of shares / securities bought-back in Form No. SH-10, giving the following details: -

(i) The consideration paid;

(ii) The date of cancellation;

(iii) The date of extinguishment and physical destruction; and

(iv) Such other particulars as may be prescribed.

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11. After the completion of buy - back, the company shall file with the ROC and also with SEBI, if listed, a return in **Form No. SH-11** containing such particulars as may be prescribed, within 30 days of such completion.

12. In case of default, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

13. Specified Securities = Employees' stock option or other securities as may be notified by the Central Government
Shares = Equity shares and Preference Shares.
Free reserves = Reserves which are-free for distribution as Dividend and securities premium account.

Transfer to and Application of Capital Redemption Reserve Account [Section 69]

When a company purchases its own shares out of free reserves or securities premium account, a sum equal to the nominal value of the shares so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet. The capital redemption reserve account may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Circumstances Prohibits Buy-Back [Section 70]

No company shall directly or indirectly purchase its own shares or other specified securities-

- Through any subsidiary company including its own subsidiary companies;
- Through any investment company or group of investment companies; or
- If a default, is made by the company, in the repayment of deposits accepted either before or after the commencement of this Act, interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable there on to any financial institution or banking company: However, the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist.
- No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has not complied with the provisions of **sec 92Annual Return), Sec 123(Declaration** of Dividend), **Sec 127** (punishment **for failure to distribute dividend) and sec 129(Financial Statement).**

Note: Sec 67 provides that a public company cannot give financial assistance to any person for purchasing its own shares.

Further Issue of Capital [Section 62]

Rights Issue of Shares [Section 62(1) (a)]

A rights issue is an offer of a company's shares to its existing shareholders. It gives them the

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first opportunity to purchase a new issue of shares.

This section provides for the issue of "Rights Shares" and states that whenever at any time, it is proposed to increase the subscribed capital by allotment of further shares, such shares shall be offered to the existing holders of equity shares in proportion to the capital paid up or their shares at the time of further issue.

The Company must give notice to each of the equity shareholders, by sending Letter of Offer giving him option to take the share offered to him by the company.

The notice so referred shall be dispatched through registered post or speed post or electronic mode to all the existing shareholders at-least 3 days before opening of the offer.

The shareholder must be informed of the number of shares he has option to buy giving him at least 15 days and not more than 30 days to decide. If the shareholder does not convey to the company his acceptance of the company's offer of further shares, he shall be deemed to have declined the offer.

Unless the articles of the company otherwise provide, the directors must state in the notice of offer of rights shares the fact that the shareholder has also the right to renounce the offer in whole or in part, in favour of some other person.

If a shareholder has neither renounced in favour of another person nor accepted the shares himself, the Board of Directors may dispose of the shares so declined in such manner as it thinks would be most beneficial to the company.

Note: Right issue is also known as Right of First Refusal or Pre-emptive Right of Existing Shareholders.

No need of SR/OR for Startup company up to 10 years from the date of its incorporation. (19th Feb 2019)

EMPLOYEES STOCK OPTION SCHEME SEC 62 (1) (b)

To employees under a scheme of employees' stock option, subject to Special Resolution (Ordinary resolution in case of Pvt. company) passed by company and subject to following conditions as specified under Rule 12 –

i) The issue shall be approved by shareholders by passing Special Resolution.

ii) The company needs to make the relevant disclosures in the explanatory statement annexed to the Notice.

iii) The company granting the option shall determine the price in conformity with the accounting policies (if any)

iv) Separate Approval by Separate Resolution shall be required if company grant option to
   a. Employees of Subsidiary co. or Holding co. OR
   b. To identified employees, during any one year, equal to or exceeding 1% of the issue capital (excluding outstanding warrants & conversions) of the company at the time of grant of option.

v) The company may vary the term of ESOS by passing SR, provided such variation shall not

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be in prejudice to the interest of option holders.

vi) The notice of passing SR for variation shall disclose full details of variation, rationale thereof, details of beneficiary employees.

vii) Minimum period between grant of option and vesting of option shall be 1 year.

viii) Company shall have freedom to specify the lock in period of such shares.

ix) Untill the shares are issued to such employees, they will not have any right to dividend and Vote in the meeting or any other benefit of shareholder.

x) The amount (if any), payable by employee, at the time of granting the option –

a. May be forfeited by the co., if the option is not exercised within prescribed time.

b. May be refunded if the options are not vested due to non – fulfilment of condition.

xi) Option granted shall not be transferable to any other person OR shall not be pledged, hypothecated, mortgaged or otherwise encumbered in any manner.

xii) No person other than employee to whom the option is granted shall be entitled to exercise the option however in case of death of such employee while in employment, such option shall vest in the legal heir or nominee of the deceased employee.

xiii) Such options shall expire, in case of resignation or termination of his employment.

xiv) The BOD shall inter alia disclose in the Director's Report for the year, all the information of ESOS.

xv) A register shall be maintained in FORM SH 6 at Registered office of co. or such other place as the BOD decide and the entries shall be authenticated by CS or other authorised officer.

xvi) If these shares are listed on recognised stock exchange, the ESOS shall be issued as per SEBI Regulations.

Here Employee Means -

a) A Permanent employee of the company who has been working in India or Outside India; OR

b) A director of company, whether a WTD or not but excluding an Independent director OR

c) An employee or director of a subsidiary co. or holding co. of the company

but does not include –

i) An employee who is promoter or a person belonging to the promoter group; or

ii) A director who either himself or through his relative or through anybody corporate, directly or indirectly, holds more than 10% of the outstanding equity shares of the company.

Provided that in case of Start up co., the above conditions shall not apply up to 10 years from the date of its incorporation.

Preferential Allotment or Allotment of Shares Section 62(1)(c)

Company may at any time issue shares to any persons, if it is authorised by a **Special Resolution**, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, **subject to compliance with provisions of chapter III** and such conditions as may be prescribed.

Note: Such issue on preferential basis should also comply with conditions laid down in section 42

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of the Act (private placement).

Note: The price of shares to be issued on a preferential basis by a listed company shall not be required to be determined by the valuation report of a registered valuer.

Under the rules 'Preferential Offer' means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

"Shares or other securities: -means equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date.

Where the preferential offer of shares or other securities is made by a company whose share or other securities are listed on a recognized stock exchange, such preferential offer shall be made in accordance with the provisions of the Act and regulations made by the SEBI, and if they are not listed, the preferential offer shall be made in accordance with the provisions of the Act and rules made hereunder and subject to compliance with the following requirements:

a) the issue is authorized by its articles of association;
b) the issue has been authorized by a special resolution of the members;
c) Securities allotted by way of preferential offer shall be made fully paid up at the time of their allotment.

Case Law **Mrs Promila Bansal vs. Wearwell Cycle Co. (India) Ltd.**

If a notice proposing forfeiture of shares sent by post is returned unserved, the company shall take steps to ascertain correct address before deciding to forfeit shares.

Facts :

The articles of the company provided that the notice was deemed to be served if sent by registered post. A notice was sent to "P" for making payment of unpaid calls, but was received back by the company unserved. Without making any further enquiry about the correct address the company forfeited the shares and also transferred them to another person.

Contention:

"P" filed a petition for rectification and entry of her name in the register.

Decision:

The court held that the deeming provisions of the articles is not applicable if the notice comes back unserved. In the case of forfeited, the technicalities must be strictly observed and service of notice was the most essential pre requisite. The forfeiture was declared void and "P"s name was restored in the register of members.

Completion Period:

The allotment of securities on a preferential basis made pursuant to the special resolution passed are required to be completed within a period of twelve months from the date of passing of the special resolution. Where the allotment of securities is not completed within twelve months from the date of passing of the special resolution, another special resolution shall be passed for

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the company to complete such allotment thereafter.

Rights of Convertible Securities or Non applicability of Section 62

The section provides that nothing in this section shall apply to the increase of the subscribed capital of a company caused by the exercise of an option as a term attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company. It is essential that the terms of issue of such debentures or loan containing such an option have been approved before the issue of such debentures or the raising of loan by a special resolution passed by the company in general meeting.

Compulsory Conversion or Loan or Debentures into Shares

As per Section 62 (4) Where any debentures have been issued, or loan has been obtained from any Government by a company, and if that Government considers it necessary in the public interest so to do, it may, by order, direct that such debentures or loans or any part thereof shall be converted into shares in the company on such terms and conditions as appear to the Government to be reasonable in the circumstances of the case even if terms of the issue of such debentures or the raising of such loans do not include a term for providing for an option for such conversion.

In terms of proviso, where the terms and conditions of such conversion are not acceptable to the company, it may, **within 60 days** from the date of communication of such order, appeal to the Tribunal which shall after hearing the company and the Government pass such order as it deems fit.

Exceptions to Sec 62:

The provision of Sec 62 does not apply:

- To a private company.
- To the increase of the subscribed capital of a company caused by the exercise of an option attached to debentures issued or loans raised by the company.
- To convert such debentures or loans into shares in the company, or,
- To subscribe for shares in the company.

But the terms of issue of such debentures or the terms of such loan should include a term providing for such option and such terms-

Either has been approved by the CG before the issue of debentures or the raising of the loan, or is in conformity with the rules, if any, made by the CG in this behalf and in the case of debentures or loans, has also been approved by a SR passed by the company in GM before the issue of the Debentures or the raising of the loans.

Bonus Share [Section 63]

A company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of-

- Its free reserves;
- The securities premium account; or
- The capital redemption reserve account:

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The section specifically clarifies that no issue of bonus shares shall be made by capitalising reserves created. The bonus shares shall not be issued in lieu of dividend.

When a company has accumulated large free reserves, it issues bonus shares to its equity shareholders. Such an issue would not place any fresh funds in the hands of the company. On the contrary, after a bonus issue it would become necessary for the company to earn more to effectively service the increased capital.

The shareholder will, however, be benefited by way of increased return on investment and increased number of shares in their hands.

The following conditions must be satisfied before issuing bonus shares:

- Bonus issue must be authorized by the **AOA** of the company.
- It has, on the recommendation of the Board, been authorized in the GM of the company;
- It has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
- The partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up;
- It complies with such conditions as may be prescribed.
- Under the rules no company which has once announced the decision of its Board recommending a bonus issue, can subsequently withdraw the same.

Return of Bonus Issue

When a company having a share capital makes any allotment of bonus shares, it must **within 30 days** in **E-form SH-3**, thereafter file with the ROC a return stating the number and nominal amount of such shares comprised in the allotment and the names, addresses and occupations of the allottees and a copy of the resolution authorising the issue of such shares.

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SHARE CERTIFICATE

Certificate No. 1

Share Certificate

Number of shares 25,000

PINNACLE CONSULTING CORPORATION

Registered under the International Business Companies Act 1990
(No 9 of 1990)

Company No. 12,491

Authorized capital of Fifty Thousand United States Dollars
divided into Fifty Thousand Shares of par value One United States Dollar each.

This is to certify that Isabelle Lucas
of 8, rue d'Idalie, 1050 Brussels, Belgium
is the registered holder of 25,000 shares of United States Dollars US$ 1.00 each
numbered 1 to 25,000 inclusive in the above named Company, subject to the
Memorandum and Articles of Association of the said Company.

Given under the common seal of the Company this 24th day of August 1999.

Director / Officer

Director / Officer

SHARE CERTIFICATE [SEC 46]:

- A share certificate is a certificate issued **under the common seal, if any, of the co. or signed by 2 directors or by a director and the CS (if any)** specifying the number of shares held by him and the amount paid on each share.
- The certificate is a statement as against the company that the person, whose name appears on it, is the registered holder of the shares.
- No share certificate is to be issued to member of the company holding shares in electronic form i.e. this section does not apply to shares held by a person as a beneficial owner in depository.

Numbering of Shares [Section 45]

- Every share in a company having share capital shall be distinguished by distinctive number, which creates a distinct identity of shares.
- The concept of distinctive number is not applicable to shares held in electronic form through depository as shares are in fungible mode.
- Fungibility means that any share of a company can be exchanged for any other share of such company.

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Purpose of Share Certificate [Section 46]

A share certificate, shall be documentary evidence of the title of the person to such shares. Such certificate shall specify the shares held by any person.

Where the shares are held in dematerialised form the depository records are the prima facie evidence of the interest of the beneficial owner.

Section 56 (4) provides that every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted-

- within a period of 2 months from the date of incorporation, in the case of subscribers to the memorandum;
- within a period of 2 months from the date of allotment, in the case of any allotment of any of its shares.

The manner of issuance of a certificate of shares or the duplicate thereof, the form of such certificate, the particulars to be entered in the register of members are prescribed under Rules.

Form of Share Certificate

Rule 5(2) of Companies (Share Capital and Debentures) Rules, 2014

Every share certificate shall be in **Form No. SH-1** or as near thereto as possible and shall specify the name(s) of the person(s) in whose favour the certificate is issued, the shares to which it relates and the amount paid-up thereon.

Every share certificate should also state the name of the company and date of issue. In case of listed companies, the size, forms and contents of the share certificate have to be approved by the concerned Stock *Exchange before its issue to the public.*

Sealing and Signing of Share Certificate [Rule 5(3)]

(Amended on 10/04/2018)

Every certificate shall specify the shares to which it relates and the amount paid-up thereon and shall be signed by two directors or by a director and the CS, wherever the company has appointed company secretary.

In case the company has a common seal it shall be affixed in the presence of persons required to sign the certificate.

Explanation. – For the purposes of this sub-rule, it is hereby clarified that -

a) in case of an OPC, it shall be sufficient if the certificate is signed by a director and the CS or any other person authorised by the Board for the purpose.

b) a director or company secretary shall be deemed to have signed the share certificate if his signature is printed thereon as facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography or digitally signed, but not by means of rubber stamp, provided that the director or company secretary shall be personally responsible for permitting the affixation of his signature thus and the safe custody of any machine, equipment or other material used for the purpose.

Issue of Share Certificates-

Authorisation: When a company issues any capital, no share certificate shall be issued except:-

- In pursuance of a Board resolution; and
- On surrender to the company of its letter of allotment.

Provided that if the letter of allotment is lost or destroyed, the Board may impose such reasonable conditions as to evidence and indemnity and the payment of out-of-pocket expenses incurred by the company in investigating evidence, the Board thinks fit.

Legal Effect of Share Certificates [Section 46(1)]

It states that share certificate issued under the common seal of the company, specifying any shares held by any person, shall be prima facie evidence of the title of the person to such shares. A share certificate once issued binds the company in 2 ways:

- **Estoppel as to payment**: If the certificate states that on each of the shares full amount has been paid, the company is stopped from alleging that they are not fully paid.
- **Estoppel as to title**: It is a declaration by the company to all the world that the person in whose name the certificate is made out and to whom it is given, is a bona fide shareholder of the company. In other words, the company is stopped from denying his title to the shares.

Issue of Duplicate Share Certificate Rule 6

As for the duplicate certificate of shares section 46 provides that the same may be issued, if original certificate-

a) Is proved to have been lost or destroyed; or
b) Has been defaced, mutilated or torn and is surrendered to the company.

- The consent of the Board is given (in case of loss or destruction of certificate.
- The certificate in lieu of which it is being issued is surrendered to the company and is cancelled.
- Payment of fees for issue of duplicate certificate is made by the shareholder, not exceeding 50 per share certificate. Rule 6(1) (Proviso)
- Proper evidence and indemnity to the satisfaction of the company is furnished.
- Out-of-pocket expenses estimated to be incurred by the company investigating the evidence, as the Board may think fit, are deposited with the company, in case of lost or stolen share certificates and the cost of public notice shall also to be borne by the member.
- The words *"Duplicate issued in lieu of Share Capital No …… /Sub divided/Replaced/Lost/Consolidation of share (as the case may be)" are rubber stamped on its face and also on the counterfoil. The word 'Duplicate' may either be rubber stamped or punched.*

Time Period for issue of Duplicate Share Certificate

The Duplicate Share Certificates shall be issued:

- In case unlisted companies, within a period of three months.
- In case of listed companies, within fifteen days, from the date of submission of complete documents with the company.

Register of duplicate Certificate

Particulars of every share certificate issued shall be recorded in a Register of Renewed and Duplicate Share Certificates. Such register shall be maintained in **Form No. SH-2** indicating against the name(s) of the person(s) to whom the certificate is issued, the number and date of issue of the share certificate in lieu of which the new certificate is issued, and the necessary changes indicated in the Register of Members by suitable cross-references in the "Remarks" column.

Such register shall be kept at the registered office of the company or at such other place where

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the Register of Members is kept. The register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for the purpose.

All entries made in the Register of Renewed and Duplicate Share Certificates shall be authenticated by the company secretary or such other person as may be authorized by the Board for purposes of sealing and signing the share certificate.

Penalty

The Act has provides for stringent penal provisions. If a company issues duplicate shares with an intention to defraud public, the company shall be punishable with a fine which will range from five times and ten times of the face value of the shares or **Rs. 10 Cr.** (whichever is higher) and every officer in default shall be liable for action for fraud under section 447.

Punishment for personation of Shareholder [Section 57]

If any person deceitfully personates as an owner of any security or interest in a company and thereby obtains or attempts to obtain any such security or interest or receives or attempts to receive any money due to such owner, he shall be punishable with imprisonment for **1 year to 3 years and** Fine **Rs. 1 lakh to Rs. 5 Lakh**

Preservation of Records and Cancellation of the Share Certificates

As per Rule 7(3) all books referred to in sub-rule (2) shall be preserved in good order not less than thirty years and in case of disputed cases, shall be preserved permanently, and all certificates surrendered to a company shall immediately be defaced by stamping or printing the word "cancelled" in bold letters and may be destroyed after the expiry of 3 years from the date on which they are surrendered, under the authority of **BR** and in the presence of a person duly appointed by the Board in this behalf:

Provided that nothing in this sub-rule shall apply to cancellation of the certificates of securities, under sub- section (2) of section 6 of the Depositories Act, 1996.

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TRANSFER AND TRANSMISSION OF SHARES

Transfer of Shares [Section 56]

An important fundamental feature of joint stock companies is that their shares are capable of being transferred. Section 44 of the Companies Act provides that the shares held by members are movable property and can be transferred from one person to another in the manner provided by the articles of association of a company. If the articles do not provide anything for the transfer of shares and the Regulations contained in Table A are also expressly excluded, the transfer shares will be governed by the general law relating to transfer of movable property. In the case of a private company, this right must always be restricted.

The scope of transfer of securities have been widened under section 56 of the Act to include all the securities of the company and the interest of a member in the company in the case of a company not having share capital.

Procedure for Transfer of Shares

General Condition:

The section provides that a company shall not register a transfer of securities, other than the transfer **between persons** both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument of transfer, in such form as may be prescribed. Such form shall be

- **duly stamped**,
- **dated and executed** by or on behalf of the transferor and the transferee, and
- Specify the **name, address and occupation,** if any, of the transferee.

Specific Condition:

Under the rules an instrument of transfer of securities held in physical form shall be in **Form No. SH-4** and every instrument of transfer with the date of its execution specified thereon shall be delivered to the company **within 60 days** from the date of such execution. In the case of a company having no share capital, the provisions aforesaid rule shall apply to the interest of the member in the company.

Certification of Transfer:

Where a shareholder sells only a part of his shares (and not all) mentioned in the share certificate, the procedure for registration of transfer of shares is slightly different.

In this case, the share certificate is not handed over to the buyer along with the instrument of transfer. Both these documents are lodged by the transferor at the Company's registered office. The Company retains the share certificate, endorses the instrument with the words **"Certificate lodged"** and returns it to the transferor. This process is known as **"certification of the transfer'**

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The transferor then sends the certified instrument of transfer to the transferee who applies to the Company for registration. The company cancels the original certificate and in its places **issues 2 new certificates**; one to the transferor to cover the shares, which he continues to own; and the other to the transferee for the shares he has purchased.

Blank Transfer:

When a shareholder signs a transfer deed without filing in the name of the transferee and hands it over with the share certificate to the transferee thereby enabling him to deal with the share, he is said to have made a **"Transfer in Blank"** or a **"Blank Transfer".**

Void and Forged Transfer:

If a shareholder transfers his shares, and the transfer turns out to be invalid, he remains liable for calls in the shares. Transfers made during winding up of the company are void, unless sanctioned by the Court, or by liquidator in case of voluntary liquidation.

An instrument on which the signature of the transferor is forged, is called a forged transfer. A forged document or transfer never has any legal effect. It can never transfer ownership from one person to another, however, genuine the transaction may appear.

Thus, a forged amount of transfer leaves the ownership of the shares exactly where it was i.e., in the original transferor and remains entitled to receive dividend.

Questions	
111 Dec 2014	A forged transfer of shares is a nullity

Loss of Instrument with Share Certificates:

Where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period i.e. **within 60 days** from date of execution, the company may register the transfer on such terms as to indemnity as the Board may think fit.

Where Signature of Transferor Differs:

Where the signature of the transferor differs from the specimen signature registered with the company, it is suggested that the company should send a notice by registered post to the transferor with a copy to the transferee. If the transferor does not respond **within 15 days** of the date of notice, the company shall take necessary action in this regard.

Partly-paid Shares:

In case a company has partly- paid shares and where the company has received any instrument of transfer of such shares, the company shall give a notice by registered post to the transferee and shall register the transfer only when no objection is received from the transferee **within 2 weeks** from the date of receipt of notice.

According to Rules a company shall not register a transfer of partly paid shares, unless the

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company has given a notice in **Form No. SH.5** to the transferee and the transferee has given no objection to the transfer **within 2 weeks** from the date of receipt of notice.

Joint Holding:

Where shares are held in the names of 2 or more persons, they are deemed to be held jointly. Generally, the articles of a company may allow joint holding in the names of up to 4 persons.

It may be noted that transposition of names is not a transfer and does not need an instrument. However, where the joint holding is proposed to be converted into a single holding or where some names are proposed to be deleted or where the shares are going to be bifurcated, such actions will be deemed to be transfer and need a valid transfer form signed by all the joint holders as transferors.

Whether the company has power to split share certificate into two values at the merger request of one of the shareholder without instrument of transfer?

Case law 62 **Rajiv Das Vs. the united press ltd**

The company has no power to divide and allot shares amongst joint holders of shares. In a case of this nature the company cannot register transfer of shares unless a proper instrument duly stamped was lodged in accordance with the provision of [section 56 of the Companies Act, 2013]. Without submission of such document the company's refusal to rectify its register would not amount to default.

Penal Provision:

If a person contravenes the order of the Tribunal under this section, he shall be punishable with imprisonment for **1 year to 3 years AND** fine **Rs. 1 Lakh to Rs. 5 Lakh.**

Circumstances under which a Pvt. Company can refuse to register the Transfer of Shares [Section 58]

The Board of Directors of a private company can refuse to register transfer of shares in favour of any person in terms of the provisions of AOA of the Company. However while refusing to transfer shares, the power must be exercised by the Board bona fide and in the best interests of the company.

In case a private company limited by shares refuses, to register the transfer of, or the transmission, any securities or interest of a member in the company, it shall within 30 days from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

The transferee is entitled to appeal to the NCLT against any refusal of the company to register the transfer.

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An appeal herein shall be made within 30 days of the receipt of the notice of such refusal or in case no notice has been sent by the company, then within 60 days from the date on which the instrument of transfer was delivered to the Company.

Circumstances in which a Public Company can refuse to register the Transfer Shares [Section 58]

The shares or debentures and any interest therein of a company shall be freely transferable subject to the provision that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

Provided that if a company, without sufficient cause, refuse to register transfer of shares, within 30 days from the date on which the instrument of transfer is delivered to the company, the transferee may within a period of 60 days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

Power of NCLT

The NCLT, while dealing with an appeal may, after hearing the parties, either dismiss the appeal, or by order-

a) Direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or
b) Direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

Time limit for Issue of Certificates Section 56(4)

Within a period of 2 months in case of unlisted companies

Every company, unless prohibited by any provision of law or of any order of any Court, Tribunal or other authority, shall deliver the certificates of all securities allotted, transferred or transmitted-

- Within a period of **2 months** from the date of incorporation, in the case of subscribers to the memorandum;
- Within a period of **2 months** from the date of allotment, in the case of any allotment of any of its shares;
- Within a period of **1 month** from the date of receipt by the company of the instrument of transfer or the intimation of transmission, in the case of a transfer or transmission of securities;
- Within a period of **6 months** from the date of allotment in the case of any allotment of debenture.

Mode of Approval of Transfers:

The instrument of transfer is considered by the committee of directors appointed by the Board, which is known as Share Transfer Committee (STC). This committee is entrusted with the power of registration of transfer of shares. It should be ensured that committee consists of:

1. Min 2 directors, if the strength of the Board is less than or equal to 6 directors and,
2. Min 3 directors, if the strength of the Board is more than 6 directors.

Transmission of shares

Meaning

- Transmission of shares takes place when a registered shareholder **dies** or becomes **lunatic** or is **adjudicated insolvent** or if the shareholder, being a company, goes into **liquidation** i.e., which is known as a transfer of shares by operation of law.
- On the death of lunacy of the original shareholder, his shares vest in his legal representative and his estate remains liable for the unpaid amount. His representative can sell the shares without being registered, subject to the provisions of the articles. He is also entitled to be put on the register of members if he so desires.
- On the insolvency of a shareholder, his shares vest in the Official Assignee or Receiver, who may get himself registered as holder of these shares, or dispose them of. He can also disclaim partly-paid shares or fully - paid shares which are subject to mortgage or other encumbrance.
- No formal instrument of transfer is required since the owner is not capable of executing the same as transferor. Moreover, there is no consideration involved and no stamp duty etc. is required for registration of transmission of shares.

In Re. Greene, 1949, the articles of the company provided that 'upon the death of any director, if such director leaves a wife surviving him, the shares of such director shall be deemed to have passed on the death of such director to such deceased director's wife and such wife shall be the only person recognized by the company as having any title to the shares and shall forthwith be registered as the holder on the death of the director, the question arose as to whether his widow was entitled to the shares or his legal representatives. The court held that the legal representatives of the deceased were entitled to the shares, and the articles were contrary to the requirements of the Companies Act concerning instrument of transfer and were illegal and void.

Procedure for Transmission of Shares:

While transfer of shares is between living persons or between or with corporate bodies, transmission of shares is the process by which the title over shares is passed on from one person to another by the operation of law. In such cases, there is no need for an instrument of transfer. The articles of association of a company contain the procedure, which the company will follow for transmission of shares.

Generally, the following documents are required for transmission of shares:-

- An application for transmission of shares;
- A letter of indemnity;
- A probate(attested copy of will) or letter of administration;
- No-objection certificate, in case of more than one claimants.

Transfer by Legal Representative

Further the section provides that the transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer

Delivery of securities:

The Company shall deliver the certificates of all securities transferred or transmitted within a

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period of one month from the date of receipt by the company of the instrument of transfer or, of the intimation of transmission.

Further the section provides where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

Penal Provisions:

The Company shall be punishable with fine → Rs. 25,000 to Rs. 5,00,000 and every officer of the company who is in default shall be punishable with fine → Rs. 10,000 to Rs. 1,00,000.

Distinction between Transfer and transmission

1. Transfer is a voluntary act of a member while transmission is by operation of law.
2. There is always consideration involved in transfer whereas in transmission, there is no question of consideration hence no stamp, duty etc.
3. Transfer is effected as transfer of property when a member intends to sell it whereas transmission takes place only on the death bankruptcy and lunacy of the member.

Transfer	Transmission
By operation of Parties	By operation of law
Transfer deed	No transfer deed
Stamp duty	No stamp duty
May or may not have consideration	No consideration
In favour of any person	In favour of nominee only

Nomination of Shares:

- Every security holder to appoint a nominee who shall be the owner of the instrument in the event of death of the holder or the joint holder unless the nomination is varied or cancelled.
- The section provides that every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.
- Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.
- According to the rules any holder of securities of a company may, at any time, nominate, in **Form No. SH-13**, any person as his nominee in whom the securities shall vest in the event of his death.
- **Following steps shall be ensured:**
    a) On the receipt of the nomination form, a corresponding entry shall forthwith be made in the relevant register of securities holders, maintained u/s 88.
    b) Where the nomination is respect of the securities held by **more than 1 person jointly**, all joint holders shall together nominate in **Form No. SH-13** any person as nominee.
    c) The request for nomination should be recorded by the company **within 2 months** from the date of receipt of the **duly filed** and **signed nomination form**.

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d) In the event of death of the holder of securities or where the shares or debentures are held by **more than 1 person jointly**, in the event of death of all the joint holders, the person nominated as the nominated as the nominee may upon the production of such evidence as may be required by the **BOD**.

e) If the person being a nominee, so becoming entitled, elects to be registered as holder of the securities himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects and such notice shall be accompanied with the death certificate of the deceased share or debenture holders.

f) All the limitations, restrictions and provisions of the Act relating to the right to transfer and the registration of transfers of securities shall be applicable to any such notice or transfer as aforesaid as if the death of the share or debenture holder had not occurred and the notice or transfer were a transfer signed by that shareholder or debenture holder, as the case may be.

g) A person, being a nominee, becoming entitled to any securities by reason of the death of the holder shall be entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he shall not, before being registered as a holder in respect of such securities, be entitled in respect of these securities to exercise any right conferred by the membership in relation to meetings of the company.

h) The board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the securities, and if the notice is not complied with **within 90 days**, the BOD may thereafter withhold payment of all dividends or interests, bonuses or other moneys payable in respect of the securities, as the case may be, until the requirements of the notice have been complied with.

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MEMBERSHIP

Member Sec 2 (55)

1) The **subscribers of the MOA** of a company, who shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.
2) Every other person who agrees **in writing** to become a member of a company and whose name is entered in its **register of members** shall, be a member of the company.
3) Every person **holding equity shares** of a company and whose name is entered as **beneficial owner** in the records of the depository shall be deemed to be member of the concerned company:

Accordingly, there are two important elements, which must be present before a person can acquire membership of a company, i.e.

- **Written agreement** to become a member; and
- Entry of the name of the person agreeing, in the **register of members**.

Modes of Acquiring Membership

a) By **subscribing** to the memorandum of association (deemed agreement).
b) By **agreeing** to become a member:
- By making an **application** to the company for allotment of shares; or
- By executing an instrument of **transfer of shares** as transferee; or
- By consenting to transfer of shares of **a deceased member** in his name; or
- By **acquiescence** or estoppels,
- And on his name being entered in the **register of members** of the company.

c) By holding equity shares in the **electronic mode** and on his name being entered as beneficial owner in the records of the depository.

a) By subscribing to the memorandum:

In the case of a subscriber, no application or allotment is necessary to become a member. By virtue of his subscribing to the memorandum, he is deemed to have agreed to become a member, and he becomes ipso facto member on the incorporation of the company and is liable for the shares he has subscribed.

Case Law 44 Kumaran Potty v. Venad Pharmaceuticals & Chemicals Ltd.

A question arose as to whether the purported promise loan into shares can also constitute a ground for rectification of Register of members. The vice-chairman of the company collected huge sums of money from employees as if they were loans. After repayment of the substantial part of the loans, the Managing director reportedly agreed to convert the remaining amounts into shares. However, the same was not done and it was prayed that the register of members be rectified to make the petitioner employee a shareholder for the unpaid amount. It was held that the amount was nothing but a loan and it always remained a loan. To become a shareholder there must be an agreement in writing under Section 2 (55) of the Companies Act, 2013 between the petitioner and the company.

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Case law 45 **Metal constituents company case**

A subscriber to the memorandum cannot rescind the contract for the purchase of shares; even on the ground of fraud by the promoters.

b) By agreement in writing:

1. **By an application and allotment**: A person who applies for shares becomes a member when shares are allotted to him, a notice of allotment is issued to him and his name is entered on the register of members.
2. **By transfer of shares**: A person can become a member by acquiring shares from an existing members and by having the transfer of shares registered in the books of the company, i.e. by getting his name entered in the register of members of the company.
3. **By transmission of shares:** A person may become a member of a company by operation of law, e.g. if he succeeds to the estate of a deceased member. On the death of a member, his executor or the person who is entitled under the law to succeed to his estate, gets the rights to have the shares transmitted and registered in his name in the company's register of members.
4. **By acquiescence (accept without protest) or estoppels:** A person is deemed to be a member of a company if he allows his name without sufficient cause, to be on the register of members of the company or otherwise holds himself out or allows himself to be held out as a member. In such a case, he is stopped from denying his membership.
5. **By holding shares as beneficial owner in the records of a depository:** A person holding equity share capital of a company whose name is entered in the records of the depository shall be deemed to be a member of the concerned company.

Who can become a Member?

Subject to the memorandum and articles of a company, any **sui juris** (a person who is competent to contract) can become a member of a company. However, it is important to note the following points in relation to certain organizations and persons:

1. **Company as a member of another company**:

A company is a legal person and so is competent to contract. Therefore, it can become a member of any other company. However, it must be **authorized by its MOA** to invest in the shares of that company or any other company.

Note: A subsidiary company cannot become a member of its holding company.

However, there are certain exceptions to this rule enumerated below:

- Where a subsidiary company acts as the **legal representative of a deceased member** of the holding company.
- If the subsidiary company is **a trustee**, for some other shareholder, the holding company or any subsidiary of it, not being beneficiary except as lender of money in the ordinary course of business.
- A subsidiary company can continue to be a member of its holding company, if it was its member **before becoming subsidiary.** But in this case, the subsidiary company cannot exercise any right of vote at any meeting of the holding company.

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2. **Partnership firm as a member**: A partnership firm is **not a legal person** and so much it cannot, in its own name, become member of a company. **However**, it can become a member of Section 8 Company but on dissolution of firm, its membership in such company ceases.
3. **Foreigners as members:** A foreigner may take shares in an Indian company and become a member with the general or special permission of the RBI under the FEMA, 1999, but in the event of war with his country, he becomes an alien enemy and his power of voting and his right to receive notices are suspended.
4. **Minors as members**: A minor cannot become a member of a company since he is not competent to enter into a contract. Consequently, an agreement by a minor to take shares is void ab - initio.

Case Law 46 **Devan Singh vs Minerva Films Ltd.**

The Punjab High court held that there is no legal bar to a minor becoming a member of the company by acquiring share provided the shares are fully paid up and no further obligation ir liability attached to them.

Case law 47 **Miss Nandita Jain Vs Benett Coleman & co. ltd**

But the CLB has held that a minor applying through his natural guardian for being registered as a member was entitled to be so registered, if the shares are fully paid - up.

5. **Pawnee**: A pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law. In this sense, a pledge differs from a mortgage. In view of the foregoing, a pawnee cannot be treated as the holder of the shares pledged in his favour, and the pawner continues to be a member and can exercise the rights of a member.
6. **Receiver**: A receiver whose name is not entered in the register of members cannot exercise any of the membership rights attached to a share unless in a proceeding to which company is a party, an order is made therein. Mere appointment of a receiver in respect of certain shares of a company without more right cannot, deprive the holder of the shares, whose name is entered in the register of members of the company of the right to vote at the meeting of the company.
7. **Bankrupt/ Insolvent:** A bankrupt may be a member of a company as long as he is on the register of members. He is entitled to vote.

Case Law 48 **Morgan v. Gray**

As Insolvent may be a member of a company as long as he is on the register of members, he is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver.

8. **Trade union**: a trade union registered under the trade union act 1926 can be registered as a member and can hold shares in the company in its own corporate name.
9. **Person taking shares in fictitious name:** He becomes liable as a member besides incurring criminal liability u/s 38 of the Act.

Cessation of Membership

A person ceases to be a member of a company when his name is removed from its register of members, which may occur in any of the following situations:

- He **transfers** his shares to another person.
- His shares are **forfeited.**

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- He makes a valid **surrender** of his shares.
- His shares are sold by the company to **enforce a lien**.
- He **dies** or is adjudged **insolvent.**
- His redeemable preference shares are **redeemed.**
- His shares are **bought-back.**
- His shares are **attached** by the Court in satisfaction of a decree.

	Questions:	
66	Dec 2007	Explain the circumstances when a person ceases to be member of a company.
67	June 2007	Whether the member of company can be expelled
68	June 2007	Modes of acquiring membership

Expulsion of a Member

- The AOA of a company cannot provide for expulsion of a member, as such a power is opposed to the fundamental principle of the Company Jurisprudence and, therefore, ultra vires the company. Such a provision is repugnant to the various provisions of the Companies Act pertaining to the rights of members.
- The AOA is a contract between the company and its members setting out the rights of member's inter-se under the contract and expulsion of a member is not only the violation of this contract but it also opposed to the principle of natural justice.
- The MCA has, therefore, clarified that any assumption of the powers by the Board of Directors to expel a member by alteration of articles of association shall be illegal and void.

Rights of Members

When once a person becomes a member, he is entitled to exercise all the rights of a member until he ceases to be a member in accordance of the provisions of the Act. The rights of members are:

- Not to have his financial **obligation increased** by the company without his consent.
- To **transfer** his shares.
- To have **a share certificate** issued to him in respect of his shares.
- To **vote** on resolutions at meetings of the company.
- To take **inspection** of the various registers of the company.
- To requisition an **extraordinary general meeting** of the company.
- To receive **notice** of general meetings and to attend and speak at general meetings.
- To appoint **proxy** and **inspect** proxy registers.
- To demand for **poll.**
- To appoint the **representative** to attend and vote at general meetings of the company on its behalf, if the member is a body corporate.
- To require the company to **circulate** his resolution.
- To enjoy the **profits** of the company in the shape of dividend.
- To **elect directors** and thus to participate in the management through them.
- To apply to the NCLT for relief in case of **oppression of the minority shareholders.**
- To apply to the NCLT for relief in case **of mismanagement**.
- To apply to the NCLT for **winding up** of the company.
- To share in the **surplus on winding up.**

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Liability of Members

- In case of Company limited by share capital, members are liable to pay for the **outstanding calls only.**
- Whereas in case of Company limited by Guarantee, subscribers to MOA are liable to pay the **amount guaranteed**, in the event of winding up, if assets of the company fall short of the liabilities.
- In case of Unlimited Company, the members are personally liable to pay for the **debts of the company** as in the case of Partnership Firm by partners.

Case law 49 **LIC vs. Escort Ltd. & others**

So long a person's name is standing registered in the books as member, even if he has sold the shares and has given the share certificates and the blank transfer deed duly signed; he alone is entitled to exercise the rights of membership.

Member	Shareholder
Person whose **name appears** on the Register of Members of the company	Person **who holds the shares** of the company
shareholder need not necessarily to be a member	member need not necessarily to be a shareholder of the company
In case of transfer of shares, the transferee even though holding shares of the company does not become a member until the transfer is registered by the Company.	In case of companies limited by guarantee or unlimited companies, a member need not be a shareholder because such companies may not have a share capital.
If shares are held by CG/SG even then CG/SG shall become member but Share Certificate shall be issued in the name of President of India/Governor as the case may be, similarly if shares are held by State Government even then SG shall become member but share Certificate shall be issued in the name of Governor of such State.	

Case Law 50 **Herdilia Unimers Ltd. V. Renu Jain (1995) 4 Comp. LJ. 45**

It was held that the moment the shares were allotted and share certificate issued and the name entered in the register of members, and on registration, the allottee became the shareholder, irrespective of whether the allottee received the shares or not

Joint Members

If more than one person apply for shares in a company and shares are allotted to them, each one of such applicants becomes a member. Each of the joint holders of shares is a member of the company. However, in the case of a private company, joint members are counted as one member for the purpose of Section 2(68) (ii) 1st proviso.

In the case of joint shareholders, usually right are exercised by the first named joint holder but duties are cast on all the joint holders.

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For instance, dividend and notices of general meetings are sent to first named joint holder. All the joint holders have, however, right to attend and participate at the annual and other general meetings but only one of them can vote.

In the case of joint holders, the vote of the senior who tenders a vote, shall be accepted to the exclusion of the votes of the other joint holders. For this purpose, seniority shall be determined by the order in which the names stand in the Register of Members.

No transfer of shares shall be registered by the company unless the instrument of transfer is executed by all the joint shareholders as transferors of the shares. Joint members are liable jointly and severally to pay calls on the shares held by them. Proxy form to be valid must be signed by all the joint shareholders.

Register Prima Facie Evidence

A register of members is prima facie evidence of the truth of its contents. Accordingly, if a person's name, to his knowledge, is there in the register of members of a company, he shall be deemed to be member and onus lies on him to prove that he is not a member.

He must promptly apply to the court for rectification of the register u/s 59 of the Act to take his name off the register, failing which the doctrine of holding out will apply.

Case Law 51 **Re. M.F.R.D. Cruz A.I.R. 1939 Madras 803**

The plaintiff applied for 4000 shares in a company but no allotment was made to him. Subsequently, 4000 shares were transferred to him without his request and his name was entered in the register of members. The plaintiff knew it but took no steps for rectification of the register of members. The company went into liquidation and he was held as a contributory. The court held "when a person knows that his name is included in the register of members and he stands by and allows his name to remain, he is holding out to the public that he is a member and thereby he loses his right to have the name removed.

Registration of shares in the name of public office

There is no provision in the Companies Act, 2013 that the shares in a company may be held in the name of a public office. The Collector of Central Excise or the Secretary to the Government of India, as such, is not a legal entity. Shares cannot, therefore, be held in the name of such office. Hence, shares in a company cannot be registered in the name of a Public Office, which is not a corporation sole as understood in law.

The Collector of a District is a civil servant of the Union / State. Under Article 299 of the Constitution of India, all contracts are required to be in the name of the President or the governor, as the case may be, and under Article 300, all suits by or against the Union / State Government are required to be filed in the name of the President of the Governor as the case may be.

A collector has no power under the constitution either to enter into contracts or to sue or to be sued in his capacity as a Collector. Therefore, the Collector cannot be said to be a Corporation sole. He is not competent to hold shares on a limited company incorporated under the Companies Act, as the Collector.

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Variation of Members' right

The rights attached to the shares of any class can be varied, subject to the following two conditions:

1) Such variation is authorized by the Memorandum and Articles of association of the Company if it is not so, then such variation is not prohibited by the terms of issue of shares of that class; and
2) Consent in writing of the holders of not less than three-fourths of the issued shares of that class is obtained or a special resolution is passed at a separate meeting of the holders of the issued shares of that class.
3) Special Resolution shall be passed by Postal Ballot except OPC and other private companies.

Cancellation of the Variation in the Members' Rights

The shareholders who did not consent to or vote in favour of the resolution for variation of members' rights are called dissentient shareholders. Under Section 48 of the Companies Act, 2013 any variation in the members' rights can be cancelled, by making a petition to the NCLT, by the dissentient shareholders holding not less than 10% of the issued shares of that class **within 21 days** from the date when the consent was given or the resolution was passed whatever the case may be.

Any such variation shall not have effect until and unless it is confirmed by NCLT. The decision of the NCLT shall be finding upon the shareholders.

The company shall within 30 days from the date of order of tribunal, file a copy of same with ROC.

The default is made in complying with the provisions of **Section 48** of the Companies Act, 2013, the company shall be punishable with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 5 lakhs and every officer of the company shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 5lakhs or both.

	Questions:	
69	Dec 2013	Short note on Right of dissentient shareholders.
70	Dec 2005 June 2007	Write a note on: Modes of acquiring membership.
71	June 2007	The name of Piyush is found entered in the register of members of a company. But, Piyush contented that he is not a member of the company. The company maintains that Piyush has orally agreed to become a member of the company, and hence, his name was entered in the register of members and so he is a member. Is the contention of Piyush valid?
72	Dec 2009	Fortune Ltd. Refused to enter the name of the minor son of a deceased member in the register of members on the ground that the minor cannot enter into a contract as per section 11 of the Indian Contract Act, 1872. The shares are fully paid up. Comment on the decision of the company and suggest remedies available.

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73	June 2010	Four types of persons, viz. a section 8 company, an insolvent individual, a trade union and a Pawnee, apply for membership in your public limited company. Will you accept them as members of your company?
74	Dec 2013	ABC Ltd., a partnership firm applied for shares in PQR Ltd. The company allotted the shares required by the partnership firm. In the given context, what is the liability of partners and partnership firm?

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DEBT CAPITAL
DEBENTURE

Definition Sec 2 (30)

The term "debenture" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not.

Provided that –

a) **Instruments referred to in chapter III D of RBI Act 1934 and**
b) **Such other instrument, as may be prescribed by CG in consultation with RBI, issued by a company.**
Shall not be treated as debenture

Meaning:
A debenture means a **document, which creates or acknowledges a debt**. Section 71 of the Act enables that a company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption.

- The issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a **special resolution** passed at a general meeting.
- The section prohibits issue of debentures carrying **voting rights.**
- Debentures are not part of share capital, it is a **loan capital** and company is liable to pay **interest** thereon whether there are profits or not.
- **Specific performance** can also be enforced against company by debenture holders [Section 71(12)].

SALIENT FEATURES OF DEBENTURES

- A debenture is usually in the form of a **certificate** (like a share certificate) issued under the common seal of the company.
- The certificate is an acknowledgement by the company of **indebtedness** to a holder.
- A debenture usually provides for the payment of a specified sum at a specified date.
- A debenture usually provides for payment of interest until the principal sum is paid back. Interest may be made payable subject to contingencies of uncertain nature [Section 71 (8)]. Even zero rate of interest debentures can be issued.
- Debenture holders do not have any right to vote at any meeting of the company [Section 71(2)]

There is no prohibition to issue debentures at a discount unlike the restrictions contained in Section 54 of the Companies Act, 2013 for the issue of shares at a discount.

The following documents have been held to be treated as debenture:

Case Law	**Knightsbridge Estates Trust Ltd. V. Byrne, 1940**
A legal mortgage of freehold and leasehold land.	
Case law	**Lemon v. Austin Friars Investment Trust Ltd.**

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A series of income-bonds by which a loan to the company was repayable only out its profits.

Case Law **British India Steam Navigation Co. v. IRC**

A note by which a company undertook to pay a loan but gave no security.

Case law **United Dominions Trust Ltd. V. Kirkwood**

A receipt or a certificate for a deposit made with a company other than a bank when the deposit was repayable after a fixed period after it was made.

CLASSIFICATION OF DEBENTURES:

Debenture may be of different kinds as follows:

1. REDEEMABLE DEBENTURES

Debentures are generally redeemable, that is to say, they are issued on the terms that the company is bound to repay the amount of debentures, either at a fixed date, or upon demand, or after notice, or under a system of periodical drawings. Redeemable debentures can be re-issued.

2. PERPETUAL OR IRREDEEMABLE DEBENTURES

A debenture in which no time is fixed for the company to pay back the money, although it may pay back at any time chooses, is an irredeemable debenture. The debenture holder cannot demand payment as long as the company is a going concern and does not make default in making payment of the interest.

3. REGISTERED AND BEARER DEBENTURES:

Registered debentures are made out in the name of a particular person, whose name appears on the debenture certificates and who is registered by the company as holder in the register of debenture holders. Such debentures are transferable in the same manner as shares.

Debenture Certificates must be issued within 6 months of Allotment

It has been held, Section 56(4)(d) of the Companies Act, 20l3, as it applies to debentures, casts an obligation on the company to deliver the debenture (certificates) within 6 months of allotment.

Bearer debentures, on the other hand, are made out to bearer, and are negotiable instruments, and so transferable by mere delivery like share warrants. These debentures are also called Unregistered Debentures.

4. SECUREED AND UNSECURED OR NAKED DEBENTURES:

Secured Debentures are issued by a company may be secured by way of creating charge on the assets of the company. Debentures may be secured by way of mortgage of company's properties.

The secured debenture holders have greater protection. Holders of secured debentures remain convinced about the payment of interest and payment of principal in the event of redemption.

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Unsecured debentures are also known as naked debentures. These debentures are not secured by way of charge on the company's assets. Interest rate payable on unsecured debentures is generally higher than that which is payable on secured debentures.

Conditions to issue secured debentures

Rule 18(1) of the Companies (Share Capital and Debentures) Rules, 2014 provide that no company shall issue secured debentures unless it complies with the following conditions:

•An issue of secured debentures may be made, provided the date of its redemption shall not exceed 10 years from the date of issue. A company engaged in the setting up of infrastructure projects may issue secured debentures for a period exceeding ten years but not exceeding thirty years. Such an issue of debentures shall be secured by the creation of a charge, on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.

- The company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures and not later than 60 days after the allotment of the debentures, execute a debenture trust deed to protect the interest of the debenture holders.
- Security for the debentures by way of a charge or mortgage shall be created in favour of the debenture trustee only:
- Any specific movable property of the company.
- Any specific immovable property wherever situated or any interest therein.

5. CONVERTIBLE AND NON-CONVERTIBLE DEBENTURES:

- **Fully convertible debentures (FCDs)** - These debentures are converted into equity shares of the company on the expiry of a specified period.
- **Partly convertible debentures {PCDs)** - Partly convertible debentures are divided into two portions, viz., convertible and non-convertible portion. The convertible portion is converted into equity shares of the company at the expiry of specified period. The non-convertible portion is redeemed at the expiry of the specified period in terms of the issue.
- **Non-convertible debentures (NCDs)** - Non-convertible debentures do not have any option to convert the same into equity shares and are redeemed at the expiry of specified period.
- **Convertible Debentures** can be issued by passing Special Resolution only.

DISTINGUISH BETWEEN DEBENTURES AND SHARES:

Debenture	Shares
Debenture constitute a loan	Shares are part of capital of company
Debenture holders are creditors of company	Shareholders are owners/members of company
Debenture holders get fixed interest which gets priority over dividend	Shareholders get dividend with varying rights
Debentures generally have charge on the assets of company	Shares do not carry any such charge
Debentures can be issued at discount without restriction.	Shares cannot be issued at discount

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In case of debentures, interest rates are fixed.	In case of equity shares, dividend varies from year to year depending on profit of company and decision of BOD to declare dividend or not.
Debenture holders do not have any voting rights	Generally Shareholders enjoy Voting Rights
Interest on debenture is payable even if there is no profit in company	Dividend to shareholder can only be paid out of profits of company and not otherwise.
Interest paid on debenture is a business expenditure and allowable deduction from profits.	Dividend is not allowable deduction as business expenditure.
Return of allotment is not required for allotment of debentures	Return of allotment in **PAS 3** is to be filed for allotment of shares.

Issue of Debentures:

- The power to issue debentures is usually set out in the memorandum.
- The debentures can be issued in the same manner as shares in a company.
- But unlike shares, they can be issued at a discount without any restriction, if articles so authorize, the reason being that they do not form part of the capital of the company.
- They can also be issued at a premium.
- Interest payable on them is a debt and can be paid out of capital.
- There is no ceiling, minimum or maximum, for the rate of interest payable on debentures. Any rate of interest, though justifiable, can be paid on the debentures. Even zero rate of interest debentures can be issued.
- In the case of unsecured debentures which amounts to be deposits, the rate of interest should be within the maximum limit prescribed by the rules.
- All sums allowed by way of discount must be stated in every balance sheet of the company until written-off.
- Section 71 of the Act provides that specific performance of a contract to give debentures may be enforced by an order of the NCLT against the company and that the company may specifically enforce against anyone an agreement to take debentures.
- No company is permitted to issue debentures carrying voting rights at any GM of the company.

Listing of Debentures under Section 40

A listed company, which proposes to issue debentures to the public, shall make the debentures enlisted in a recognised Stock Exchange. It shall, before issuing the prospectus for such issue, make the application to the Stock Exchange concerned and the permission must be obtained before the expiry of ten weeks from the date of the closing of the subscription.

REDEMPTION OF DEBENTURES(SECTION 71):

Debenture Redemption Reserve (DRR)

Creation of DRR

The company is required to create a debenture redemption reserve for the redemption of such debentures. The company shall credit the DRR adequate amounts from out of its profits of the

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company available for payment of dividend every year until such debentures are redeemed. DRR shall be utilized by the company only for the purpose of redemption of debentures.

Rule 18 (7) of the Companies (Share Capital and Debentures) Rules, 2014 provide that the company shall create a DRR for the purpose of redemption of debentures, as per following conditions: (16th Aug 2019)

a) DRR shall be created out of the profits of the company available for payment of dividend;

b) The limits with respect to adequacy of DRR & investment of deposit shall be as under:

i. For AIFI & Banking Co., No DRR is required.

ii. For other FI, DRR shall be as applicable to NBCF registered with RBI.

iii. For listed companies (other than AIFI & Banking Co.'s), DRR is not required in following cases –

I. In case of public issue of debentures –

A. For NBFC & for Housing Finance companies.

B. For other listed companies.

II. In case of privately placed debentures, for companies specified in A & B above.

iv. For unlisted companies, (other than AIFI & Banking co.) –

A) For NBFCs & Housing Finance companies, DRR is not required in case of privately placed debentures.

B) For other Unlisted companies, the adequacy of DRR shall be 10% of value of outstanding debentures.

v. In case of companies covered in item A or B of point iii or item B of point iv, it shall on or before the 30th day of April in each year, in respect of debentures issued by such a company, invest or deposit a sum which shall not be less than 15% of amount of debenture maturing during the year, ending on 31st day of March of next year in any one or more methods of investments or deposits.

Provided that the amount remaining invested or deposited, shall not at any time fall below 15% of the amount of debenture maturing during the year ending on 31st day of March of that year.

vi. The methods of investments or deposits are as follows:

a. In deposit with SCB, free from any charge or lien.

b. In unencumbered securities of CG or SG.

c. In unencumbered securities specified in Indian Trust Act 1882

Note: the amount so invested or deposited shall not be used for any purpose other than for redemption of debentures maturing during the year referred above.

c) In case of partly convertible debentures, DRR shall be created in case of non convertible portion of debenture.

d) The amount credited to DRR shall not be utilised by co., except for the purpose of redemption of debentures.

Failure to Redeem the Debentures

If a company fails to redeem the debentures on the date of their maturity or fails to pay interest on the debentures when it is due, the NCLT may, on the application of any or all of the debenture- holders, or debenture trustee and, after hearing the parties concerned, direct, by

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order, the company to redeem the debentures forthwith or the payment of principal and interest due thereon.

If any default is made in complying with the order of NCLT, every officer of the company who is in default shall be punishable with imprisonment **up to 3 years** OR with fine **minimum Rs. 2 lakhs and maximum Rs. 5 lakhs**, OR **with both**.

Roll Over of Debentures in Listed company

1. All the debentures issued by the company shall necessarily be redeemed as per the terms of issue.
2. Listed company can roll over non-convertible debentures/non-convertible portion of convertible debentures, in accordance with Regulations 21 & 22 of the SEBI (ICDR) Regulations, 2009.
3. For considering the proposal of roll over of debentures a meeting of the Board of directors shall be convened.
4. Convene a general meeting of debenture holders for considering and approving the proposal of rollover of debentures by way of special resolution.
5. Obtain a fresh credit rating within six months preceding the date of redemption and it should be communicated to all the debenture holders.
6. Prepare a letter of option for rollover of debentures.
7. The letter of option shall be forwarded to every debenture holder separately.
8. The company can roll over debentures of those debenture holders who have given their positive written consent for roll over.
9. Debentures held by those debenture holders who do not give their positive consent for the rollover cannot be rolled over.
10. If the trust deed executed earlier is not on continuation basis till the redemption, then execute a fresh trust deed.
11. The company shall redeem all those debentures in respect of which it has not receive positive written consent for roll over and payment for redemption shall be made within one month since the date of redemption.

DEBENTURE TRUST DEED (SECTION 71)

Meaning

When debentures are issued for public subscription, involving a considerable number of debenture holders, who do not have the time to look after their interests in the properties mortgaged or charged to them, a trustee may be appointed for the supervision of their common interest. A trust deed is made under which some of them are appointed as trustee, whereby the properties of the company are mortgaged or charged to trustee. The trust deed also contains provisions dealing with the rights of the debenture holders and the company.

The trustee act as watchdogs to ensure that company's obligations under the trust deed are carried out and they can act expeditiously and effectively to safeguard the interests of the debenture holders.

Format of Debenture Trust Deed Rule 18(5)

Rule 18(5) of the Companies (Share Capital and Debentures) Rules, 2014 provides that for the purposes of Sec 71 (13) and sub-rule (1) a **trust deed in Form SH-12** or as near thereto as possible shall be executed by the company issuing debentures in favour of the debenture trustees **within 60**

days of allotment of debentures.

Advantages of a Trust Deed

- The trustees hold the title deeds of the mortgaged property, which prevents the company from misusing the property for any purpose.
- The trustees are given power under the trust deed so that the property mortgaged is kept insured and is maintained in proper condition.
- The company can, with the consent of the trustees, enjoy a number of powers over the property charged, e.g., by way of sale, exchange or lease, thus enabling the company to put the property to advantageous use without jeopardizing the interest of debenture holders.
- In case of default by the company, the trustees can take necessary steps to realize the security without the aid of the Court.

Central Government to prescribe rules as to trust deed, quantum of DRR etc. Section 71(13) states that the Central Government may prescribe the procedure,

a) for securing the issue of debentures,
b) the form of debenture trust deed,
c) the procedure for the debenture-holders to inspect the trust deed and to obtain copies thereof,
d) Quantum of debenture redemption reserve required to be created and such other matters.

Rule* 18 *of Companies (Share Capital and Debentures) Rules, 2014 prescribes the following conditions

i. ***With regard to trust deed and its inspection*** Rule 18 (8)
A trust deed for securing any issue of debentures shall be open for inspection to any member or debenture holder of the company, in the same manner; to the same extent and on the payment of the same fees, as if it were the register of members of the company. Further a copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within seven days of the making thereof, on payment of fee.

ii. ***Creation of DRR Rule*** 18(7)(b)
The company shall create DRR equivalent to at least 25% of the amount raised through the debenture issue before debenture redemption commences.

APPOINTMENT, VACANY AND REMOVAL OF DEBENTURE TRUSTEE:

Appointment of Debenture Trustee

The section provides that no company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding 500 for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed. In simple terms the company shall not issue prospectus to more than 500 hundred persons without appointing debenture trustee.

Conditions for appointment of Debenture trustees [Rule 18(2)]

The company shall appoint debenture trustees Section 71(5), after complying with the following conditions, namely:

- The names of the debenture trustees shall be stated in letter of offer inviting subscription for

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debentures and also in all the subsequent notices or other communications sent to the debenture holders.

- Before the appointment of debenture trustee or trustees, a written consent shall be obtained from such debenture trustee or trustees proposed to be appointed and a statement to that effect shall appear in the letter of offer issued for inviting the subscription of the debentures.

Disqualification from being appointed as Debenture Trustee.

1. A person shall not be appointed as a debenture trustee, if he-

- ✓ Beneficially holds shares in the company;
- ✓ Is a promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;
- ✓ Is beneficially entitled to money which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;
- ✓ Is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
- ✓ Has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;
- ✓ Has any pecuniary relationship with the company amounting to 2% or more of its gross turnover or total income or Rs. 50 lakh or such higher amount as may be prescribed, whichever is lower, during the 2 immediately preceding financial years or during the current financial year;
- ✓ Is relative of any promoter or any person who is in the employment of the company as a director or KMP

2. Casual Vacancy of Debenture Trustee

The Board may fill any casual vacancy in the office of the trustee but while any such vacancy continues, the remaining trustee or trustees, if any, may act: Provided that where such vacancy is caused by the resignation of the debenture trustee, the vacancy shall only be filled with the written consent of the majority of the debenture holders.

3. Removal of Debenture Trustee

Any debenture trustee may be removed from office before the expiry of his term only if it is approved by the holders of not less than 3/4th in value of the debentures outstanding, at their meeting.

Duties and functions of debenture trustee

The functions of the debenture trustee to protect the interest of debenture holders shall generally:

- To protect the interest of holders of debentures.
- To redress the grievances of holders of debentures effectively.

Rule* 18(3) *of the Companies (Share Capital and Debentures) Rules, 2014 provides for the duty of every debenture trustee to:

a) Satisfy himself that the prospectus or letter of offer does not contain any matter which is inconsistent with the terms of the issue of debentures or with the trust deed;

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b) Satisfy himself that the covenants in the trust deed are not prejudicial to the interest of the debenture holders;

c) Call for periodical status/performance reports from the company;

d) Communicate promptly to the debenture holders defaults, if any, with regard to payment of interest or redemption of debentures and action taken by the trustee there of;

e) Appoint a nominee director on the Board of the company in the event of:

- two consecutive defaults in payment of interest to the debenture holders; or
- default in creation of security for debentures; or
- Default in redemption of debentures.

f) Ensure that the company does not commit any breach of the terms of issue of debentures or covenants of the trust deed and take such reasonable steps as may be necessary to remedy any such breach;

g) Inform the debenture holders immediately of any breach of the terms of issue of debentures or covenants of the trust deed;

h) Ensure the implementation of the conditions regarding creation of security for the debentures, if any, and debenture redemption reserve;

i) Ensure that the assets of the company issuing debentures and of the guarantors, if any, are sufficient to discharge the interest and principal amount at all times and that such assets are free from any other encumbrances except those which are specifically agreed to by the debenture holders;

j) Do such acts as are necessary in the event the security becomes enforceable;

k) Call for reports on the utilization of funds raised by the issue of debentures;

l) Take steps to convene a meeting of the holders of debentures as and when such meeting is required to be held;

m) Ensure that the debentures have been converted or redeemed in accordance with the terms of the issue of debentures;

n) Perform such acts as are necessary for the protection of the interest of the debenture holders and do all other acts as are necessary in order to resolve the grievances of the debenture holders.

MEETING OF DEBENTURE HOLDERS: Rule18(4)

The meeting of all the debenture holders shall be convened by the debenture trustee on-

- Requisition in writing signed by debenture holders holding at least one-tenth in value of the debentures for the time being outstanding;
- The happening of any event, which constitutes a breach, default or which in the opinion of the debenture trustees affects the interest of the debenture holders.

Right to obtain copies and inspection of trust deed [Rules 18(8)]

a) A trust deed for securing any issue of debentures shall be open for inspection to any member or debenture holder of the company, during business hours being minimum 2 hours on every working day without any fees.

b) A copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within **7 days** of the making thereof, on payment of fee prescribed in AOA not exceeding 10 per page.

Right of Debenture Holders to Obtain Copies of Annual Accounts [Section 136]

Every trustee of debenture holder of a company shall, on demand, be entitled to be furnished free of cost, with a copy of the last annual accounts and directors' reports of the company.

REGISTER OF DEBENTURE HOLDER: Section 88(1) (b)

Every company shall keep a register of debenture holders. The register of debenture-holders shall also include an index of the names included therein. The register shall be in the form prescribed by the CG and contain the prescribed particulars.

Further the CG may prescribe separate registers for each type of debentures. The register can be closed by the company after giving **at least 7 days'** previous notice by advertisement for **maximum 45 days in a year** but not **exceeding 30 days** at a time. However, SEBI may prescribe lesser notice period for listed companies or companies which intend to get their securities listed in the prescribed manner.

Inspection of Register Section 94(2)

The register and its indices, except when they are closed under the provisions of the Act is open to inspection by the members and debenture holders, other security holder or beneficial owner during **business hours** without payment of any fees and by any other person on payment of nominal charges

LIABILITY OF TRUSTEE TO DEBENTURE HOLDERS: SECTION 71(7)

In general, a debenture trustee is liable to debenture holders for any type of breach of trust. However, he may escape the liability in the following cases:

- Where the trustee can show that he took such care and diligence as required of him as a trustee having regard to the powers, authorities and discretions conferred on him by the trust deed.
- Where a majority of, not less than 3/4th in value, debenture holders, present and voting in person or by proxy agree, at a meeting summoned for the purpose, with respect to specific acts or omissions of the trustee.

REMEDIES OF DEBENTURES HOLDERS:

The remedies to debenture holders vary according to whether he is secured or unsecured.

Unsecured debenture-holder can

- Sue the company according to the terms of issue as an unsecured creditor, and/or
- Present a petition for winding up of the company and prove his debts in the winding up as an unsecured creditor for the amount due.

Secured Debenture holder can:

- Sue, on behalf of himself and all other debenture holders, to obtain payment or to enforce his security by sale. The Court will appoint a receiver and order the sale of a property.
- Present a petition for the winding up of the company; this is so even if the debentures are bearer debentures.
- Sell the assets charged as security, if an express power to do is contained in the issue of debentures.
- Appoint a Receiver; if the conditions of the issue of debentures give him power to do so. The Receiver will sell the property charged and the sale proceeds will be utilized for the payment

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of the debentures.

- Apply to the Court for a foreclosure order. The effect of the order is to terminate the company's interest in the assets charged, the debenture holders becoming the owners of them. Have the property sold by the trustee, if the debenture trust deed permits such sale.

If debenture holder owes a debt to the company which is unable to pay its debentures in full, the debenture holder cannot set off his debt against the liability he owes to the company. The rule of law is that a person who claims a share of a fund must first pay everything he owes to the fund.

Nomination of Securities [Section 72]

Every security holder can appoint a nominee who shall be the owner of the instrument in the event of death of the holder.

Where the securities of a company are held by more than 1 person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

Note: No nomination shall be made for part of the holdings held by shareholder or debenture holder.

Rights of Nominee

A person being a nominee, becoming entitled to a share or debenture or other securities, by reason of the death of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he was the registered holder of the share or debenture or other securities.

A nominee is not entitled to exercise his voting right but is entitled to dividend and other benefits before being registered as a member.

However, if the Board of Directors has issued a notice to the nominee to elect and no election either to transfer or hold the security in his name is made within a period of 90 days, the Board may withhold the payment of the dividend, bonus or other moneys payable to the security holder.

Case law **Dayagen Pvt. Ltd. Vs. Rajender Doriyan Punj**

The company was wrong in transmitting the shares of the deceased shareholder in favour of the nominee, when a registered will of the deceased bequeathing shares in the legal heir's favour had been presented. The will was undisputed and hence the shares had to be transferred in the legal heir's favour.

Nomination Made by Joint Holders

Joint holders up to two may appoint a nominee for the shares/debentures/security held by them in a company by preparing and signing prescribed form and sending the same to the company concerned for necessary registration. In case if one of the joint holders dies, the shares debentures/securities will get transmitted in favour of the surviving holder. Nomination will remain intact but nominee will have a right to shares/debentures/securities only upon the death of all the joint holders.

Surviving joint holder can make fresh nomination revoking the old nomination because upon the death of a joint holder, he will become the sole owner.

Option for Holdings in Demat Form and Physical Form

Demat shareholders are given an option as to election of nominee at the time of opening of Demat account.

Effect of Nomination Upon Transfer of Shares

In case, shares in respect of which nomination has been made are transferred, the nomination shall automatically stand rescinded. The same position is applicable in respect of transfer of debentures and renewal/repayment of deposits.

Cancellation and Variation of Nominee

A nomination may be cancelled, or varied by nominating any other person in place of the present nominee, by the holder of securities who has made the nomination, by giving a notice of such cancellation or variation, to the company in **Form No. SH-14.** The cancellation or variation shall take effect from the date on which the notice of such variation or cancellation is received by the company.

Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority. Further where the nominee is a minor, the holder of the shares or debentures, making the nomination, may appoint a person in **Form No. SH-14** who shall become entitled to the securities of the company, in the event of death of the nominee during his minority.

Pari Passu Clause in case of Debentures

a) Debentures are usually **issued in a series with a *pari passu*** clause and it follows that they would be on an **equal footing as to security** and should the security be enforced, the amount realised shall be **divided prorata,** i.e. they are to be discharged rateably. In the event of deficiency of assets, they will abate proportionately.

b) The expression ***'pari passu'* implies with equal step, equally treated, at the same rate, or at par with.**

c) When it is said that existing debentures shall be issued *pari passu* clause, it implies that no difference will be made between the old and new debentures.

d) If the words *'pari passu'* are not used, the debentures will be payable according to the date of issue, and if they are all issued on the same day, they will be payable accordingly to their numerical order. However, a company cannot issue a new series of debentures so as to rank *pari passu* with prior series, unless the power to do so is expressly reserved and contained in the debentures of the previous series.

DEBENTURE STOCK:

A company, instead of issuing debentures, each in respect of separate and distinct debt, may raise one aggregate loan fund or composite stock known as 'debenture stock'. Accordingly, a debenture stock is a borrowed capital consolidated into one mass for the sake of convenience.

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Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum being a portion of one large loan. It is generally secured by a trust deed. As in the case of shares, a person may subscribe for, or transfer any amount even a fraction amount. Debenture stock is the indebtedness itself, and the debenture stock certificate furnishes evidence of the title or interest of the holder in the indebtedness. Debenture is the document which furnishes evidence of the debt. Debenture stock must be fully paid, while debenture mayor may not be fully paid.

Difference between Debenture and Debenture Stock

Debenture is the description of an instrument, while 'debenture stock' is the description of a debt or sum secured by an instrument. In the words of LORD LINDLEY, it is "borrowed capital consolidated into one mass for the sake of convenience".

Distinction between Debenture and Loan

A debenture means a **document** which **creates or acknowledges a debt. A loan creates a right in the creditor** to demand repayment, and the substance of a debt is a liability upon the debtor to repay the money.

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DEBT CAPITAL DEPOSITS

INTRODUCTION

Section 2 (31) of Companies Act

Rule 2 (1) (C) DEFINITION OF DEPOSIT

"**Deposit**" includes any receipt of money by way of deposit or loan or in any other form, by a company

But does not include;

- Any amount received from the CG or a SG, or any amount received from any other source whose repayment is guaranteed by the CG or a SG, or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature;
- Any amount received from Foreign Governments, foreign or international banks, multilateral financial institutions;
- Any amount received as a loan or facility from any Bank or FI;
- Any amount received against issue of commercial paper or any other instruments issued under guidelines or notification issued by RBI;
- Any amount received by a company from any other company (Inter-corporate Deposits);
- Any amount received towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, provided that securities are allotted within 60 days from the date of receipt of money failing which, money should be refunded within 15 days after the expiry of 60 days, otherwise it shall be treated as deposit;
- Any amount received from a person who, at the time of the receipt of the amount, was a director of the company, provided it is not being given out of borrowed funds;
- Any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets referred to in **Schedule III** of the Act excluding intangible assets of the company or bonds or debentures compulsorily convertible into shares of the company within five years, provided the amount of borrowing is not more than the market value of such assets assessed by a registered value;
- Any amount received from an employee of the company not exceeding his annual salary under a contract of employment with the company in the nature of non-interest bearing security deposit;
- Any non-interest bearing amount received or held in trust;
- Any amount received in the course of, or for the purposes of the business of the company, such as an advance for the supply of goods or provision of services or sale of property, provided that if the aforesaid amount becomes refundable on account of not getting the requisite approval/permission, then the money should be refunded within 15 days from the date it becomes due for refund, otherwise it shall be treated

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as deposit;

- Any amount brought in by the promoters of the company by way of unsecured loan subject to fulfilment of the following conditions, namely:
  a) The loan is brought in pursuance of the stipulation imposed by the lending FI or bank on the promoters to contribute such finance;
  b) The loan is provided by the promoters themselves or by their relatives or by both and not by their friends and business associates; and
  c) The exemption shall be available only till the loans of financial institution or bank are repaid and not thereafter.

It may be noted that Sections 73 and 76 and Companies (Acceptance of Deposits) Rules, 2014 do not apply to acceptance of deposits by Banking Companies, NBFCs, Housing Finance Companies and such other class of notified companies. The acceptance of deposits by the aforesaid companies is governed by different norms.

KINDS OF DEPOSITS:

A. **Acceptance of deposit from Members:** Any company (whether private or public) can accept deposits from its members, subject to the passing of a resolution in general meeting and subject to certain specified conditions.
In order to accept deposits from members, the company has to certify, in circular, that it has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits. [Section 73]

B. **Acceptance of deposits from the Public:** Only a public company, having a net worth of not less than Rs. 100 Cr. OR a turnover of not less than Rs. 500 Cr., can accept deposits from the Public. Such kind of public company, shall be referred to as **'Eligible Company:**

Further, an eligible company is also required to obtain the prior consent of the company in GM by means of a special resolution and also filed the said resolution with the ROC of Companies before making any invitation to the Public for acceptance of deposits. However, if the amount of proposed deposits from the public together with the existing borrowings of the company do not exceed its net worth (i.e., sum total of PSC and FR), an eligible company may accept deposits by means of an ordinary resolution. [Section 76]

In order to accept deposits from the public, the company has to certify, in circular in the form of an advertisement, that it has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits. Further, such company shall obtain the credit rating from a recognized credit rating agency, atleast once in a year. The rating shall be obtained for every year during the tenure of deposits. Copy of the rating shall be sent to the ROC along with the return of deposits in **Form DPT-3.**

DEPOSITOR (RULE 2 (1) (d))

- Any member of the company who has made a deposit with the company u/s 73 of the Companies Act; or
- Any person who has made a deposit with an eligible company u/s 76 of the Companies Act.

Eligible Company: Rule 2(1)(e)

A Public company having a net worth of not less than Rs. 100 Cr. or a turnover of not less than Rs. 500 Cr. and which has obtained the prior consent of the company in GM by means of a SR and filed the said resolution with the ROC and where applicable, with the RBI before making any invitation to the public for acceptance of Deposits;
Provided that an eligible company, which is accepting deposits within the limits specified u/s 180(1)(c), may accept deposits by means of an ordinary resolution.

Prohibition on acceptance of deposits from public: Section 73(1)

No company shall invite, accept or renew deposits under this Act from the public except in a manner provided under Chapter V.

Exceptions:

- A banking company
- Non-banking financial company as defined in RBI Act, 1934 and
- To such other company as the CG may, after consultation with the Reserve Bank of India, specify in this behalf.

Conditions for acceptance of deposits from members:

Section 73(2) states that a company may, subject to

- The passing of a resolution in GM and
- Subject to such rules as may be prescribed in consultation with the RBI, accept the deposits from its members on such terms and conditions, including the provisions of security, if any, on such repayment of such deposits with interest, as may be agreed upon between the company and its members,

  Subject to the fulfilment of the following conditions, namely-

  a) Issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such manner as may be prescribed.
  b) Filing a copy of the circular along with such statement with the **ROC 30 days** before the date of issue of the circular;
  c) Depositing **sum not less than 20%** of the amount of its deposits maturing during a FY and the FY next following, and kept in a scheduled bank in a separate bank account to be called as **Deposit Repayment Reserve Account.**
  ~~d) Providing such **deposit insurance** in such a manner and to such extent as may be prescribed.~~ **(Omitted)**
  e) Certifying that the company has **not committed any default** in the repayment of deposits accepted either before or after the commencement of this act or payment of interest on such deposits **and where such default has occurred, the company made good the default and a period of 5 years had lapsed since the date of**

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making good the default.

f) Providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation if such charge on the property or assets of the company. In case when a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as "unsecured Deposits" and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

Clauses (a) to (e) of section 73(2) Shall not apply to a private company

A. which accepts from its member's monies not exceeding 100 % of aggregate of the paid up share capital, free reserves and securities premium account; or
B. which is a start-up, for 5 years from the date of its incorporation; or
C. which fulfils all of the following conditions, namely:
   a) which is not an associate or a subsidiary company of any other company;
   b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or Rs. 50 Cr., whichever is lower; and
   c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

Provided that the company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the ROC in prescribed manner (2018)

Section 73(3) states that every deposit accepted by a company shall be repaid with interest as per terms and conditions of the agreement. If a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to NCLT for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as NCLT may deem fit.

Deposit repayment: Section 73(5)

The deposit repayment reserve account shall not be used by the company for any purpose other than repayment of deposits.

Deposits accepted before the commencement of the Act: Section 74(1)

When, in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall-

- **File, within a period of 3 months** from such commencement or from the date on which such payments are due, with the ROC a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained subject to which the deposit was accepted or any scheme framed under any law; and
- **Repay within 3 years** from such commencement or on or before expiry of the period for which the deposits were accepted. w.i.e.
  Provided that renewal of any such deposits shall be done as per provisions of chapter V and rules made thereunder.

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Section 74(2) states that the NCLT may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

Sec 74(3) states that if a company fails to repay the deposit or part thereof or any interest thereon within specified time or such further time as may be allowed by NCLT,
The company shall be punishable with fine →Rs. 1Cr. to Rs. 10 Cr
and
Every officer in default shall be punishable with imprisonment up to 7 years **OR** with fine minimum Rs. 25 Lakhs and maximum Rs. 2 Cr, **OR** with both.

Applicable Rules [Rule 3]

- **Periods of Acceptance of Deposits**
  No company shall accept or renew any deposit, which is repayable on demand; or on notice; or after a period of less than 6 months or more than 36 months from the date of acceptance or renewal of such deposits, as the case maybe

  However, a company may, for meeting short-term requirements of funds, accept or renew short-term deposits for repayment earlier than 6 months from the date of deposit or renewal; provided that such deposits do not exceed 10% of the aggregate of the paid-up share capital and free reserves of the company and such deposits are not repayable earlier than 3 months from the date of acceptance or renewal, as the case may be.

- **Joint Depositors**
  Where depositors so desire, deposits may be accepted in joint names, but not exceeding three, with or without any of the clauses, namely, "Jointly", "Either or Survivor", "First named or survivor", "Anyone or Survivor".

- **Ceiling limits for Acceptance of Deposits**
  For a Company other than an Eligible Company: It may accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits does not exceed 25% of the aggregate of the paid-up share capital and free reserves of the company.

- **For an Eligible Company**
  An Eligible Company, other than a Government Eligible Company, can accept or renew deposits, together with existing deposits, subject to the following ceiling:-
  - **Deposits from Members:** 10% of the aggregate of paid-up share capital and free reserves.
  - **Any other Deposits:** 25% of the aggregate of paid-up share capital and free reserves.
  - A Government Eligible Company can accept or renew deposits, together with existing deposits, up to 35% of aggregate of its paid-up capital and free reserves.

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Ceiling on Rate of Interest and Brokerage [Rule 3(6)]

No company shall accept/renew deposits at a rate of interest exceeding the maximum rate of interest prescribed by RBI that the NBFCs can pay on their public deposits.

Similarly, no company shall pay brokerage at a rate exceeding the maximum rate of brokerage prescribed by RBI that the NBFCs can pay on their public deposits.

Who is eligible to receive brokerage?

Only the person who is authorized, in writing, by a company to solicit deposits on its behalf and through whom deposits are actually procured will be entitled to the brokerage and payment of brokerage to any other person for procuring deposits shall be deemed to be in violation of these Rules. **[Explanation to Rule 3(6)]**

Rule 3(7) states that the company shall not reserve to itself either directly or indirectly a right to alter, to the prejudice or disadvantage of the depositor, any of the terms and conditions of the deposit, deposit trust deed and deposit insurance contract after circular or circular in the form of advertisement is issued and deposits are accepted.

Form and Particulars of Advertisements or Circulars [Rule 4]

Every company, other than an Eligible Company, intending to invite deposit from its members shall issue a circular to all its members by registered post with acknowledgement due or speed post or by electronic mode **in Form DPT-1**. It may be noted that in addition to this, the circular may be published in English language in an English newspaper and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated.

Every Eligible Company intending to invite deposits shall issue a circular in the form of an advertisement **in Form DPT-1** for the purpose in English language in an English newspaper and in vernacular language in one vernacular newspaper having wide circulation in the State in which the registered office of the company is situated. Every company inviting deposits from the public shall upload a copy of the circular on its website, if any.

Such circular or circular in the form of an advertisement must be issued only on the authority and in the name of the Board of Directors of the company and must contain a reference to the conditions, subject to which deposits shall be accepted by the company.

No company shall issue circular or circular in the form of an advertisement inviting deposits unless, not less than 30 days on before the date of its issue, a copy of the same has been delivered to the Registrar of Companies for registration. The copy of circular or circular in the form of an advertisement delivered to the Registrar must be signed by the majority of the directors of the Company.

It may be noted that a circular or circular in the form of advertisement issued shall be valid until the expiry of 6 months from the date of closure of the financial year in which it is issued or until the date on which the financial statement is laid before the company in annual general

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meeting, whichever is earlier. Further, a fresh circular or circular in the form of advertisement shall be issued, in each succeeding financial year, for inviting deposits during that financial year.

As per the Companies (Acceptance of Deposits) Amendment Rules, 2018 w.e.f 15/08/2018 a new proviso to be inserted as follows –

"Provided further that a certificate of the statutory auditor of the company shall be attached in Form DPT-1, stating that the company has not committed default in the repayment of deposits or in the payment of interest on such deposits accepted either before or after the commencement of the Act and in case a company had committed a default in the repayment of deposits accepted either before or after the commencement of the Act or in the payment of interest on such deposits, a certificate of the statutory auditor of the company shall be attached in Form DPT-1, stating that the company had made good the default and a period of 5 years has lapsed since the date of making good the default as the case may be.";

~~MANNER AND EXTENT OF DEPOSIT INSURANCE (RULE 5) – OMITTED~~ (2018)

CREATION OF SECURITY (RULE 6)

Every company inviting secured deposits shall, **within 30 days** from the date of acceptance, provide for security by way of a charge on its assets, by way of either mortgage or hypothecation only.

It may be noted that the company shall ensure that the total value of the security either by way of deposit insurance or by way of charge or by both on company's assets shall not be less than the amount of deposits accepted and the interest payable there on.

APPOINTMENT OF TRUSTEE FOR DEPOSITORS, ETC. (RULE 7,8,& 9):

Every company, inviting secured deposits shall appoint one or more trustees for depositors for creating security for the deposits. The company shall execute a deposit trust deed in **Form DPT-2 at least 7 days** before issuing the circular or circular in the form of advertisement.

Certain Persons not to be appointed as Deposit Trustees

No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the deposit holders, if the proposed trustee -

a) Is a director, KMP or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company;
b) Is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
c) Has any material pecuniary relationship with the company;
d) Has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon;
e) Is related to any person specified in clause (a) above.

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REMOVAL OF DEPOSIT TRUSTEES:

No deposit trustee may be removed from office after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting of the board. In case the company is required to appoint independent directors, at least one independent director shall be present in such meeting of the Board

The duties and functions of deposit trustee shall generally be -

- To protect the interest of holders of depositors (including creation of securities within the stipulated time); and
- To redress the grievances of holders of depositors effectively.

The trustee for depositors shall call a meeting of all the depositor son-

- Requisition in writing signed by at least one-tenth of the depositors in value for the time being outstanding;
- The happening of any event, which constitutes a default or which, in the opinion of the trustee for depositors, affects the interest of the depositors.

Form of Application for Deposits [Rule 10]

- On and from the commencement of these rules, no company shall accept, or renew any deposit, whether secured or unsecured, unless an application, in the form prescribed by the company, is submitted by the intending depositor for the acceptance of such deposit.
- The application shall contain a declaration by the intending depositor to the effect that the deposit is not being made out of any money borrowed by him from any other person.

Nomination Facility to Depositors [Rule 11]

Every depositor-may, at any time, nominate any person to whom his deposits shall vest in the event of his death and the provisions of Section 72 of Companies Act, 2013 shall, as far as possible, apply to the nomination made by the depositor.

Deposit Receipt [Rule 12]

Every company shall, on the acceptance or renewal of a deposit, furnish to the depositor or his agent a receipt for the amount received by the company, within a period of two weeks from the date of receipt of money or realisation of cheque or date of renewal, as the case may be.

Maintenance of Liquid Assets [Rule 13]

A company is required to deposit **at least 20% of the amount** of its deposits maturing during a FY (i.e., 1st April to 31st March) and the FY next following the year, and kept in a SCB in a separate bank account to be called as **Deposit Repayment Reserve Account**. This amount is required to be deposited **by the 30th of April each year**. The amount so deposited cannot

be utilized for any purpose other than for repayment of deposits maturing during the year.

It should, however, be ensured that the amount remaining deposited should not, at any time during the year, fall below **20% of deposits** maturing and remaining to be paid until the end of current financial year and the next financial year.

Register of Deposits [Rule 14]

Every company accepting deposits shall keep, at its registered office, one or more registers in which there shall be entered, separately in the case of each depositor, the following particulars, namely:-

1. Name and address of the depositor;
2. Date and amount of each deposit;
3. Duration of the deposit and the date on which each deposit is repayable
4. Rate of interest;
5. Date or dates on which payment of interest will be made;
6. Any other particulars relating to the deposit.

The register or registers must be preserved in good order for a period of not less than eight calendar years, from the financial year in which the latest entry is made in the register.

Premature Surrender of Deposits [Rule 15]

If a company makes repayment of any deposit **after the expiry of 6 months** from the date of such deposit but before, the maturity date of deposit, it should, reduce the interest on such deposit by **1%** from the rate which the company would have paid, had the deposit been accepted for the period for which such deposit had run; and the company should not pay interest at a rate higher than the rate so reduced.

Where the period for which the deposit had run contains any part of year, then if such part is **6 months or more**, it should be reckoned as one year for the purpose of this Rule.

Return of Deposits [Rule 16]

Every company shall file a return of deposits, in **Form DPT-3**, with the **ROC** on or before **30th June** of every year. This return shall contain information as on **31st March** and shall be duly certified by the Auditors of the Company.

Penal Rate of Interest [Rule 17]

A penal rate of interest of 18% per annum shall be paid for the overdue period, in case of public deposits, whether secured or unsecured, matured and claimed but remaining unpaid.

Power of CG To Decide Certain Questions Rule 18

If nay question arises as to the applicability of these rules to a particular company, such question shall be decided by the CG in consultation with the RBI.

Applicability of sections 73,74 and 75 to eligible companies Rule 19

It may be noted that

- For the purpose of this rule, it is hereby clarified that in case of a company which had accepted or invited **public deposits** under co. Act 1956 and Rules made thereunder and has been repaying such deposits and interest thereon as per such provisions, the provisions of Section 74(1)(b) of the Act shall be deemed to have been complied with if they company complies with requirements under the Act and these rules and continues to repay such deposits and interest thereon on due dates from the remaining period of such deposits in accordance with the terms and conditions and period of such Earlier deposits and in compliance with the requirements under the Act and these rules.

The fresh deposits by every **eligible company** shall have to be in accordance with the provisions of Chapter V of the Act and these rules. Without prejudice to above, in case of deposits accepted by an eligible company under section 76 of the Act, the provisions of section 73(3) & (4), provisions of section 74(2) & (3) and and provisions of sec 75 shall be applicable irrespective of the fact that such deposits were not accepted by the co. before the commencement of this Act.

Damages for Fraud [Section 75]

Section 75 provides that in case the company fails to pay the deposit or any interest thereon within one year from the commencement of the Act or from the date on which such payments becomes due, whichever is earlier, or within such time periods as allowed by the NCLT and it is proved that the deposits had been accepted with intent to defraud the depositors, every officer who was responsible for acceptance of such deposits shall be liable without prejudice to the visions contained under Section 74 and liability for fraud **u/s 447**, be personally responsible, without any limitation of liability for all losses or damages incurred by the depositors.

For failure to repay the deposits, action may also be taken by any person, group of persons or any association of persons who had incurred any loss as a result such failure.

Penalty for Violation of the Provisions of Deposits [Section 76A]

If a company fails to repay the deposits or part thereof or any interest thereon within the specified time the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with minimum fine of **Rs. 1Cr or twice the amount of deposit accepted by the company (w.i.l)** and maximum fine of **Rs. 10 Cr** and every officer in default shall be punishable with imprisonment which may extend to 7 years **AND** with minimum fine of **Rs.25 Lakh** and a maximum fine of **Rs.2 Cr.** ~~**or with both.**~~

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REGISTRATION OF CHARGES

MORTGAGE:

Definition and Nature of Mortgage

According to Section 58 of the Transfer of Property Act 1882, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan; an existing or future debt or the performance of an agreement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest the payment of which is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called a mortgage deed.

ESSENTIALS OF MORTGAGE:

Following are the essential of a mortgage:-

1. **Transfer of Interest:** A mortgage is a transfer of interest in the specific immovable property. After mortgage, the interest of the mortgagor is reduced by the interest, which has been transferred to the mortgagee.
2. **Specific Immovable Property**: The property must be specifically mentioned in the mortgage deed.
3. **To secure the payment of a Loan:** The transaction is for the purpose of securing the payment of a loan or the performance of an obligation, which may give rise to pecuniary liability.

KINDS OF MORTGAGE

There are in all 6 kinds of mortgage in immovable property, namely:-

- ✓ Simple Mortgage.
- ✓ Mortgage by conditional sale.
- ✓ Usufructuary mortgage.
- ✓ English mortgage.
- ✓ Mortgage by deposit of title - deeds or equitable mortgage.
- ✓ Anomalous mortgage.

Note: Mortgage is not a part of this subject as per ICSI publication and is covered under the module of Economic and Commercial Laws in detail.

Charges

Definition Sec 2(16)

Section 2(16) of the Companies Act, 2013 defines charges so as to mean an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

1. There should be 2 parties to the transaction, the creator of the charge and the charge holder.

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2. The subject-matter of charge, which may be current or future assets and other properties of the borrower.
3. The intention of the borrower to offer one or more of its specific assets or properties as security for repayment of the borrowed money together with payment of interest at the agreed rate should be manifested by an agreement entered into by him in favour of the lender, written or otherwise.
4. A charge may be fixed or floating depending upon its nature.

"Charge" as defined under Section 100 of the Transfer of Property **Act,** 1882,where an immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge.

A charge is a security, given for securing loans or debentures. The security may be provided either by way of mortgage, hypothecation, pledge or lien.

Thus, charge is a general concept and it covers each and every mode of creating the security on the assets of a company, for the purpose of securing the repayment of any debt due by a company.

Kind of Charges

A charge on the property of the company as security for creditors may be of the following kinds, namely:

1. Fixed or specific charge.
2. Floating charge.

Fixed or Specific Charge:	A charge is fixed or specific when it is made specifically to cover assets, which are ascertained and definite or are capable of being ascertained and defined, at the time of creating charge e.g., land, buildings, or heavy machinery. A fixed charge, therefore, is against security of certain specific property, and the company loses the right to dispose off that property as unencumbered.
Floating Charge:	A floating charge is a charge on a class of assets present and future, which in the ordinary course of business is changing from time to time and leaves the company free to deal with the property as it sees fit until the holders of charge take steps to enforce their security. A floating charge is not attached to any definite property but covers property of a fluctuating type.

Case Law	Maturi U. Rao v. Pendyala A.I.R. 1970

"The essence of a Floating charge is that the security remains dormant until it is fixed or crystallized". But a floating security is not a future security. It is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder of such charge cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgager i.e. the company can deal with them without the concurrence of the mortgagees.

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Case Law 70 Borax Co.

It was held that a company may sell the whole of its undertaking if that is one of the objects specified in its memorandum. Unless specifically precluded, the company can create fixed charge subsequent to floating charges over the same property.

Crystallisation of Floating Charge

A floating charge attached to the company's property generally remains dormant till it crystallizes or becomes fixed. The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event, which determines this right.

A floating charge crystallizes and the security becomes fixed in the following cases-

- When the company goes into liquidation.
- When the company ceases to carry on the business.
- When the creditors or debenture holders take steps to enforce their security e.g. by appointing Receiver to take possession of the property charged.
- On the happening of the event specified in the deed.
- On crystallization, the floating charge converts itself into a fixed charge on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors

Case Laws 71 **In Govt. Stock Investment Co. Ltd. V. Manila Railway Co. Ltd.**

The debentures created a floating charge. 3 months' interest became due but the debenture holders took no steps and so the charge did not crystallize but remaining floating. The company then made a mortgage of a specific part of its property. Held, the mortgagee had priority. The security for the debentures remained merely a floating security as the debenture holders had taken no steps to enforce their security.

Need for Creating a Charge on Company's Assets

Almost all the large and small companies depend upon share capital and borrowed capital for financing their projects. Borrowed capital may consist of funds raised by issuing debentures, which may be secured or unsecured, or by obtaining financial assistance from financial institution or banks.

The financial institutions banks do not lend their monies unless they are sure that their funds are safe and they would be repaid as per agreed repayment schedule along with payment of interest.

In order to secure their loans they resort to creating right in the assets and properties of the borrowing companies, which is known as a charge on assets. This is done by executingloan agreements, hypothecation agreements, mortgage deeds and other similardocuments, which the borrowing company is required to execute in favour of the lending institutions/banks etc.

The real question which alerts the lending institutions is how to ensure that the assets being offered as security for their proposed loans are not already encumbered.

RegistrationofCharges

1. **Certificate of Registration of Charge**:
Where a charge is registered with the ROC, ROC shall issue a certificate of registration of charge **in CHG-2** and for registration of modification of charge **in CHG-3** to the company and to the person in whose favour the charge is created. The certificate issued by the ROC whether in case of registration of charge or registration of modification, shall be conclusive evidence that the requirements of Chapter VI of the Act (Registration of Charges) and the rules made there under as to registration of creation or modification of charge, as the case may be, have been complied with. Further the Act provides that no charge created by the company shall be taken into account by the liquidator or any other creditor unless it is duly registered and a certificate of registration is given by the Registrar. However, this does not prejudice any contract or obligation for the repayment of the money secured by a charge.

2. **Duty to Register Charge (Sec 77)**
Every company creating a charge shall register the particulars of charge signed by the company and its charge - holder together with the instruments creating.
Important points in the Act relating to charge creation:
   - ✓ Any charge created within or outside India-
   - ✓ On property or assets or any of the company's undertakings.
   - ✓ Whether tangible or otherwise, situated in or outside India shall be registered.

   Hence all types of charges are required under the Act to be registered whether created within or outside India
   Except charges as may be prescribed in consultation with the RBI.

3. **Time Limit for Registration of a Charge**
A charge created by a company is required to be registered with the ROC within 30 days of its creation in CHG 1 (for other than debentures) and CHG 9 (for Debentures).
Provided that the ROC may, on an application, allow such registration to be made— (02/11/18)
   a) in case of charges created before the commencement of the Companies (Amendment) Act, 2019, within a period of 300 days of such creation; or
   b) in case of charges created on or after the commencement of the Companies (Amendment) Amendment, Act 2019, within a period of 60 days of such creation, on payment of such additional fees.

   Provided further that if the registration is not made within the period specified—
   a. in clause (a) to the 1st proviso, the registration of the charge shall be made within 6 months from the date of commencement of the Companies (Amendment) Act, 2018, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies;
   b. in clause (b) to the 1st proviso, the ROC may, on an application, allow such registration to be made within a further period of 60 days after payment of such ad-valorem fees as may be prescribed."

   Where a charge is registered with the ROC obtain a certificate of registration of such charge in Form No. CHG-2.

4. **Application for Registration of Charge by the Charge-holder**

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According to Section 78 where a company fails to register the charge within the period **30 days**, the person in whose favour the charge is created may apply to the ROC for registration of the charge along with the instrument created for the charge in **Form No.CHG-1** or **Form No.CHG-9**, as the case may be, duly signed along with fee.

Where registration is affected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company, the amount of any fee or additional. The **ROC** may, on such application, give notice to the company about such application. The company may either itself register the charge or shows sufficient cause that why such charge should not be registered. On failure on part of the company, the **ROC** may allow registration of such charge within 14 days after giving notice to the company shall allow such registration fees paid by him to the Registrar for the purpose of registration of charge.

Modification of charges[Section 79]

The requirement of registering the charge shall also apply to a company acquiring any property subject to charge or any modification in terms and conditions of any charge already registered.

It provides that the provisions of Section 77 relating to registration of charge shall apply to:

1. A company acquiring any property subject to a charge within the meaning of that section; or
2. Any modification in the terms or conditions or the extent or operation of any charge registered under that section.

The provisions relating to Condonation of delay shall apply, mutatis mutandis, to the registration of charge on any property acquired subject to such charge and modification of charge under Section 79 of the Act.

Verification of Instruments

According to the Rules, a copy of every instrument evidencing any creation or modification of charge and required to be filed with the ROC in pursuance of Section 77, 78 or 79 shall be verified as follows:

1. where the instrument or deed relates solely to the property situated outside India, the copy shall be verified by a certificate issued either under the seal of the company, or under the hand of any director or company secretary of the company or an authorised officer of the charge holder or under the hand of some person other than the company who is interested in the mortgage or charge;

2. Where the instrument or deed relates, whether wholly or partly, to the property situated in India, the copy shall be verified by a certificate issued under the hand of any director or company secretary of the company or an authorized officer of the charge holder.

Section 80 – Effect of registration of charges

According to Section 80, where any charge on any property or assets of a company or any of its undertakings is registered u/s 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from

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the date of such registration. The section clarifies that if any person acquires a property, assets or undertaking for which a charge is already registered, it would be deemed that he has complete knowledge of charge from the date the charge is registered.

Particulars of Charges

The following particulars in respect of each charge are required to be filed with the ROC:

a) Date and description of instrument creating charge;
b) Total amount secured by the charge;
c) Date of the resolution authorising the creation of the charge; (in case of issue of secured debentures only);
d) General description of the property charged;
e) A copy of the deed/instrument containing the charge duly certified or if there is no such deed, any other document evidencing the creation of the charge to be enclosed;
f) List of the terms and conditions of the loan; and
g) Name and address of the charge holder.

Consequences of Non-Registration

According to Section 77 of the Companies Act, 2013, all types of charges created by a company are to be registered by the ROC, where they are not filed with the ROC for registration, it shall be void as against the liquidator and any other creditor of the company.

This does not, however, mean that the charge is altogether void and the debt is not recoverable. So long as the company does not go into liquidation, the charge is good and may be enforced.

•***Void against the liquidator*** means that the liquidator on winding up of the company can ignore the charge and can treat the concerned creditor as unsecured creditor. The property will be treated as free of charge i.e. the creditor cannot sell the property to recover its dues.

•***Void against any creditor*** of the company means that if any subsequent charge is created on the same property and the earlier charge is not registered, the earlier charge would have no consequence and the latter charge if registered would enjoy priority. In other words, the latter charge holder can have the property sold in order to recover its money.

Thus, non-filing of particulars of a charge does not invalidate the charge against the company as a going concern. It is void only against the liquidator and the creditors at the time of liquidation.

Register of charges maintained by company[Section -81]

ROC shall maintain a register containing particulars of the charges registered in respect of every company. The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of Section 81 of the Act. This charge register shall be open to inspection by any person on payment of fee for each inspection.

Satisfaction of Charges[Section 82]

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A company shall give intimation to the ROC in prescribed form, of the payment or satisfaction in full of any charge registered within 30 days from date of such payment of satisfaction in FORM NO. CHG 4 along with the FEE.

Provided that the ROC may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within 300 days of payment or satisfaction on payment of such additional fees as may be prescribed.

On receipt of such intimation, the ROC shall issue a notice to the holder of the charge calling a show cause within such time **not exceeding 14 days**, as to why payment or satisfaction in full should not be recorded as intimated to the **ROC**. If no cause is shown, by such holder of the charge, the **ROC** shall order that a **memorandum of satisfaction** shall be entered in the register of charges maintained by the **ROC** u/s 81 and shall inform the company. If the cause is shown to the **ROC** shall record a note to that effect in the register of charges and shall inform the company accordingly.

However, the aforesaid notice shall not be sent, in case intimation to the **ROC** is in specified form and is signed by the holder of charge.

Power of roc to make entries of satisfaction of charge[Section 83]

There may be times where a company may fail to send intimation of satisfaction of charge to the Register but according to Section 83 of the Act, **ROC** may enter in the register of charges **memorandum of satisfaction** on receipt of evidence to his satisfaction that -

a) The debt for which the charge was given has been paid or satisfied in whole or in part; or
b) Part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking.

The ROC shall inform affected parties **within 30 days** of making the entry in the **register of charges**.

Certificate of registration of satisfaction of charge:

Where the **ROC** enters a memorandum of satisfaction of charge in full in pursuance of Section 82 or 83, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.

Company's Register of Charges [Section 85]

Every company shall keep at its registered office a register of charges in **Form No. CHG.7** which shall include details of all charges created, modified and satisfied.

All the entries in the register shall be authenticated by a director or the secretary of the company or any other person authorised by the Board for the purpose.

The register of charges shall be preserved permanently and the instrument creating a charge or modification there on shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

A copy of the instrument creating the charge shall also be kept at the registered office of the

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company along with the register of charges.

Inspection of the Register of charges and of the instruments creating charges can be allowed only during the business hours to any member or creditor of the Company or any other person subject to reasonable restriction as the company by its article impose. The register of charges and the instrument of charges kept by the company shall be open for inspection-

a) By any member or creditor of the company without fees;
b) By any other person on payment of fee.

Penalty for Non-Registration of Charge [Section 86]

The company, shall be punishable with fine which shall not be less than Rs. 1lakh and maximum 10Lakh and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or fine not less than Rs.25, 000 which may extend to Rs. 1, 00,000, or with both.

If any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77, he shall be liable for action u/s 447. (02/11/18)

Rectification by Central Government in register of charges [Section 87]

(02/11/18)

The CG on being satisfied that —

a. The omission to give intimation to the ROC of the payment or satisfaction of a charge, within the time limit OR;
b. The omission or misstatement of any particulars with respect to any such charge or modification or with respect to any memorandum of satisfaction;

was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company,

Then

CG may, on the application of the company or any person interested and on prescribed terms and conditions, direct that the time for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or misstatement shall be rectified.".

Intimation of Appointment of Receiver or Manager [Section 84]

If any person obtains an order for the appointment of a receiver of, or of a person to manage, the property, subject to a charge, of a company or if any person appoints such receiver or person under any power contained in any instrument, he shall, within a period of 30 days from the date of the passing of the order or of the making of the appointment, give notice of such appointment to the company and the ROC along with a copy of the order or instrument and the ROC shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

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Any person so appointed shall, on ceasing to hold such appointment, give to the company and the ROC a notice to that effect and the ROC shall register such notice.

Condonation of Delay/Power of the CG to grant extension of time/Rectification of the Register of Charges maintained by the ROC

The CG has powers to grant extension of time for filing particulars of any charge; or any modification thereof; or for giving of any intimation about the payment or satisfaction of charge, if the CG is satisfied:

- That the omission to do so within the prescribed time:-
- Is accidental, or
- Is due to inadvertence, or
- Is not of a nature, as to prejudice the position of creditors / shareholders,
- That it is just and equitable to grant relief on other grounds.

For this purpose, an application in the Form CHG 8 shall be made to CG.

The petition shall be accompanied by the following documents:-

- Copy of the agreement creating or modifying the charge or no dues letter, as the case may be.
- Copy of the resolutions passed as may be applicable.
- Affidavit verifying the petition.
- Memorandum of appearance with copy of Board resolution, authorizing anyone of the Directors or Company Secretary of the Company, to appear before the CG, the executed Vakalatnama, as the case may be.

Various Forms related to Charge

1. **CHG-I** - Creating or modifying the charge (for other than Debentures).
2. **CHG-2**-Certificate of registration.
3. **CHG-3** Certificate of modification of charge.
4. **CHG-4** Intimation of the satisfaction to the Registrar.
5. **CHG-5** Memorandum of satisfaction of charge.
6. **CHG-6** Notice of appointment or cessation of receiver or manager.
7. **CHG-7** Register of charges of Company.
8. **CHG-8** Application for condonation of delay shall be filed with the Central Government.
9. **CHG-9** Creating or modifying the charge in (for debentures).
10. **CHG-IO** Application for delay to the registrar.

All the fees shall be paid in accordance with Annexure 'B' of Companies(Registration offices and fees) Rules, 2014 issued by the Ministry of Corporate Affairs as a circular dated 01/04/2014.

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Divisible Profits and Dividend

Definition and Meaning of Dividend

Dividends are share received by a shareholder of a company from **profits legally available for distribution** and divided among the members.

OR

Dividends are **sums** of money to **be paid to the members** of the Company **out of the profits** made by the Company. Dividend is paid in proportion to the **amount paid - up on the shares held** by them.

All companies except **companies registered u/s 8** (i.e., **non-profit companies), can declare dividend.**
Dividend Warrant is an **order by the company to its banker** to pay the amount specified to the shareholder, **whose name is written** therein.

Difference between Dividend and Interest:

- ✓ Dividend is **paid on preference and equity shares** whereas interest is **paid on debentures** and long term and short term loans/borrowings including fixed deposits.
- ✓ Interest is a **debt** which like all debts is paid out of the company's assets generally. A dividend however **becomes a debt** only after it has been declared by the company.
- ✓ Dividend cannot be paid out of the assets of the company, generally it **can be declared only out of the profit** available for the purpose. Interest is a **charge on profits** while dividend is an appropriation of profits.

The power to pay dividend is **inherent** in a company and is **not derived** from the Companies Act, 1956 or the **MOA or AOA** although the Act and the Articles regulate the manner in which dividends are to be declared.

Right to claim dividend will only arise **after a dividend is declared** by the company in **General Meeting** and until and unless it is so declared, the shareholder has no claim against the company in respect of it.

Case Law 93 **Bacha F. Guzdar vs. CIT (1952)(BOM)**

Observation of this case was improved upon by the **Supreme Court** saying that the right to participation in the profits exists independent of any declaration by the company with only difference that the **enjoyment of profits is postponed until dividends are declared.**

Kinds of dividend:

Final Dividend:

Dividend **declared at the AGM** of the company is called as Final Dividend.
Final dividend **once declared becomes a debt** enforceable against the company.
Final Dividend can be declared only if it is **recommended by the BOD** of the Company.

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BOD must **state in the Board's Report the amount of dividend,** if any, which it recommends to be paid.

Interim Dividend

Dividend is said to be an interim dividend, if it is **declared** by the **Board of Directorsbetween2AGM**of the company.

However, all the provisions relating to the payment of dividend shall be applicable on the interim dividend also.

Interim Dividend Section 123(3)

1) The BOD may declare interim dividend during any financial year or any time during the period from closure of financial year till holding of the AGM out of surplus in the P & L a/c or out of profits of the financial year in which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:

   Provided that in case the co. has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the avg. dividends declared by the co. during immediately preceding 3 FY.

2) The amount of declared interim dividend shall be deposited in a separate bank account in a Scheduled Bank **within 5 days** from the date of declaration and shall be utilized for the payment of interim dividend only.

   It may be noted that declaration of interim dividend by the BOD does not create a debt enforceable against the Company, as it open to the BOD to rescind its resolution before dividend is paid.

4) No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash.

4) Nothing in this section shall prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid - up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

Note:→ If a company fails to comply with Sec 73and Sec 74, shall not, so long as such failure continues, declare any dividend on its equity shares

AND

The term **'dividend' includes any interim dividend.** It means that the provisions of Companies Act, 2013 pertaining to final dividend, to the extent-possible, shall also apply to the interim dividend.

Dividend on Preference Shares:

A preference share carries a preferential right as to dividend in accordance with the term of the issue and the AOA, subject to the availability of distributable profits. It could either be a fixed amount or an amount calculated at a fixed rate. It may be cumulative or non-cumulative. Preference shares can carry dividend of a fixed amount, before any dividend is paid on the equity shares. If there are 2or more classes of preference shares, the shareholders of the class which has priority are similarly entitled to their preferential dividend before any dividend is paid in respect of the other class.

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Dividend on Equity Shares:

Dividend on equity shares are to be paid as per rights of the respective classes of shares. Equity shares are entitled to be paid dividend on their shares only after all dividends on preference shares have been paid to date. Although the equity shareholder stands second in preference to preference shareholders, he enjoys a privilege of a higher dividend as the preference dividend is fixed and cannot be increased.

Dividend Warrant:

"Dividend warrant" is an order to its banker to pay the amount specified therein to the shareholder whose name is written therein. The shareholder may, at his discretion thereafter draw the amount of the warrant from his account with the bank and with whom he deposits the warrant for collection**.**

Restrictions on Declaration of Dividend and purpose behind it.

The restrictions that the company law puts on declaration of dividends by companies is that the must be paid out of profits and after providing for depreciation. Of course, losses, if any of the previous years must be set off before declaring dividend.

Case Law 94 Raghundan Neotia v. Swadeshi Cloth Dealers Ltd.

The cumulative effect of all the provisions of the Act is that the declaration of dividends should be made at the AGM.

Case Law 95 Kantilal v. CIT

It is well established and the law is quite clear that a dividend can only be declared by the shareholders of the company. Articles of companies usually contain provisions with regard to declaration of dividends. It would be seen that under Relevant provisions of Articles, power to declare a dividend vests with the GM, but it has no power to declare a dividend exceeding the amount recommended by the Board.

Ascertainment of Divisible Profits and Dividends (Sec 123)

The Companies Act, 2013 lays down the following guidelines for determining the divisible profits and for declaration of dividend:

1. Declaration of dividend at annual general meeting

- Dividend is to be **declared at an AGM** but it has **no power** to declare a dividend **exceeding the amount** recommended by the Board.
- **On declaration, dividend becomes a debt** payable by the company to the registered shareholders, who are entitled to sue the company for the non-payment of declared dividend.
- A company **cannot pass a resolution** for the declaration of dividend **without passing a resolution for the adoption of annual accounts** u/s **129. [Bishwanath Prasad Khaitan v. New Central Jute Mills]**
- It is beyond the powers of a company to declare a further dividend after the declaration of a dividend at the AGM. However, a company, which **could not declare a dividend at an AGM, may do so at a subsequent EGM.**

The MCA has clarified that declaration of dividend should be unconditional and should not be subject to prior approval of financial institutions, banks, etc. However, companies should take **prior approval from financial institutions / banks,** wherever required as per the loan agreement, before dividend is declared.

2. Sources of Dividend

The payment of dividend is bound by two fundamental principles, which are: -

a) Dividend must **never** be paid **out of the capital;** and
b) Dividend shall be declared only **out of the profits.**

The Companies Act allows dividend to be paid out of the following sources:-

a) **Profits of the company** for the year for which the dividend is to be paid;
b) **Undistributed profits** of the previous financial years OR
c) **Both**

Provided that in computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded **OR**

d) Out of money provided by CG or SG for the payment of dividend by the co. as per guarantee given by that govt.

3. Transfer to Reserves

A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company

4. Inadequacy of Profits - 2nd Proviso to Sec 123(1)

If growing to inadequacy or absence of profits in any year, a company proposes to declare dividend out of the accumulated profits earned by the company in any previous financial year or years and **transferred by the co. to free reserves**,

Provided also that no dividend shall be declared or paid by the co. from its reserves other than free Reserves.

Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous years are set off against profit of the co. of current year.

5. Mode of Payment of Dividend

First of all, the amount of declared dividend shall be deposited in a separate bank account in a scheduled Bank within 5 days from the date of declaration and shall be utilized for the payment of dividend only and shall be distributed **within 30 days**.

Section 123 provides that:

No dividend shall be payable **except in cash**.

Provided that nothing in this section shall be deemed to prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid - up bonus shares or paying up any amount, for the time being unpaid on any shares held by the members of the company.

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Any dividend payable in cash may be paid by cheque or warrant or in any electronic mode to the shareholder entitled to the payment of dividend.

A company which does not comply with the provisions relating to acceptance and repayment of deposits as provided under sections 73 and 74 would be barred to declare dividend.

Dividend Mandate:

The shareholders may desire that their dividends be credited directly to their bank account. The request will be made in a form duly filled and sent to the company. This is known as 'Dividend Mandate".

A company can declare dividend in case of absence or inadequacy of profits for a financial year out of the surplus of the previous years. But for such a declaration, the following conditions are to be fulfilled simultaneously:-

1. **Rate of Dividend**
   The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the **3 years immediately preceding that year**. It may be noted that the aforesaid provision shall not apply to a company, which has not declared any dividend in each of the three preceding financial year.

2. **Total amount to be drawn**
   The total amount to be drawn from the accumulated profits shall not-exceed an amount equal to $1/10^{th}$ of the sum of its paid - up capital and free reserves and the amount so drawn shall first be utilized to set off the losses incurred in the financial year before any dividend is declared.

3. **Balance of Reserves**
   The balance of reserves after such withdrawal shall not fall below **15%of its paid - up share capital.**

4. **Set-off of Unabsorbed Depreciation**
   In case a company has incurred a loss in previous financial years, the amount of loss or an amount, which is equal to the amount, provided for depreciation for these previous financial years, whichever is less, shall be set off against the profits of the company for the year for which dividend is to be paid.

Unpaid and unclaimed Dividend and its Payment (Sec 124)

1) Where a dividend has been declared by a company but has **not been paid or claimed within 30 days** from the date of the declaration, the company shall, **within 7 days** from the date of the expiry of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed, to a special account to be opened by the company in that behalf in any SCB to be called **'Unpaid Dividend Account** of ..... Company Limited / Company (Private) Limited;

2) Where a default is made in transferring the amount, the company shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of **12% per annum** and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining

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unpaid to them.

3) Any person claiming to be entitled to any money transferred to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed.
4) Any money transferred to the unpaid dividend account which remains unpaid or unclaimed for a period of **7 years** from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the **IEPF** and the company shall send a statement in the prescribed form of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer.
5) All shares in respect of which dividend has not been paid or claimed for 7 consecutive years or more shall be ~~**unpaid or unclaimed dividend has been transferred, shall also be**~~ transferred by the company in the name of investor education and protection fund. Any claimant of shares so transferred shall be entitled to claim them in accordance with the prescribed procedure.

As per General circular no. 07/2017 dated 05.06.2017 MCA clarified that since transfer of shares to IEPF under section 124(6) of the Companies Act, 2013 read with Rule 6 (3) (d) of the IEPF Authority (Accounting, Audit, Transfer and Refund) Rule 2016, is on account of operation of law, the procedure followed during transmission of shares may be followed in such cases and duplicate shares need not to be issued in such cases. **(2018)**

Details of unpaid dividend to be placed on the website

The company shall, **within 90 days** of making any transfer of an amount to the Unpaid Dividend Account,

1. Prepare a statement containing
   - the names,
   - their last known addresses and
   - the unpaid dividend to be paid to each person and
2. Place it on the website of the company, if any, and
3. Also on any other web site approved by the Central Government for this purpose,

In such form, manner and other particulars as may be prescribed.

If company fails to comply,

Punishment

Fine on Company: Min Rs. 5 Lakh, Max – Rs. 25 Lakh,
Officer in default: Min Rs. 1 Lakh, Max – Rs. 5 Lakh

Payment of Dividend out of Capital profits:

The term 'capital profits' may be defined to mean those profits which arise otherwise than in the normal course of the business and earned out of capital transactions. The usual sources of capital profits are:

1. Profits on sale of fixed assets.
2. Profits on revaluation of fixed assets.
3. Premium on issue of shares/debentures/bonds/redemption of debentures.
4. Profits on reissue of forfeited shares.
5. Capital redemption reserve account.
6. Profit prior to incorporation i.e. profits which accrues to a company till the date of

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incorporation.

The Companies Act does not mention specifically whether capital profits i.e. profits which arise where a company sells part of its fixed assets at a price higher than the original cost of such asset, can be distributed as dividend.

Investor Education and Protection Fund [IEPF] (Sec 125).

The Central Government has established a Fund to be known as 'Investor Education &Protection Fund' under Section 125 of the Companies Act, 2013.

Following amounts shall be credited to IEPF:-

a. Unpaid Dividend;
b. Unpaid application money received by companies for allotment of securities and due for refund;
c. Unpaid matured deposits;
d. Unpaid matured debentures;
e. Interest accrued on (a) to (d) above;
f. Grants and donations given to IEPF by the C/G, S/G, companies or any other institutions for the purposes of IEPF;
g. Interest or other income received out of the investments made from the IEPF;
h. Sale proceeds of fractional shares arising out of issuance of bonus shares, merger and Amalgamation for 7 or more years;
i. Redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and such other amount as may be prescribed

It may be noted that amounts mentioned in clauses (a) to (d) shall be transferred to IEPF only after they have remained unpaid and unclaimed for a period of 7 years from the date they become due for payment.

The Fund shall be utilised for:

a) The refund in respect of **unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest** there on;
b) **Promotion** of investors' education, awareness and protection;
c) **Distribution of any disgorged amount** among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement;
d) **Reimbursement of legal expenses** incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the NCLT; and
e) **Any other purpose** incidental thereto, in accordance with such rules as may be prescribed. **Note:** Section 125 is not yet applicable.

Right to Dividend on Pending Registration of Shares (Sec 126)

Where any instrument of transfer of shares has been delivered to any company for registration and the transfer of such shares has not been registered by the company, then the dividend is required to be

paid to the transferee in case the transferor has given a mandate to that effect. In case no mandate has been given, the dividend in respect of the shares should be transferred to the Unpaid Dividend Account.

Further, the company shall keep in abeyance (suspend) the rights shares and bonus shares, to be issued in respect of transferred shares but not registered.

Punishment for Failure to Distribution Dividends (Sec 127)

It states that where a dividend has been **declared** by a company but has not been paid or the warrant in respect thereof has not been posted**, within 30 days** from the date of declaration, to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with **simple imprisonment** which may extend to **2 years** and shall also be liable to fine of **Rs.1, 000**for every day during which such default continues. Further, company shall be liable to pay **simple interest @ 18% p.a.** for the period of default.

However, no offence shall be deemed to have been committed within the meaning of this section in the following cases, namely:

a. Where the dividend could not be paid by reason of the **operation of any law**;
b. Where a shareholder has given **directions** to the company **regarding the payment** of the dividend and those directions cannot be complied with;
c. Where there is a dispute regarding the **right to receive** the dividend;
d. Where the dividend has been **lawfully adjusted** by the company against any sum due to it from the shareholder;
e. Where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

Here, the term 'payment' implies the act of posting of dividend warrant or cheque irrespective of the fact whether the shareholder concerned receives it or not.

Case Law 97 **Hanuman Prasad Gupta vs. Hiralal**

As the obligation to post the warrant arises at the registered office of the company, failure to discharge obligation also arises at that office of the company and hence the court having jurisdiction over that place alone can have jurisdiction to entertain the complaint.

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Corporate Social Responsibility

Corporate Social Responsibility (Sec 135)

There was no corresponding provision in the Companies Act, 1956 but MCA, Government of India had brought 'CSR Voluntary Guidelines, 2009' in December, 2009.

According to these guidelines, each business entity should formulate a CSR policy to guide its strategic planning and provide a roadmap for its CSR initiatives, which should be an integral part of overall business policy and aligned with its business goals. The policy should be framed with the participation of various level executives and should be approved by the Board.

The CSR Policy is expected to normally cover following core elements:

- Care for all stakeholders
- Ethical functioning
- Respect for workers' rights and welfare
- Respect for human rights
- Respect for environment
- Activities for social and inclusive development.

What is CSR?

The term 'Corporate Social Responsibility' (CSR) term is not defined in the Companies Act, 2013.

- CSR has many interpretations but can be understood to be a concept imposing a liability on the Company to contribute to the society (whether towards environmental causes, educational promotion, social causes etc.) along with the reinforced duty to conduct the business in an ethical manner.
- Corporate Social Responsibility (CSR) is a form of self-regulation integrated into a business model. It is also known as corporate conscience, corporate citizenship, social performance or sustainable business/responsible business.

Benefits of CSR

The benefits of CSR could be listed as follows:

- Strengthened brand positioning
- Enhanced corporate image and reputation
- Satisfaction of economic and social contribution to society
- Contribution to the surrounding society
- Increased ability to attract, motivate and retain employees
- Enhanced sales and market share
- Increased appeals to investors and financial analysts
- Local economy gains in all dimensions.

Why CSR?

Although the Indian companies seem wary of this new regulation, not wanting to be forced to

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do 'charity' or finding themselves unequipped to deal with the implementation of such a CSR Policy, there are numerous positives to this concept:

- Development of 'reputation capital' for capturing and sustaining markets. Therefore, CSR has developed as a new business strategy, to reduce investment risks and maximize profits by taking all the key stakeholders into confidence.
- Long term gains as opposed to short term profits, which are the outcome of good CSR policies.
- Environmental stability and sustainability-being an important resource for companies is ensured.
- Social stability and acceptance in society.
- Facilitates **sustainable economic development** as corporate become drivers of economic growth.
- With globalization, the **negative aspects** of businesses **have been intensified and exploitation is widespread** - CSR Policies may work to counter this effect.
- Also, it is a fact that a successful company cannot co-exist in a society that fails and therefore, a company being a member of the society is required to contribute positively and effectively.

CSR, during the last few decades, has moved from the periphery to centre stage corporate policies and strategies. The concept of CSR has moved on to a comprehensive concept called **"Corporate Responsibility"** and then on to the futuristic concept of **"Corporate Social Entrepreneurship".** This is basically to pass on the values and work ethics of a corporate business into the community. This will enable a company to transmit values and rational attitudes among members of the society and future generations of the society.

The underlying theme of CSR initiative can be summed up as follows

- CSR is the **process by which an organization thinks about and evolves its relationships with stakeholders** for the common good and demonstrates its commitment in this regard by adoption of appropriate business processes and strategies;
- CSR is **not charity or mere donations;**
- CSR is a way of conducting business, which **makes corporate entities socially responsible** citizens, visibly contributing to the social good;
- Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits;
- Companies use CSR to **integrate economic, environmental and social objectives with the company's operations and growth.**
- Companies may engage in CSR activities in different modes - projects or ongoing programmes. Such activities may focus on integrating business models with social and environmental priorities and **processes in order to create shared value;**

Objectives of CSR in Companies Act, 2013

The objective of inclusion of CSR activities in the Companies Act are many fold which are as under:

- The CSR provisions of the Act seek **to create an enabling environment;**
- They will allow corporates to harness and channelize their core competencies as well as develop effective business models;
- They will promote and facilitate **far better connect between businesses and communities.**
- They will **facilitate deeper thought and long term strategies** for addressing some of our most persistent social, economic and environmental problems;

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- They will **assist in synergizing partnerships** between Corporates, Governments, Civil Society Organizations, Academic Institutions and Social Entrepreneurs.
- The Act provides **great flexibility to business and industry** for strategizing and conducting their CSR initiatives.

Section 135 seeks to provide that every company having

- **Net worth** of Rs. 500 C**r** or more; or
- **Turnover of Rs. 1,000 Cr** or more; or
- **Net profit** of Rs. 5 **Cr** or more
- During ~~any financial year~~ **immediately preceding FY** shall constitute a CSR Committee of Board comprising of 3 **or more directors, one** of whom **shall be an independent director.**
- The composition of the committee shall be included in the Board's Report. The Board shall disclose the content of policy in its report and place on website, if any of the company. The section further provides that the Board shall ensure that at-least 2% of average net profits of the company made during 3 immediately preceding financial years OR **where the company has not completed the period of three financial years** since its incorporation, during such immediately preceding financial years, shall be spent on such policy every year.
- If the company fails to spend such amount the Board shall give in its report the reasons for not spending the amount and, **unless the unspent amount relates to any ongoing project, transfer such unspent amount to a Fund specified in Schedule VII, within 6 months of the expiry of the financial year".**
- **Any amount remaining unspent, pursuant to any ongoing project, fulfilling such conditions as may be prescribed, undertaken by a company in pursuance of its CSR Policy, shall be transferred by the company within 30 days from the end of the FY to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent CSR Account, and such amount shall be spent by the company in pursuance of its obligation towards the CSR Policy within 3 FY from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within 30 days from the date of completion of the 3rd financial year.**
- **If a company contravenes the above 2 provisions, the company shall be punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 25,00,000 and every officer of such company who is in default shall be punishable with imprisonment for a term which may extend to 3 years OR with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5 Lakh, OR with both.**
- **The Central Government may give such general or special directions to a company or class of companies as it considers necessary to ensure compliance of provisions of this section and such company or class of companies shall comply with such directions.".**

Composition of CSR Committee

- The CSR committee shall consist of **three or more directors,** out which **one director** shall be an **Independent Director.** The presence of an Independent Director shall ensure that the Committee is not just a quasi- committee addressing the whims of the Board, but is in fact, taking up an initiative. The composition of such Corporate Social Responsibility Committee shall have to be disclosed in the Board's Report as required u/s**134(4).**
- An **unlisted public company or a private company** which is **not required to appoint an independent director** shall have in its CSR Committee **2 or more directors**.
- A **private company** having only **2 directors** on its Board shall constitute its CSR Committee

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with two such directors.

- With respect of **foreign company,** the CSR Committee shall comprise of at least **2 persons** of which **one-person resident in India and another person shall be nominated by the foreign company.**
- The CSR Committee s**hall Institute a transparent monitoring mechanism for implementation of CSR projects** or programs or activities undertaken by the company.

CSR Policy

The CSR Policy of the company shall, inter alia includes the following, namely:

a) A **list of CSR projects or programs** which a company plans to undertake falling within the purview of the **Schedule VII** of the Act, specifying modalities of execution of such project or programs and implementation schedule for the same; and

b) **Monitoring process** of such projects or programs. But the activity should not be undertaken in pursuance of normal course of business of a company.

c) The Board shall ensure that the activities included by the company in its CSR Policy are related to the activities mentioned in **Schedule VII** of the Act.

d) The CSR Policy of the company shall specify that the surplus arising out of the CSR projects or programs or activities shall not form part of business profit of a company.

Functions of the CSR Committee

1. The Committee shall formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the **activities to be undertaken** by the company (in areas or subject) as specified in **Schedule VII** of the Act.
2. The Committee shall also initiate a CSR Policy, which shall **stipulate how, where, and when they want to invest their funds** with respect to this requirement.
3. The Committee shall recommend the amount of expenditure to be incurred on the activities referred to above.

Further, the CSR Committee is under an obligation to monitor the implementation of the CSR policy from time to time.

CSR Activities

The Companies Act, 2013 does not prescribe the methodology by which CSR activities are to be undertaken by the company. Companies have been given flexibility to decide the activity within the framework, choose programmes, implement in the manner it desires, monitor it and ensure compliance of its own CSR policy.

However, the CSR activities may be undertaken by way of the following methods:

a) By Charity: Company can donate money to various charitable trusts, societies, NGOs etc. who work for social economic welfare of society.

b) By Contract: Company can hire an NGO or any other agency like that which can carry out the projects on behalf of the company.

c) By Itself: Company can take up a project on its own or create its own trust and use its own staff for its proper working/ monitoring or through other trusts/ societies.

Schedule VII describes the following activities to be undertaken by the company in CSR

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activities which are as detailed below:

i. Eradicating hunger, poverty and malnutrition, providing preventive health care and sanitation and making available safe drinking water;
ii. Promoting education including special education and employment, enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;
iii. Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
iv. Ensuring environment sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water;
v. Protection of national heritage, art and culture including restoration of building and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;
vi. Measures for the benefits of armed forces veterans, war widows and their dependents;
vii. Training to promote rural sports, nationally recognized sports, Paralympic sports and Olympic sports;
viii. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;
ix. Contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;
x. Rural development projects

Role of Board (Sec 135)

The Board of every company shall -

1. The Board to compose a Corporate Social Responsibility Committee.
2. After receiving recommendation and policy made by the Corporate Social Responsibility Committee, approve and take steps to implement / execute the CSR policy for the company and disclose such policy –

a. in the Board's Report as per section 134(3) pertaining to a financial year commencing on or after the 1st day of April, 2014; and

b. Also place the contents of policy on its Company's web site, if any, in form prescribed under Companies (Corporate Social Responsibility Policy) Rules, 2014.

Ensure that the activities which formulate by CSR Committee in the Policy are duly undertaken by the company

CSR Contribution or Expenditure (Sec 135(5))

Ensure that the company spends in every financial year, **at least 2% of the average net profits** (to be calculated in accordance with the provisions of Sec. 198) of the company made during the 3 immediately preceding financial years, in pursuance of its CSR Policy. The company shall give

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preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities as per CSR Policy.

If the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount. The intention is that company should spend on approved CSR activities or explain the reasons for not so spending in its Board report.

Note 1: For a contribution to qualify as a CSR contribution, the **nature of contribution** is to be kept in mind. Any contribution to CSR may not result in any direct or indirect commercial benefit to the company.

Note 2: However, it should be ensured that CSR expenditure complies with company's CSR Board approved CSR policy and the legal provisions.

Note 3: CSR expenditure include all expenditure including contribution to corpus for projects or programs relating to CSR activities approved by the Board on the recommendation of its CSR Committee, but does not include the expenditure on an item not in conformity or not in line with activities which fall within the purview of Schedule VII of the Act.

Here Net Profit shall not include such sums as may be prescribed and shall be calculated as per sec 198.

Penalty

The Companies Act requires that -

a) The Board's report shall disclose the composition of the CSR Committee;
b) If the company fails to spend such amount, the Board shall disclose and specify the reasons for not spending the amount in its Board's report.

Consequences of not complying with the CSR provisions

a) Proviso to section 135(5) provides that sufficient reasons need to be provided for not making the requisite CSR spend. No specific penalties are contemplated in the Companies Act, 2013 with respect to CSR, Chapter XXIX of the Act (Sections 450 and 451) provides for general penalties for contravention and repeat offences.
b) As per section 450 the company and every officer of the company who is in default or such other person shall be punishable with maximum fine up-to 10,000 and where the contravention is continuing one, with a further maximum fine up to 1,000 for every day after the 1st during which the contravention continues.
c) Section 451 provides that if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.
d) As per section 134 of Companies Act, 2013 if the Company fails to disclose such information, it shall be punishable with fine, which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

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ACCOUNTS

Books of Account (Sec 128)

- The shareholders would like to know as to how the funds available with the company have been utilized during a particular period and whether the company has made profit or suffered loss in that period.
- That is why, the Companies Act makes it obligatory for companies to maintain books of account and to make available to their member's essential information contained therein in the annual accounts, i.e., the balance sheet and statement of profit and loss.
- The shareholders provide capital to the company for running the business. They are in a way, the owners of the company. But, all of them cannot take part in managing the affairs of the company as their number is usually much more. But they have every right to know as to how their money has been dealt with by the directors in a particular period.
- This is why perhaps compulsory disclosure through annual information to the shareholders by the directors about the working and financial position of the company enables them to exercise a more intelligent and purposeful control over the affairs of the company.
- For preparation of annual accounts, the maintenance of proper books of account is must.
- Section 128 of the Companies Act, 2013 contains the provisions for books of account etc. to be kept by company.

Place of keeping books of accounts

Sec 128 read with Rule 3 & 4 of companies (accounts) Rules, 2014

Every company shall prepare and keep the books of account and other relevant books and papers and financial statements at **its registered office.**

However, all or any of the books of accounts may be kept at such other place in India as the Board of directors may decide. When the Board so decides the company is required within seven days of such decision to file with the Registrar a notice in writing giving full address of that other place. **(Form AOC-5)**

Case Study

X Ltd. is carrying the business with its registered office in the city of Kolkata at place name Ballygan], Co is willing to keep his books of AIC in their Corp. office situated at Tollygunge (a) Can Co. do so?

(b) Also advice Co. to maintain his books of accounts in Punjabi Bagh New Delhi Inter corporate office?

(c) Can Co. keep his books of Accounts with his foreign branch situated in Mauritius**.**

Nature of transactions to be Recorded or Contents of Books of Accounts:

The original books of account, which must be kept by a company, are with respect to: -

- All sums of money received and expended by the company.
- All sales and purchases of the goods.
- The assets and liabilities.

In the case of a company engaged in production, processing, manufacturing or mining activities, such particulars relating to utilization of material or labour or other items of cost as may be prescribed

System of Accounting

The books of account should be kept on:

- Accrual basis and
- According to the double entry system of accounting.

Accrual concept

It is one of the four principles or accounting concepts, which involves recording income and expenses as they accrue, as distinct from when they are received or paid. The main feature of the accrual concept is that the accounting period covers only the revenue and expense transactions of that period and ignores the timing of actual cash receipts and payments. In this method, revenues and expenses are identified with specific period of time, such as a month or a year, and are recorded as 'incurred' along with acquired assets, without regard to the date of actual receipt or payment of cash in any form.

Double entry book-keeping

It is a method of recording any transactions of a business in a set of accounts, in which every transaction has a dual aspect of debt and credit and therefore, needs to be recorded in at least two accounts. For example, when a person (debtor) pays cash to a business for goods he has purchased, the cash held by the business is increased and the amount due from the debtor is decreased by the same amount. The debit entries/amount must equal the credit entries / amount for each transaction recorded.

Inspection of Books of Account by Directors (Section 128(3) Read with Rule 4 of Companies (Accounts) Rules, 2014)

1. The books of account and other books and papers shall be open for inspection by any director during business hours.
2. The expression "Books and Papers" includes accounts, deeds, vouchers, writings and documents.
3. Such inspection may be done by any type of director- nominee, independent, promoter or whole time.
4. A director of the Company can inspect the books of accounts of the subsidiary, only on authorisation by way of the resolution of Board of Directors.
5. Where any other financial information maintained outside the country is required by a director, the director shall furnish a request to the company setting out the full details of the financial information sought and the period for which such information is sought.
6. The said information shall be provided to director **within 15 days** of receipt of request.
7. The director can seek the information only individually and not by or through his attorney holder or agent or representative.

Note: The right to inspect books of accounts and other books and papers under this section has been provided to the directors only.

Period of Preservation (Sec 128(5))

- The books of accounts, together with vouchers relevant to any entry in such books, are required to be preserved in good order by the company for a period of **not less than 8 years** immediately

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preceding the relevant financial year.

- In case of a company incorporated less than 8 years before the financial year, the books of accounts for the entire period preceding the financial year.

Where an investigation has been ordered in respect of a company, the CG may direct that the books of account may be kept for such period longer than 8 years, as it may deem fit and give directions to that effect.

Case Study

X Ltd. Co. having paid up capital = Rs. 10 Cr. Borrowings = Rs. 12 cr. & member= 100 having its registered office in Mumbai. SIFO investigated the Co. and demanded A/c's for immediately preceding 12 years, which co. is unable to produce. Is there a violation of law? Can SIFO order X ltd. To maintain books of A/c's for at least 12 yrs.?

Answer:

SFIO cannot demand books of accounts for more than 8 years as it is not obligatory for the company to maintain books of accounts for a period more than 8 years u/s 128(5). Thus there is no violation by the Co. if A/Cs of 8 years has been produced by Co. to SFIO.

SIFO in its ordinary capacity cannot order company to preserve A/Cs for more than 8 years but CG may provide company to preserve A/C for 12 years on the basis of investigation due to submitted by SFIO to CG.

Person responsible for keeping the books of accounts(Sec 128(6))

The following persons have made responsible for keeping the books of account and securing compliance by the company with the requirement of maintenance of books of accounts etc. (sub-section 6)

i. Managing Director,
ii. Whole-Time Director, in charge of finance
iii. Chief Financial Officer, or
iv. Any other person of a company charged by the Board with duty of complying with provisions of section 128.

Default:

In case MD, WTD, CFO etc., fail to take reasonable steps to secure compliance of this section and thus, contravene such provisions, they shall in respect of each offence, be punishable with imprisonment for a term which may extend to one year or with fine which shall **not be less than Rs. 50,000 but which may extend to Rs. 5 Lakhs or both.**

Case Study

Company X Ltd. authorized Mohammad Aslam for. Maintenance of books of a/c. Inspection was conducted by independent director to whom a/c were not provided in 15 days of demand made, such independent director reported to CG.

CG held MD, WTD CFO liable and prosecuted for the period of 2 months along with fine of Rs.3.5 Lakhs. Can such accused file an appeal and escape their liability on the ground that

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Mohammad Aslam has been duly appointed by company by passing Board Resolution?
Answer: yes

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Maintenance of Books of Accounts in Electronic form (Sec 128(1))

The maintenance of books of account and other books and papers in electronic mode is permitted and is optional.

Rule 3 of the Companies (Accounts) Rules, 2014

- Such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent use.
- The information contained in the records shall be retained completely in the format in which they were originally generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered.
- The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches.
- The information in the electronic record of the document shall be capable of being displayed in legible form.
- There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit. Committee, if any, or the board may deem appropriate and such records shall not be disposed of unless permitted by law.
- The back-up of the books of account of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India.
- The company shall Intimate to the Registrar on an annual basis at the time of filing of financial statement -
  - the name of service provider;
  - the internet protocol address of service provider:
  - the location of the service provider (wherever applicable);

Where the books of account and other books and papers are maintained on cloud (e.g.: I cloud, Ozonetel, Genpact), such address as provided by the service provider.

Branch Office Accounts

According to **Sec 2(14), "Branch Office" means any establishment described as a branch by the company.**

The branches of the company, if any, in India or outside India shall also keep the books of account in the same manner, for the transaction effected at the branch office. Further the branch' offices are required to send the **proper summarized return at quarterly intervals** to the company at its **registered office.**

Financial Statement

[Section 129 Read with Rule 5 and 6 of the Companies (Accounts) Rules, 2014]

Meaning of "Financial year" [Sec 2(41)]

In relation to any company or body corporate to mean the period ending on the 31st March every year, and where it has been incorporated on or after the 1st January of a year, financial year means the period ending on 31st March of the following year, in respect whereof the financial statement is made

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Alignment of Financial Year

Existing companies or bodies corporates, not adopting 1st April to 31st March as financial year for Companies Act, 1956 presupposes to align themselves with 1st April - 31st March **within 2 years** of commencement of the Companies Act, 2013.

Exception for different financial year

Exception is given to **companies which are holding/subsidiary or associate co. of a company incorporated outside India** and requiring consolidation outside India, who can have a different financial year with the approval of Tribunal. If the **NCLT is satisfied, it may allow the company to follow a different period as its financial year.**

Definition of Financial Statement

Financial Statement is defined under **Section 2 (40),** to include -

- **Balance Sheet**
- **P& L account or Income and Expenditure account**
- **Cash flow Statement**
- **Statement of change in equity,** if applicable
- **Any explanatory notes** annexed to or forming part of financial statements, giving information required to be given and allowed to be given in the form of notes.

However, the financial statement with respect to **OPC, small company and dormant company, and private company (if the private company is a start-up) may not include the cash flow statement.**

Financial statements should be prepared for financial year and shall be in form as per **Schedule III.**

The financial statements shall give a true and fair view of the state of affairs of the company or companies, comply with the accounting standards and shall be in form or forms as may be provided for different class or classes of companies in **Schedule III.**

Insurance companies, banking company, companies engaged in generation / supply of electricity or any other class of companies shall make financial statements in the form as has been specified in or under the Act governing such companies. The financial statement shall be laid in the AGM of that financial year.

According to amended Rules the Companies which are required to comply with Companies (Indian Accounting Standards) Rules, 2015 shall forward their statement in **Form AOC-3A**. (2018)

Consolidated Financial Statements

All companies including:

- Unlisted companies and
- Private companies having one or more subsidiary company **or associate company**

Is required to prepare consolidated financial statements of all the subsidiary **and associated companies.**

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The clause does not exclude any company from such requirement except that Central Government may exempt any class or classes of companies from complying with any such requirement, conditionally or unconditionally, in public interest. Like financial statements, consolidated financial statements shall also comply with accounting standards.

The consolidated statements is required only if the company has one or more subsidiaries or associate company.

The term **'joint venture'** has not been defined. Associate includes a joint venture. If the company has only a joint venture or an associate company but no subsidiary, even then, consolidation of financial statements shall be required.

The statement containing the salient feature of the financial statement of a company's subsidiary or subsidiaries, associate company or companies and joint venture or ventures under the 1st proviso to Sec 129(3) shall be in **Form AOC-l**.

The Consolidation of financial statements of the company shall be made in accordance with the provisions of **Schedule III** and Accounting Standards, subject however, that if the company is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions on consolidated financial statements provided in Schedule III of the Act..

Persons responsible for compliance

The persons responsible to take all reasonable steps to secure compliance by the company with the requirement of section 129 are -

- Managing Director.
- Whole time Director.
- CFO
- Other person of a company charged by the Board with the duty of complying with requirements of section 129.

Where any of the aforementioned officers are absent, all the directors shall be responsible and punishable.

Penalty

In case of contravention, officer in default shall in respect of each offence be punishable with imprisonment for a term which may extend to 1 year **OR** with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5,00,000 **OR** with both.

Re-Opening of Accounts on Court's or Tribunal's Orders (Sec 130)

The section provides for provisions relating to re-opening or recasting of books of accounts of the company.

Accordingly,

i. **A company shall not re-open its books of accounts** and shall not recast its financial statements, unless an application in this regard is made by anyone or more of the following -
   a) the **Central Government,** or
   b) the **Income-tax authorities,** or

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c) the **Securities and Exchange Board of India (SEBI),** or
d) **any other statutory regulatory body** or **authority or any person concerned**, and
e) An order in this regard is made by a court of competent jurisdiction or the **NCLT**.

ii. The re-opening and recasting of financial statements is **permitted only for the** following **reasons -**
a) the relevant earlier accounts were **prepared in a fraudulent manner;** or
b) The **affairs of the company were mismanaged** during the relevant period, casting a doubt on the reliability of financial statements.

iii. The Court or the Tribunal, as the case may be, shall give the notice to the authorities mentioned above.

Note: The accounts so revised or re-cast under this section shall be final.

Sec 130(3) w.e.f. 3/1/18

No order shall be made in respect of re-opening of books of account relating to a period earlier than 8 financial years immediately preceding the current financial year:

Provided that where a direction has been issued by the Central Government under the proviso to section 128(5) for keeping of books of account for a period longer than 8 years, the books of account may be ordered to be re-opened within such longer period.

Voluntary Revision of Financial Statements or Board's Report (Sec 131)

1. This provision allows the **directors to prepare revised financial statement or a revised Board's report** if it appears to them that the company's financial statement or the Board's Report **did not comply with the requirements of Section 129 or Section 134**, after obtaining approval of the **NCLT**.
2. The **application to the Tribunal** shall be made within **2weeks** of the decision taken by the Board and the company shall **disclose** in the application if the **majority of directors and auditors** have been changed immediately before such decision. The Tribunal will issue notice and hear the auditor of original financial statement.
3. Tribunal shall give notice and take into account the representations, if any, of the Central Government and of the Income Tax Department.
4. A **certified copy of the order** of the Tribunal shall be **filed with the ROC** within **30 days** of the date of receipt of the certified copy.
5. The **detailed reasons for revision of such financial statements** or report shall be disclosed in the Board's report in the relevant financial year in which such revision is being made.
6. On receipt of approval from Tribunal a **GM may be called.** Notice of such GM along with reasons for change in Financial Statements may be **published in Newspaper in English and in vernacular language.**
7. In such GM, the said revised financial statements, statement of directors and the statement of auditors may be put up for consideration before a decision is taken on adoption of the revised financial statements.
8. On approval of the General Meeting, the revised financial statements along with the statement of auditors or revised report of the Board, as the case may be shall be **filed with the ROC within 30 days** of the date of approval by the general meeting.

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9. The **Central Government may make different provisions** according to which the previous financial statement or report are replaced or are supplemented by a document indicating the correction to be made.

The previous financial statement or report may be replaced by revised financial statement or revised report of the board, and supplemented by:

a) A **summarised statement** of revisions effected
b) The **copy of the. Order of the Tribunal.**
c) The **revised auditor's** report on the revised financial statement, if applicable

Note 1: It shall be ensured that the word "revised" is prefixed prominently on all the documents forming part of the revised financial statements/ revised board report.

Note 2: It may also be noted that while the present **section sets out a 3 year's limit for voluntary revision** of financial statements or Board's Report, but **no such time limit** has been prescribed for re-appointment of accounts **due to order of Court or NCLT** u/s **130.**

National financial Reporting Authority (Sec 132)

Through **Section 132** of the Companies Act, 2013, the **Central Government has introduced** a new regulatory authority named as **National Financial Reporting Authority (NFRA)** with wide **powers to recommend, enforce and monitor the compliance of accounting and auditing standards.** The Companies Act, 2013 empowers the Central Government to form a Committee for recommendations on Accounting Standards which is **National Advisory Committee on Accounting Standards (NACAS).** This is now being renamed with enhanced independent oversight powers and authority as National Financial Reporting Authority (NFRA).

- NFRA shall be responsible for monitoring and enforcing compliance of auditing and accounting standards and for that purpose, oversee the quality of professions associated with ensuring such compliances.
- The **Authority shall investigate professional and other misconducts** which may be **committed by Chartered Accountancy** members and firms. There is also a provision for appellate authority.
- The NFRA shall be a quasi - judicial body to regulate matters related to accounting and auditing.
- With increasing demand of non - financial reporting, it may be referred to as **a National level business Reporting Authority to regulate standards of all kind of reporting- financial as well as non - financial,** by the companies in future.
- NFRA shall function through prescribed division.
- **NFRA** shall give its recommendations on accounting standards and auditing standards.
- It shall only recommend and it is the Central Government who shall prescribe such standards.

Objective

The objectives of **NFRA** inter-alia shall be as follows:

- **Make recommendations on formulation of accounting and auditing policies** and standards for adoption by companies, class of companies or their auditors;

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- **Monitor and enforce the compliance with accounting standards,** monitor and enforce the compliance with auditing standards;
- **Oversee the quality of service of professionals** associated with ensuring compliance with such standards and suggest measures required for improvement in quality of service, and
- **Perform such other functions** as may be prescribed in relation to aforementioned objectives.

These objectives simply bring chartered accountants, cost accountants, management accountants, company secretaries as well as independent directors /members audit committees under jurisdiction of **NFRA**

Constitution of NFRA

The constitution of **NFRA** shall be as follows:

i. It shall consist of a chairperson, who shall be a person of eminence &having expertise in accountancy, auditing, finance, business administration, business law, economics or similar disciplines, to be nominated by CG, and such other prescribed **members not exceeding 15**.
ii. The chairperson and all members shall make a declaration in prescribed form about no conflict of interest or lack of independence in respect of their appointment. The chairperson and all full - time members shall not be associated with any audit firm or related consultancy firm during course of their appointment and 2 years after ceasing to hold such appointment.
iii. The head office of **NFRA** shall be at New Delhi and it may, meet at such other places in India, as it deems fit.
iv. Its accounts shall be audited by Comptroller & Auditor General of India (CAGI) and such accounts as certified by CAGI, together with audit report, shall be forwarded annually to the Central Government.
v. Each division of NFRA shall be presided with chairperson or a full time member authorised by chairperson.
vi. There should be executive body of NFRA consisting of chairperson and full time members of such authority for efficient discharge of its function.

For the constitution of **NFRA**, the Act doesn't prescribe for nomination of members from MCA, ICSI, ICAI, ICMAI, as opposed to what was prescribed under the Companies Act, 1956 in respect of constitution of National Advisory Committee on Accounting Standards. The same shall be prescribed by Central Government so far as terms, conditions and manner of appointment is concerned. Members appointed could be full time members or part time members.

Jurisdiction, Powers of and Imposition of Penalties by NFRA

The NFRA shall have jurisdiction over bodies corporate and persons for matters of professional and other misconduct committee, by any member or firm of CA. No other institute or body (including professional institutes) shall initiate or continue any proceeding in such matters of misconduct where the authority has initiated an investigation under this section.

The Authority shall have powers as are vested in a civil court under CPC in respect of following matters:

1. Discovery and production of books of accounts and other documents

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2. Summoning and enforcing the attendance of persons and examining them on oath
3. Inspection of any books, registers and other documents of any person
4. Issuing commission for examination of witness or documents.

Sub-section (4) is a non-obstante clause, providing a bar on anybody or any institute, in initiating or continuing the proceedings in matters relating to misconduct as referred to in Chartered Accountants Act 1949.

The Authority shall have powers to make an order in relation to:

A. Imposing penalty of
- not less than 1 lakh rupees which may extend to 5 times of the fees received in case of individuals and
- not less than ~~**Rs. 10 lakh**~~ **(Rs. 5 Lakhs)** which may extend to 10 times of the fees received in case of firms

B. Debarring member or the firm from –

i. being appointed as an auditor or internal auditor or undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate; or

ii. **performing any valuation as provided u/s 247,**

For a period of 6 months to 10 years.

Appeals and Appellate Authority

Any person aggrieved by any order of the NFRA may prefer appeal to Appellate Authority, in such manner and on payment of such fees as may be prescribed.

~~The Appellate Authority shall consist of a chairperson and not more than 2 members. However, the Appellate Tribunal constituted under the Chartered Accountants Act, 1949 will not act as Appellate Tribunal under this section.~~ (omitted w.e.f. 3/1/18)

CG to prescribe Accounting Standards

[Section 133 Read with Rule 7 of Companies (Accounts) Rules 2014]

The Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the ICAI, in consultation with and after examination of the recommendations made by the NFRA.

Authentication of Financial Statement, Board's Report Etc. (Sec 134)

1) The FS including CFS, if any, shall be approved by the BOD before being signed by chairperson on behalf of BOD.
   Such chairperson shall be authorised by BOD or by 2 directors (out of which 1 shall be MD, if any) AND CEO, CFO & CS wherever they are appointed.
   In case of OPC, only by 1 Director.
   For submission to auditor for his audit report thereon.
2) Auditor's report shall be attached to every FS.
3) Board Report shall also be attached to such FS which shall include -
   a) the web address, if any, where annual return referred to in section 92(3) has been

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placed;
b) no. of Board Meetings.
c) Director's responsibility statement.
ca) details in respect of frauds reported by auditors, u/s 143(12) other than those which are reportable to CG.
d) Statement of declaration by Independent Directors u/s 149(6).
e) Such other matters as may be prescribed.

3A) CG may prescribe an abridged BR for OPC or small co.

The Auditor's Report is to be Attached to Every Financial Statement

A report by the Board of directors containing details on the matters specified, including director's responsibility statement, shall be attached to every financial statement laid before company. The Board's report and every annexure has to be duly signed.

Penalty:

Any contravention of provisions of Section 134 is punishable to the following extent -

a) company is punishable with fine of not less than Rs. 50,000 but which may extend up-to Rs. 25,00,000;and
b) Every officer in default is punishable with
   i. Imprisonment up-to a term of 3 years, **OR**
   ii. Monetary fine from Rs. 50,000 to Rs.5 lakh, **OR**
   iii. Both (i) and (ii) above**.**

Every listed company shall disclose in its Board Report the following:

a. The ratio of the remuneration if each director to the median remuneration if the employees of the company for the financial year;
b. Percentage increase in remuneration of each director and CEO in the financial year;
c. Percentage increase in the median remuneration of employees in the financial year;
d. Number of permanent employees on the rolls of company;
e. Explanation on the relationship between average increase in remuneration and company performance;
f. Comparison of the remuneration of the key managerial personnel against the performance of the company;
g. The key parameters for any variable component of remuneration availed by the directors;
h. Affirmation that the remuneration is as per the remuneration policy of the company.

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance" if any, attached to the financial statement:

- ✓ all elements of remuneration package such as salary, benefits bonuses, stock options, pensions, et of all the directors;
- ✓ details of fixed component and performance linked incentives along with the performance criteria;
- ✓ service contracts, notice period, severance fees, stock option details if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

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As per Companies (Management and Administration) Second Amendment Rules, 2018 Dated: 13-06-2018 - Rule 13 relating to Return of Changes in Shareholding Position of Promoters and Top Ten Shareholders has been omitted. Henceforth the same is not required. (2018)

Companies (Accounts) Amendment Rules, 2018 w.e.f 31st July, 2018

Rule 8A. Matters to be included in Board's Report for OPC and Small Company.

1. The Board's Report of OPC and Small Company shall be prepared based on the stand alone financial statement of the company, which shall be in abridged form and contain the following:
   a) the web address, if any, where annual return referred to in sub-section (3) of section 92 has been placed;
   b) number of meetings of the Board;
   c) Directors' Responsibility Statement as referred to in sub-section (5) of section 134;
   d) details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central Government;
   e) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report;
   f) the state of the company's affairs;
   g) the financial summary or highlights;
   h) material changes from the date of closure of the financial year in the nature of business and their effect on the financial position of the company;
   i) the details of directors who were appointed or have resigned during the year;
   j) the details or significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future.
2. The Report of the Board shall contain the particulars of contracts or arrangements with related parties referred to in section 188(1) in the Form AOC-2.".

Penal provisions:

Any contravention of provisions of section 134 is punishable to the following extent-

a. company is punishable with fine of not less than Rs. 50,000 but which may extend up-to Rs. 5 lakhs and,
b. every officer in default is punishable with-
   - ✓ imprisonment up-to a term of 3 years or;
   - ✓ Monetary fine from Rs. 50,000 to Rs. 5 lakhs, or both.

Right of Member to Copies of Audited Financial Statement

[Section 136 Read with Rule10, 16 of Companies (Accounts) Rules 2014]

This section seeks to provide that a copy of financial statements including consolidated financial statement, if any, auditor's report along with annexures I attachments shall be sent to every member, every trustee for the debenture holder and all other persons who are so entitled, at least 21 days before the date of general meeting.

Provided that if docs are sent less than 21 days before date of GM, they shall be deemed to have been duly sent, if it is so approved by 95% of members entitled to vote at the GM.

Members and Debenture Trustee's Right to Get Copies of Annual Accounts

Every member of the company, the trustee for the debenture holders and every other person being the person so entitled, is entitled to get from the company, every year, a copy of financial statement including consolidated financial statements (if applicable), which are to be laid at a general meeting of the company, comprising of:-

a. Balance Sheet
b. Profit and Loss Account
c. Cash Flow Statement
d. Statement of change in equity
e. Auditor's Report
f. Director's Report
g. Every other document required by law to be annexed or attached to the financial statement.

In case of companies not having share capital, the financial statements and other documents required to be attached or annexed to it shall be required to be sent to all members and debenture holders, even if they are not entitled to receive the notice of general meeting in terms of section 101.

Right to Inspect

Every member or trustee of debenture holder shall have right to inspect the financial statements and documents to be attached thereto, at its registered office during business hours. However, this right is not available to debenture holders.

Obligation of Listed Company

Listed company may make available the copies of the documents for inspection at its registered office during working hours for a period of 21 days before the date of the meeting and a statement containing the salient features of such documents in **Form AOC-3** prescribed by the CG or the documents and sent the same to every stake holder.

Rule 11 of Companies (Accounts) Rules, 2014,

All listed companies and public companies which have a net worth of more than **Rs.1 Cr.** and turnover of **more than Rs. 10 Cr.,** may send the financial statements:

a. By **E- mode** to such members whose shareholding is in De-mat form and whose email Ids are registered with Depository for communication purposes;
b. Where shareholding is held other than by De-mat form, to such members who have positively consented in writing for receiving by E-mode; and
c. By dispatch of physical copies through any recognised mode of delivery, in all other cases.

Every listed company is required to supply a copy of the complete financial statements with auditor's report and director's report, to such shareholders who ask for full financial statements.
Every listed company is also required to place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its web site, which is maintained by or on behalf of the company

Financial Statements of Subsidiaries

Every company (listed or unlisted) having subsidiary or subsidiaries shall:

a) Place separate audited financial statements in respect of each of its subsidiary on its website, if any
b) Provide copy of separate audited financial statements if any shareholder demands a copy of

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the separate audited financial statements in respect of each of its subsidiary.

Penal Provisions

If any default is made in complying with the provisions of this section,

i. the company shall be liable to a penalty of Rs. 25,000 and
ii. Every officer of the company who is in default shall be liable to a penalty of Rs. 5000.

Filing of Financial Statement with ROC

[Section 137 Read with Rule 12]

If for any reason, the annual general meeting before which a balance sheet is laid does not adopt it or is adjourned without adopting the balance sheet or if the annual general of a company for any year has not been held, a statement of the fact and of the reasons therefore must also be annexed to the balance sheet and to the copies thereof to be filed with the ROC.

The ROC shall take them in his record as provisional, until the adoption at AGM.

The OPC shall file the copy of financial statements duly adopted by its members within 180 days from the closure of financial year.

If AGM has not been held, the financial statement duly signed along with the statement of facts and reasons for not holding the AGM shall be filed with the ROC within 30 days of the last day before which the AGM should have been held.

The company shall also attach the accounts of subsidiaries incorporated outside India and which have not established their place of business in India with the financial statements.

If company fails to comply with the requirement of submission of financial statement before Registrar,

- The company shall **be liable to a penalty** of Rs. 1000 for every day of default subject to maximum of Rs. 10 lakhs.
- The MD and CFO if any, and, in their absence, any other director who is charged by the board with the responsibility of complying with the provisions of Section 137, and, in the absence of any such director, all the directors of the company, **shall be liable to a penalty** of Rs. 1 Lakh and in case of continuing failure, with a further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 5 Lakhs.
- Every company have to file the financial statements including consolidated financial statement together with **Form AOC- 4** with the ROC **within 30 days** from the day on which the AGM held and adopted the financial statements with prescribed fees.
- **Every NBFC that is required to comply with IND AS shall file the FS with the ROC together with AOC 4 NBFC (Ind AS) and the Consolidate financial statement (if any), with FORM AOC – 4 CFS NBFC (Ind AS)** **(30th Jan 2020)**

Default in Filing Financial Statements is a Compoundable Offence

Default of section 137 of the Act is compoundable under section 441 of the Act, but first the default should be made good and only then application for compounding of offence u/s 441

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will be maintainable.

Maintenance of Costing and stock records Section 138

A company engaged in production, processing, manufacturing or mining activity, is also required to maintain particulars relating to utilization of material, labour or other items of cost as the Central Government may prescribe for such class of companies.

Extensible Business Reporting Language (XBRL)

Extensible Business Reporting Language" means a standardised language for communication in electronic form to express, report or file financial information by companies.

XBRL is a data rich dialect of XML (Extensible Mark-up Language), the universally preferred language for transmitting information via the internet. It was developed specifically to communicate information between business and other users of financial information, such as analysts, investors and regulators. XBRL provides a common, electronic format for business reporting.

Benefits of XBRL

XBRL offers major benefits at all stages of business reporting and analysis.

i. The benefits of automation, cost saving, faster, more reliable and more accurate handling of data, improved analysis and in better quality of information and decision making.
ii. All types of organisations can use XBRL to save cost and improve efficiency in handling business and financial information.
iii. XBRL is extensible and flexible and can be adapted to a variety of different requirements.
iv. All participants in the financial information supply-chain can be benefitted being makers, exchangers or users of business data.
v. XBRL enables producers and users of financial data to switch resources, away from costly manual processes, typically involving time consuming comparison, assembly and re-entry of data. They are able to concentrate effort on analysis, aided by software which can validate and manipulate XBRL information.

Mandatory Requirement

The class of companies as may be notified by the Central Government from time to time, shall mandatorily file their financial statement in Extensible Business Reporting Language (XBRL) format and the Central Government may specify the manner of such filing under such notification for such class of companies (Rule 12(2))

As per Companies (Filing of documents and forms in Extensible Business Reporting Language) Rules, 2015

- Every Indian Listed Company &their Indian subsidiaries;
- Every Company having paid up share capital of Rs. 5 Cr. or more;
- Every company having turnover of Rs. 100 Cr. or more
- all companies which are required to prepare their financial statements in accordance with Companies (Indian Accounting Standards) Rules, 2015 (2018)0

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Provided that the companies preparing their financial statements under the Companies (Accounting Standards) Rules, 2006 shall file the statements using the Taxonomy provided in Annexure-II and companies preparing their financial statements under Companies (Indian Accounting Standards) Rules, 2015, shall file the statements using the Taxonomy provided in Annexure-II A:

Note: Companies in Banking, Insurance, Power Sector and non-banking financial companies are exempted from XBRL filing.

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Auditors

Introduction

A company carries on business with capital furnished by persons who are not in control of the use of the money supplied by them. They would, therefore, like to see that their investments are safe. For this purpose, the accounts of the company are checked and audited by duly qualified persons known as **auditors.**

Audit is an **examination of accounting records** undertaken with a view to establish the correctness or otherwise of the transactions reflected therein. It involves the **intelligent scrutiny of the books of accounts** of a company with reference to documents, vouchers and other relevant records. The main object of audit is to ensure that the statement of accounts of the relevant financial year, truly and fairly, reflect the state of affairs of the company.

Qualification of Auditors sec 141 (1) and (2)

Only a CA (individual) or a Firm, where majority of partners practicing in India are CA, can be appointed as auditor of any company, whether public or private.

Disqualification of Auditors Sec 141 (3)

None of the following persons shall be qualified for appointment as auditor of a company:

a) A body corporate, except LLP;
b) An officer or employee of the company;
c) Any partner/ employee of officer or employee of company;
d) A Person who or his partner or relative –
   i. Is holding any security of or interest in the co., H.C, S.C, A.C. Provided that his relative may hold the security or interest in co. of FV not exceeding Rs. 1000 or other prescribed sum. OR
   ii. Is indebted to co., H.C, S.C, A.C. or subsidiary of such holding co. in excess of prescribed amount. OR
   iii. Has given a guarantee or provided security for any indebtness of any 3rd party to co. H.C, S.C, A.C. or subsidiary co. of such holding co. for a prescribed amount.

e) A person or a firm who, whether directly or indirectly, has business relation with co. H.C, S.C, A.C. or subsidiary co. of such holding co. of such nature as may be prescribed.
f) A person whose relative is a director or is in the employment of the co. as a director or KMP.
g) A person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies.
h) A person who has been convicted by a court of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction;
i) **A person who, directly or indirectly, renders any service referred u/s 144 to the co. or its holding co. or its subsidiary co.**

Further, an internal auditor cannot act as statutory auditor.

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If an auditor becomes disqualified in any of the above ways after his appointment as auditor, then he shall be deemed to have vacated his office and such vacation shall be deemed to be a casual vacancy in the office of the auditor.

Appointment of Auditors

In general, Audit Committee of a company and in case where such a committee is not required to be constituted the Board shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointed or re- appointed as auditor and whether such qualification and experience are commensurate with the size and requirements of the company.

Where a company is required to constitute the Audit Committee, the committee shall recommend the name of an individual or a firm as auditor to the Board for consideration who in turn recommend it to the shareholders for appointment, and in other cases the Board shall consider and recommend an individual or a firm as auditor to the members in the AGM for appointment or re- appointment.

It may be noted for the purpose of this entire topic Chapter '**Audit and Auditors**' the term "appointment" includes re - appointment

Appointment of First Auditor (Sec 139(6)

The 1st auditor of a company, other than a Government Company, is to be appointed by the Board of Directors:

- **Within 30 days** of the date of the registration (incorporation) of the company.
- If the Board of Directors fails, the company in **GM within 90 days** of the date of the registration (Incorporation) of the company, may appoint the first auditor.

The first auditor so appointed is to **hold office until the conclusion of the AGM** of the company.

Subsequent Appointment of Auditors (Sec 139 (1))

It is necessary for every company, before making an appointment at any AGM of an auditor, to obtain from the auditor proposed to be appointed his written consent and a certificate to the following effect:

a) The individual is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules of regulations made there under;
b) The proposed appointment is as per the term provided under the Act;
c) The proposed appointment is within the limits laid down by or under the authority of the Act;
d) The list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

The Certificate shall also indicate whether the auditor satisfies the criteria provided in section 141 of the Act. Section 139 (1) of the Companies Act, 2013 read with Rule 3 of Companies (Audit and Auditors) Rules, 2014 provides that company, other than a Government Company, shall at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its 6th AGM and

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therefore till the conclusion of every 6th meeting.

~~**Such appointment shall be subject to ratification in every AGM till the 6th AGM by way of passing of an ordinary resolution. If the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditor or auditors after following the procedure laid in this behalf under the Act.**~~

In consonance to Companies (Amendment) Act, 2017 read with section 139- requirement of annual ratification of appointment of auditor has been done away with. (2018)

The Company shall inform the auditor concerned of his or its appointment and also file a notice of such appointment with the registrar in **Form ADT-1 within 15 days** of the meeting in which the auditor is appointed.

Term of Auditor

a) A listed company
b) An unlisted Public Company having a paid up share capital of Rs. 10 Cr. or more.
c) A private Limited Company having a paid up share capital of **Rs. ~~20~~ 50 (2018)** Cr. or more;
d) All Companies having public borrowings from Banks, Financial Institutions or Public deposit of Rs. 50 Cr. or more.

shall not appoint or re – appoint an individual as auditor for more than 1 term of 5 consecutive year; and an audit firm as auditor for more than 2 terms of 5 consecutive years:

Further, no audit firm shall be appointed as auditor of the company for a period of 5 years, if same firm presently having a common partner to the previous audit firm, whose tenure has expired in a company immediately preceding the financial year.

It may be noted that these auditor (either individual/audit firm) can be re-appointed after cooling off period of 5years.

It may further be noted that a transition period of three years has been provided to the existing companies to comply with this requirement. (From the date of commencement of Co. Act 2013)

Appointment of Auditors in a Government Company (Sec 139(5))

The appointment of auditor in a Government company or government controlled (directly/ indirectly) company shall be held in accordance with the following provisions:

The First auditor shall be appointed by the C&AG within 60 days from the date of incorporation and in case of failure to do so, the Board shall appoint auditor within next 30 days and on failure to do so by BOD, it shall inform the members, who shall appoint the auditor within 60 days at an extraordinary general meeting (EGM), such auditor shall hold office till conclusion of 1st AGM.

In case of subsequent auditor for existing government companies, the C&AG of India shall

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appoint **within 180 days** from the commencement of the financial year and the auditor so appointment shall hold his position till the conclusion of the AGM.

The C&AG shall have a right to the conduct a supplementary audit of financial statement of the company and comment upon or supplement such audit report within 60 days from the date of receipt of the audit report u/s 143 (5).

It may be noted that any comments given by the C&AG upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements u/s 136 (1) and also be placed before the AGM of the company at the same time and it the same manner as the audit report.

Re-appointment of Auditors (Sec 139(9)

A retiring auditor shall be re- appointed unless:

a) He is not qualified for re-appointment; or
b) He has given to the company notice in writing of his unwillingness to re-appointed; or
c) A special resolution has been passed at that meeting appointing somebody instead of him or expressly providing that he shall not be appointed.

If at any AGM, no auditor is appointed or re- appointed, the existing auditor shall continue to be the auditor of the company.

Appointment of Auditor by filling Casual Vacancy

The casual vacancy in the office of auditor may be filled by the Board. But where the vacancy is caused by resignation of auditor, such vacancy shall only be filled by the company in general meeting **within 3 months** of the recommendation of the Board. The auditor so appointed shall hold the office until the conclusion of the next AGM.

The casual vacancy in the office of an auditor of a Government Company or government controlled (directly/ indirectly) company shall be filled by the C&AG within 30 days from the date of vacancy and in case of failure to do so, Board shall fill up the same within next 30 days.

In case the company had appointed more than one auditor, the remaining auditor or auditors can continue to act notwithstanding the vacancy caused by the resignation of other auditor.

Appointment of Auditor other than Retiring Auditor

The procedure for appointing an auditor, who is not the retiring auditor, is as follows:

1. A special notice of minimum 14 clear days is required for appointing as auditor a person other than the retiring auditor shall not be reappointed. However, special notice is not required if the retiring auditor has completed the term of 5 or 10 years as the case may be.
2. On receipt of notice is received of such a resolution, the company can conveniently send a copy of the same to the retiring auditor.
3. Where the notice is received well in advance, the company can conveniently send the notice of the resolution to the members including the same in the notice of the AGM. Where it is received just 14 days before the meeting and it is not feasible for the company

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to send notice of the same to members, the company has to notify the same in English and Vernacular language newspapers at least 7 days before the meeting.

4. The retiring auditor can make a representation and request for the notification to members. The company should do so unless the representation is received too late, then representations shall be read out at the meeting. It may be noted that if a copy of the representation is not sent as aforesaid, a copy thereof shall be filled with the ROC.
5. If on the application of the company or any other person who claims to be aggrieved, the NCLT; on being satisfied that the rights are being abused to secure needless publicity for defamatory matter, the company need not send a copy or read out the representations.
6. At AGM, the appointment will be considered and the necessary resolution to be passed.
7. After the appointment, the company shall inform the auditor concerned of his or its appointment and also file a notice of such appointment with the Registrar in **FormADT-1within 15 days** of the meeting in which the auditor is appointed.

Rotation of Auditors

Member of a company can provide for following by passing a resolution:

a) If the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members; or
b) The audit shall be conducted by more than one auditor.

Remuneration of Auditors (Sec 142)

The remuneration of the auditor of a company shall be determined by the shareholders or in such manner as the shareholders may determine. Board may fix the remuneration of the first auditor appointed by it.

In general, the authority appointing the auditor has to fix the remuneration. However, in the case of government Company, auditor is appointed by C&AG but remuneration is determined by the shareholders or in such manner as the shareholders may determine.

Resignation by an Auditor

The auditor who has resigned from the company shall file a statement in **Form ADT-3** indicating the reasons and other facts as may be relevant with regard to his resignation as follows:

1) In case of other than Government Company, the auditor shall within 30 days from the date of resignation, file such statement to the company and ROC.
2) In case of Government Company or government controlled company, auditor shall within 30 days from the resignation, file such statement to the company and the registrar and also file the statement with the C&AG.
3) **If the auditor does not comply with the above provision, he or it shall be liable to a penalty of Rs. 50,000 or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with a further penalty of Rs. 500 for each day after the first during which such failure continues, subject to a maximum of Rs. 5,00,000.**

Removal of Auditors:

By the Shareholders

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The auditor appointment u/s 139 may be removed from his office before the expiry of the term only by-

I. Obtaining the prior approval of the Central Government by filling an application in Form ADT-2 within 30 days of Board resolutions.
II. The company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution.
III. The auditor concerned shall be given a reasonable opportunity of being heard.

By the National Company Law Tribunal

National Company Law Tribunal (NCLT) can either-

i. Suo moto; or
ii. On an application from Central Government, or
iii. on an application from person concerned,

It can direct the company to change the auditor if it is satisfied that the Auditor of a company has, whether directly or indirectly acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers.

In the case of application being made by the CG and the NCLT being satisfied that change of auditor is required, it shall within 15 days of the receipt of such application, make an order that the Auditor shall not function as an auditor of the company and the CG may appoint another auditor in his place. This will happen only when an application is made by the CG and not any other person.

Where the auditor, whether individual or firm, against whom the final order as aforementioned is passed by the NCLT under this section, he shall not be eligible to be appointed as an auditor of any' company for a period of 5 years from the date of passing of such order. Further, the auditor shall also be liable for action u/s 447 which provides for punishments for frauds.

It has been clarified by way of explanation that in case a firm is appointed as auditor of the company, the liability shall be of the firm and every partner or partners who acted in fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers shall be liable and not be eligible to be appointed as auditor of any company for a period of 5 years.

Rights of Auditors (Sec 143)

Following are the important rights of Auditors:

1. Right of access to Books of Accounts
2. Right to obtain information and explanation
3. Right to attend the general meeting
4. Right to be heard at the general meeting
5. Right to visit branch office.
6. Right to receive remuneration.
7. **Right to access records of Subsidiary Co. & Associates Co. related to consolidated**

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Financial statements.

Duties of Auditors (Sec 143)

Following are the important of Auditors:

1.Duty to make and audit report
2.Duty to make adequate disclosures in the audit report
3.Duty to give reasons for qualifications
4.Duty to sign the audit report
5.Duty to attend the meetings of Audit Committee of Directors.

If an auditor of Co. in the course of the performance of his duties as auditor, has reason to believe that a fraud involving prescribed amount is being or has been committed by the officers or employees of Co., the auditor shall report the matter to CG within prescribed time and manner.

But if amount involved in fraud is lesser than specified amount, the auditor shall report the matter to audit committee of Co. constituted u/s 177 or to the BOD and such companies shall disclose the details about such fraud in Board's Report in prescribed manner.

Audit of Branch Accounts (Sec 143)

If a company has branch offices, the accounts of every branch office must be audited by the company's auditor or the company may appoint another qualified auditor for the purpose. If any branch office of the company is outside India, the accounts shall be audited by a person qualified to audit accounts according to laws of that country or the company's auditor or a person qualified for appointment as auditor under the companies Act, 2013.

The branch auditor shall receive such remuneration and shall hold his appointment subject to such terms and conditions as may be fixed either by the company in general meeting or by the Board of directors, if so authorized by the company in general meeting.

The branch shall prepare a report on the accounts of the branch office examined by him and forward the same to the company's auditor who shall in preparing the auditor's report, deal with the same in such manner as he considers necessary.

Auditor not to do Certain Services (Sec 144)

An auditor shall provide to the company only such other services as are approved by the Board of Directors/ the audit committee, but which shall **not include any of the following services** (whether such services are rendered directly or indirectly) to the company or its holding company or subsidiary company, namely:

(a) Accounting and book keeping services;
(b) Internal audit;
(c) Design and implementation of any financial information system;
(d) Actuarial services;
(e) Investment advisory services;
(f) Investment banking services;
(g) Rendering of outsourced financial services;

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(h) Management services; and
(i) Any other kind of services as may be prescribed.

Signing and Reading Out of Auditors Report [Sec 145]

As per Section 145 of the Companies Act, 2013, only the person appointed as **auditor** of the company, or where a **firm** is so appointed, only a partner in the firm who are chartered accountants may **sign the auditor's report** on behalf of the firm.

Further, any qualifications, observations or comments on financial transactions matters, which have an adverse effect on the functioning of the company mentioned in the **auditor's report shall be read out before the company in general meeting** and shall be **open to inspection by any member** of the company.

Cost Audit

[Section 148 Read with Rule 14]

Cost audit is the verification of cost accounts and a test on the compliances to the cost accounting plan.

At the outset, cost audit involves:

- The verification of the record of cost accounts like the accuracy of the cost accounts, cost technique and cost reports;
- Scrutinizing these records to make sure that they adhere to the cost accounting principles and objectives'

CG may, by order, in respect of such class of companies engaged in the production of such goods or providing such services as may be prescribed, direct that particulars relating to the utilization of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept by that class of companies.

If CG is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies and which have a prescribed amount of net worth **or** a turnover, shall be conducted in the manner specified in the order.

The audit shall be conducted by a ~~**practicing**~~ **(2018)** cost Accountant, who shall be appointed by the BOD on such remuneration as may be determined by the members.

The audit conducted under this section be in addition to the audit conducted u/s 143.

The qualifications, disqualifications, rights, duties and obligations applicable to auditors under this chapter shall, so far as may be applicable, apply to a cost auditor appointed under this section and it shall be duty of the company to give all assistance and facilities to the cost auditor appointed under this section for auditing the cost records of the company.

Further the report on the audit of cost records shall be submitted by the cost accountant in practice to the Board of Directors of the Company.

A company shall **within 30 days** from the date of receipt of a copy of the cost audit report, furnish the CG with such report along with full information and explanation on every reservation or qualification contained therein.

If, after considering the cost audit report and the information and explanation furnished by the

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company, the CG is of the opinion that any further information or explanation is necessary, it may call for such as may be specified by CG.

As per Rule 2(fa) of the Companies (Cost records and audit) Rules, 2014 "Indian Accounting Standards" means Indian Accounting Standards as referred to in Companies (Indian Accounting Standards) Rules, 2015. **(2018)**

Internal Audit

[Sec 138 read with Rule 13 of Companies (Accounts)Rules 2014]

Classes of companies requiring Internal Audit

The following class of companies shall be required to appoint an internal auditor or a firm of internal auditors: -

a) every listed company;
b) Every unlisted public company having -
   i. paid up share capital of Rs. 50 Cr. or more during the preceding financial year; **OR**
   ii. Turnover of Rs. 200 Cr. or more during the preceding financial year; **OR**
   iii. Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 Cr. or more at any point of time during the preceding financial year; **OR**
   iv. Outstanding deposits of Rs. 25 Cr. or more at any point of time during the preceding financial year; and
c) Every private company having -
   i. turnover of Rs. 200 cr. or more during the preceding financial year; **OR**
   ii. Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 cr. or more at any point of time during the preceding financial year.

An existing company covered under any of the above criteria shall comply with the requirements of section 138 and this rule **within 6 months** of commencement of such section.

The Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, formulate the scope, functioning, periodicity and methodology for conducting the internal audit.

The company board shall be free to appoint any practicing Chartered Accountant or a Cost Accountant or any other person whom it deems fit to be appointed as its internal auditor.

For carrying out internal audit smoothly and effectively, it would be desirable on the part of internal auditor to-

a) Obtain knowledge of legal and regulatory framework within which the audited entity operates. Obtain knowledge of the entity's accounting, internal control systems and procedure along with accounting policies
b) Determine the effectiveness of internal control and check procedures adopted by the entity.
c) Understand the business and other technical details of the audited entity.

Determine nature, timing and extent of procedures to be carried out or performed.

Punishment for contravention (Sec 147)

If any provision of sec 139-146 is contravened

Punishment on Co. → Fine – Min – Rs. 25K, Max – Rs. 5 Lakh

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And
Punishment for officer in default → Fine – Min – Rs. 10K, Max – Rs. 1 Lakh
OR
Imprisonment – up-to 1 Year
OR
Both

If auditor contravenes any provision of sec 139, 143, 144, 145, Punishment → Fine – min Rs. 25K, Max 5 Lakh or 4 times of Remuneration (w.i.L)
But if contravention was done knowingly or wilfully to deceive the co. or its s/h or Creditors or Tax authorities, Punishment → Imprisonment – up-to 1 year AND Fine – Min Rs. 50K, Max Rs. 25 Lakh OR 8 times the remuneration of auditor, (w.i.L)

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner who acted in fraudulent manner or abetted or colluded in any fraud shall only be liable and not all the partners of the firm.

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Transparency and Disclosures

BOARD REPORT (Section 134(3))

Section 134(3) of the Act provides that there shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include –

Disclosures by Board of Directors in the Board's Report

a. the Web address, if any, where annual return has been placed
b. Board report shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period.
c. Number of board meetings.
d. Director's responsibility statement.
e. details in respect of frauds reported by auditors other than those which are reportable to the CG.
f. Statement on declaration given by independent director.
g. Particulars of loan, guarantees or investments.
h. The state of company's affairs
i. Particulars of contracts and arrangements with related parties
j. Statement relating to risk management policy
k. Statement on corporate social responsibility
l. The amount proposed to carry to any reserve conservation of energy,
m. technology absorption,
n. foreign exchange earnings and outgo.

Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report:

Provided further that where the policy referred to in clause (e) or clause (j) is made available on company's Website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the Web-address is indicated therein at Which. the complete policy is available.

134 (3A) The CG may prescribe an **abridged Board's report**, for the purpose of compliance with this section by OPC or small company.

134(4) The board report to be attached to financial statement under this section shall, in case of OPC, mean a report containing explanations or comments by board on every qualification, reservation or adverse remarks or disclaimer made by auditor in his report.

Disclosure in Board's report by listed company

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Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014

Every listed company shall disclose in board report a statement showing the names of the top 10 employees in terms of remuneration drawn and the name of every employee who –

if employed throughout the FY, was in receipt of remuneration-for that year which, in the aggregate, was not less than Rs. 1 Cr and Rs. 2 Lakhs.

if employed for a part of the FY, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than Rs.8,50,000 per month.

Signing of Board's report (Sec. 134(6))	**Case (a)** The chairperson of the board is authorized by the Board to sign the Board's report The Board's report shall be signed by the chairman of the Board.	**Case (b)** In any other case - The Board's report shall be signed by 2 directors (one of whom shall be MD, if there is one) The Board's report shall be signed by 1 director, if only 1 director is for the time being in India.

DIRECTORS' RESPONSIBILITY STATEMENT (Section 134(5))

The Directors' Responsibility Statement referred to in **Section 134 (3)(c)** shall state that -

a) In the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;
b) The directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
c) The directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;
d) The directors had prepared the annual accounts on a going concern basis; and
e) The directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.
f) The directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

REPORTING OF CORPORATE SOCIAL RESPONSIBILITY (CSR)

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According to **Rule 8** of the Companies (Corporate social Responsibility Policy) Rules 2014 the Board's Report of a company covered under these rules pertaining to any financial year shall include an annual report on CSR containing particulars specified in Annexure to these rules.

Other Disclosures under Companies Act. 2013

a) Appointment of independent director
b) Disclosure about the composition of audit committee under section 177(8) and also the
c) recommendation of audit committee
d) Details of establishment of vigil mechanism [section 177(9)]
e) Policies by the nomination and remuneration committee.
f) Secretarial report given by a company secretary in practice.

ANNUAL RETURN

Discussed in the chapter named Registers and Returns

Other Disclosures

Private Limited Company

i. The notice of the general meeting of the company shall be simultaneously placed on the website of the company, if any.
ii. Detail of unpaid Dividend: The company shall, within a period of ninety days of making any transfer of an amount to the Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company,
iii. Corporate Social Responsibility Policy: The Board of every company shall disclose contents of such Policy in its report and also place it on the company's website.
iv. Audited Account: Every company having a subsidiary or subsidiaries shall place separate audited accounts in respect of each of its subsidiary on its website.
v. Resignation of Director: The Company shall **within 30 days** from the date of receipt of notice of resignation from a director post the information on its website.

Public Limited Company:

In addition to the disclosures mentioned above, a public company required to publish following details on its website:

i. Change of objects for which money is raised through prospectus. The notice of the same shall also be placed on the website of the company.
ii. Every company inviting deposits from the public shall upload a copy of the circular on its website.
iii. Closure of register of members or debenture holders or other security holders.
iv. The notice of the postal ballot shall also be placed on the website of the company.
v. The results of postal ballot shall be declared by placing it, along with the scrutinizer's report, on the website of the company

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vi. Vigil Mechanism: details of establishment of such mechanism shall be disclosed by the company on its website, if any.

vii. Terms of Appointment of Independent Director: The terms and conditions of appointment of independent directors shall also be posted on the company's website.

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REGISTERS AND RETURNS

REGISTERS:

- The Companies Act, 2013 lays down that every company incorporated under this Act **must** maintain and keep at its **registered office** certain books, registers and copies of certain returns, documents etc. These books are known as **Statutory Books.**

- To give certain notices, file certain returns, forms, reports, documents etc. with the Registrar of Companies within certain specified time limits and with the prescribed filing fees, such returns are called **Casual and Periodic Returns.**

- Some of the statutory registers are required to be kept open by the company for inspection by directors, members, creditors of the company and by other persons.

- The company is also required to allow extracts to be taken from certain documents, registers, returns etc. and furnish copies of certain documents on demand by a member or by any other person on payment of specified fees.

All the books or registers may be broadly divided into two categories:

- Statutory Books or Registers
- Optional or Statistical Books or Registers.

Statutory Books or Registers	Every company incorporated under the Act is required to keep at its registered office, inter-alia, the following statutory books and registers - 1. Register of Sweat Equity Shares. 2. Register of Securities bought back. 3. Register of deposits. 4. Register of charges. 5. Register of members 6. Index of members. 7. Register of debenture holders. 8. Index of debenture holders. 9. Register and index of beneficial owners. 10. Foreign register of security holders. 11. Register of Postal Ballot. 12. Minutes of General Meetings and Board Meetings. 13. Books of accounts. 14. Register of Directors and Key Managerial Personnel. 15. Register of Loans, Guarantee, Security Investment. 16. Register of Investment in securities not held in Company's name. 17. Register of Contracts with companies or firms in which directors are interested.
Optional book or register	With a view of keeping proper records, companies invariably maintain some other books in addition to statutory books. These are

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called optional books. These are:

1. Register of transfer of shares.
2. Register of documents sealed.
3. Register of share application and allotment.
4. Director's Attendance Books.
5. Register of attendance of shareholders, etc.
6. Register of proxies for general meeting.

Register of Members or Debenture Holders or other security holders

Register of Members, etc. [Section 88]

1.Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely:
(a) **Register of members**, indicating separately for each class of equity and preference shares held by each member residing in or outside India;
(b) Register of **debenture - holders**; and
(c) Register of **any other security holders**.

Every co. shall keep in one or more books, a register of its members, and enter therein the following particulars:

a. The name, address and the occupation, of each member
b. Shares held by each member, distinguishing each share by its no. except where such shares are held with a depository and the amt paid or agreed to be considered as paid on those shares
c. The date at which each person was entered in the register as a member
d. The date at which any person ceases to be a member

Provided that where the co. has converted any of its shares into stock and given notice of the conversion to the ROC, the register shall show the amount of stock held by each of the members concerned instead of the shares so converted which were previously held by him.
In case of any default, the co. and every officer in default, shall be punishable with fine which may extend to Rs. 500 for every day of default.

[Rules 3(1) of Companies (Management and Administration) Rules, 2014.

1. Every company shall, from the date of its registration, keep and maintain a register of its members in one or more books in **Form No. MGT-1**
2. Every register shall maintain shall include an index of names entered in the respective registers.
3. The index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio, in the register to be readily found.
4. The co. shall make the necessary entries in the index simultaneously with the allotment or transfer of any security in such register.
5. The maintenance of index is not necessary in case the no. of

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members is less than 50.

Note: -The register and index of beneficial owners maintained by a depository u/s 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.

2.A company may, if so authorised by its articles, keep in any country outside India, in such manner as may be prescribed, a part of the register mentioned above, called" **foreign register**" containing the names and particulars of the members, debenture - holder, other security holder or beneficial owners residing outside India.

3.If a company does so, then the company shall inform the ROC about the foreign address within 30 days from the date of opening the foreign register in **Form MGT-3.**

Default: If a company does not maintain a register of members or debenture - holders or other security holders the company and every officer of the company who is in default shall be punishable with fine minimum Rs. 50,000 and maximum of Rs. 3 lakh and where the failure is a continuing one, with a further fine which may extend to Rs. 1000 for every day, after the first during which the failure continues.

Closing of register (Sec 91)

A co. may, after giving prior notice of at least **7 days** by advertisement in some newspaper circulating in the district in which the R.O. of co. is situated, close the register of members or register of debenture holders for any period or periods not exceeding in the aggregate 45 days in each year, but **not exceeding 30 days** at any ONE time.

In case of contravention, the company and every officer in default shall be punishable with fine which may extend to Rs. 5,000 for every day in default.

[Section 89] Declaration in Respect of Beneficial Interest in Any Share

- **Declaration by Registered Holder:**

  Where any person who is a member but does not hold the beneficial interest in such shares, such person shall make a declaration in **Form no. MGT-4** in duplicate, within a period of thirty days from the date on which his name is entered in the register of members of such company.

- **Declaration by Beneficial Holder:**

  Every person who holds or acquires a beneficial interest in a share of a company shall make a declaration to the company specifying the nature of his interest, particulars of the person in

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whose name the shares stand registered in the books of the company and such declaration shall be filed in **Form NO. MGT-5** in duplicate, within thirty days after acquiring such beneficial interest in the shares of the company.

- **Return to be filed with Registrar:**
  Where any declaration is made to a company, the company shall make a note of such declaration in the register concerned and shall file, within thirty days from the date of receipt of declaration by it, a return in **Form No MGT-6** with the Registrar in respect of such declaration.

Case Law 85	**Murshidabad Loan office Ltd. vs. Satish Chandra Chakravarti.**

A lady was registered as holder of certain shares in a co. The co, on learning that the shares actually belonged to her husband, sued her husband for the unpaid calls on the shares. Held, he was not liable as he was not the member of the co. It is only the registered member, who is liable on the share, though he or she may not be the real owner of the shares.
The court observed: Assuming that the register shareholder is not the real owner but if he is the member in the books of the co, it is he alone who would be entitled to the rights of a shareholder and he alone is liable for call on shares and to be put on the list of contributories.

Register of Significant Beneficial Owners in a co. (Section 90)

Read with co. (beneficial Interest & SBO interest) Rules 2018

13/06/2018

1. Every Individual (acting alone or together or through one or more person or trust) including trust & person resident outside India, who hold beneficial Interest of at-least 25% or other prescribed percentage in shares of co. OR right to exercise OR the actual exercise of significant influence or control (called as Significant Beneficial Owner) over a company shall make a declaration in form BEN 1 within 90 days from the date of notification and within 30 days from date of becoming SBO, subsequently.
   Explanation: where an individual becomes SBO, or where SBO undergoes any change, within 90 days of the commencement of the CO. (SBO), amendment Rules, 2019, it shall be deemed that such individual became the SBO or any change therein happened on the date of expiry of 90 days from the date of commencement of said rules and the period of 90 days will be reckoned accordingly.
   If failed –
   Punishment
   Imprisonment up to one year OR fine of min = Rs. 1Lakh, max Rs. 10 Lakh OR both
   And if default continues, then further fine of Rs. 10,000 for each day in default.
   However, exemption can be provided by CG to specified class

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of persons.

2. Every co. shall maintain a register of SBO in BEN – 3, which shall be open for inspection for at-least 2 hours during business hours on every working day, by any member of co. on payment of fees specified by co. but not more than Rs. 50.
3. Co. shall file a return of SBO, in form no. BEN 2, with ROC within 30 days from date of receipt of declaration along with prescribed fees.
   Note: In case of default w.r.t. point 2 and 3, co. & its officer in default will be punishable with fine of min Rs. 10 lakhs to max of Rs. 50 lakhs and if the default continues then further fine of Rs. 10,000 for each day in default.
4. Co. shall give notice in form BEN – 4 to person, who company knows –
   a. To be SBO, OR
   b. To be having knowledge of SBO, OR
   c. To have been SBO at any time during last 3 yrs. But not registered with co. as such.
5. Such person shall reply to company within 30 days, and if he fails, co. shall apply to NCLT within 15 days from an order restricting the transfer of shares/ interest and suspension of all rights attached.
   NCLT may pass appropriate order within 60 days from the date of application and aggrieved party may within one year apply for relaxation or lifting of restriction.
   Note: If any person provides false information, then he will be liable for action u/s 447.

Explanation – As per sec 2(27) – Significant influence or control shall include
   a. Right to appoint majority of directors
   b. To control management
   c. Policy decision exercisable by person or person acting in concert etc.

Closing the Register of Members or Debenture holders or Other Security holder [Section 91]

The register of members of a company may be closed, after giving not less than seven days' previous notice, by advertisement in English Newspaper and also in some vernacular language newspaper circulating in the district in which the registered office of the company is situated. The register can be closed for any period not exceeding in the aggregate 45 days in each year but not exceeding thirty days at any one time.

The register of members can be closed for the following purposes:

- To finalize the list of shareholders to whom to notice of general meeting is to be sent;
- To determine the entitlement of dividend;
- To determine the entitlement of corporate benefits i.e., when right share or bonus share are to be issued.

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	It may be noted that Section 91 also applies to closing of register of debenture holders and register of other security holder. **Note:** In the case of Listed Company, closure of books is only at the time of AGM. At any other time, if the books are closed; it is called record date. Record date is a date fixed by a company for taking a record of its shareholders or debenture holders for declaration of dividends, issue of right or bonus shares or conversion of debenture into shares.
Place of keeping the Registers and Returns [Sections 94]	The register of members, debenture - holders and any other security-holders and copies of annual returns shall be kept at the registered office. However, a company may also keep the said registers and returns at any other place in India other than the registered office where more than 1/10th of total number of members reside, if: • Such other place has been approved for this purpose by a special resolution passed by the company in general meeting • ~~**The Registrar has been given in advance a copy of the proposed resolution.**~~**(Omitted)**
Inspection, Extract and Copy of Registers and Returns [Section 94]	The registers and their indices, except when they are closed under the provisions of this Act, and the copies of all the returns shall be open for inspection by any member, debenture - holder, other security holder or beneficial owner, during business hours, without payment of any fees and by any other person on payment of such fees as may be specified in the AOA of a company subject to a maximum of Rs.50/- for each inspection. Any such member, debenture - holder, other security holder or beneficial owner or any other persons may - Take extracts from any register, or index or return without payment of any fee; or Require a copy of any such register or entries therein or return on payment of such fees as may be specified on the AOA of the company subject to maximum of Rs. 10/- for each page. Such request has to be honoured within 7 days from the date of deposit of fees. **Default:** If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default shall be liable, for each such default, to a penalty of **Rs. 1,000** for every day subject to a **maximum of Rs. 1 Lakh** during which the refusal or default continues.

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	Further, the Central Government may also, by order, direct an immediate inspection of the document, or direct that the extract required shall forth with be allowed to be taken by the person requiring it.
Rectification of register of members Section 59	The register of members is only prima facie evidence of membership and any person can say either a) That his name should no longer appear or should never have been place in the register at all; b) That his name has wrongfully been removed from the register; or c) That his name should be entered as a member. That aggrieved person may apply to the NCLT or to a Competent Court outside India in respect of foreign members, for rectification of the register. The NCLT has full powers to decide any question relating to the title of any person entered or omitted from the register of members. **Default:** If default is made in complying with the order of the NCLT, the company shall be punishable with fine Rs. 1 Lakh to Rs. 5 lakhs **AND** Every officer of the company who is in default shall be punishable with imprisonment up to 1 year **OR** with fine Rs. 1 Lakh to Rs. 3 lakhs, **OR** with both.

Returns:

The returns can be classified into 2 categories namely:

i. Casual Returns; and
ii. Periodical Returns

Casual Returns	Casual returns are those returns, which are required to be filed as, and when contingency arises. The important casual returns are the creation of charge, return of allotment, change of directors, change in the registered office, special resolution, etc.
Periodical Returns	Periodical returns are those returns, which are required to be filed after a specified period. There are these important periodical returns. **These are:** i. Annual Return under Section 92. ii. Balance Sheet and Profit and Loss Account under Section 137.
Annual Return	1. Every company shall, **within 60 days** from the day on which

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[Section 92]

each of the annual general meeting is held, prepare and file the Registrar, an annual return in Form No MGT.7, containing particulars regarding:

- Its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;
- Its shares, debentures and other securities and shareholding pattern;
- ~~Its indebtedness~~; (Omitted)
- Its members and debenture - holders along with changes therein since the close of the previous financial year;
- Its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;
- Meeting of members or a class thereof, Board and its various committees along with attendance details;
- Remuneration of directors and key managerial personnel;
- Penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;
- Matter relating to certification of compliances, disclosures as may be prescribed;
- Details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors ~~**indication their names, addresses, countries of incorporation, registration and percentage of shareholding held by them**~~;(Omitted) and
- Such other matters as may be prescribed and signed by a director and the CS, or where there is no CS, by a PCS.

  Provided that CS may prescribe abridged form of annual return for OPC, small co., and such other class of companies.

  Every co. shall place a copy of AR on the website of co., if any, and the web link of such annual returns shall be disclosed in the Board report.

If any company fails to file its annual return under sub-section (4), before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to a penalty of 50,000 rupees and in case of continuing failure, with further penalty of 100 rupees for each day during which such failure continues, subject to a maximum of 5 lakh rupees." **(2018)**

Note 1: It may be noted that where AGM is not held for a year, annual return should be filed within 60 days from the last day on which the AGM should have been held together with the statement specifying the reasons for not holding the AGM, with prescribed fees or additional fees.

Note 2: An extract of the annual return in Form No MGT 9 shall form

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part of the Board's report.

Signing of Annual Return

Annual return is required to be signed by one director and Company Secretary of the company and where there is no company secretary them by a company secretary in whole - time practice.

- In case of listed company; And
- A company having paid-up share capital of **Rs. 10Cr.**'or'
- A company having turnover of **Rs. 50 Cr.** or more,

The annual return shall also be certified by a **PCS,** in **Form No MGT-8**, stating that the annual return disclosed the facts correctly and adequately and that the company has complied with all the provisions of this Act.

In case of contravention, penalty on PCS → minimum Rs. 15,000 to maximum Rs. 5 Lakhs.

In relation to **OPC**, Small Company and Start-up Private Company (2018), the **Annual Return** shall be signed by the **CS** of the company or where there is no CS, by a director of the company.

Note: Filing of return to the registrar for change in the promoters and top 10 shareholders in case of a listed company

Section 93 provides that every listed company shall file a return in the prescribed form **MGT-10**with the registrar with the fee with respect to changes relating to either increase or decrease of 2% or more than in the shareholding position of promoters and top ten shareholders of the company in each case either value or volume of shares, **within 15 days** of such change.

	Questions	
147	**Dec 2008**	Enumerate the difference between 'statutory books' and 'statistical books'.
148	**Dec 2013**	Chairman of your company wants to know the procedure of condonation of delay by central Government in filing the document with the Registrar of Companies, prepare a note for consideration of the Chairman.
149	**June 2014**	Pioneer Fisheries Ltd. Has borrowed an amount of Rs.50cr from a financial Institution. The annual general meeting of the company was held on 1st September, 2015. Examining the provisions of the Companies Act, 2013, state as to who will sign and certify the annual return while filing the same with the Registrar of Companies after the annual general meeting.

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150	**June 2013**	The Director's Report of Ayush Ltd. For the financial year ended 31st march, 2012 has been dated 15th May, 2012. Is this in order? Explain.
151	**June 2009**	List out the various registers required to be maintained statutorily under the Companies Act, 2013.

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MERGER AND AMALGAMATION

INTRODUCTION

A company may decide to accelerate its growth by developing into new business areas, which may or may not be connected with its traditional business areas, or by exploiting some competitive advantage that it may have. Once a company has decided to enter into a new business area, it has to explore various alternatives to achieve its aims.

For Obtaining Growth & development basically there are three Alternatives:

- Form New Company
- Takeover
- Merger & Amalgamation

THE DECISION TO BE TAKEN ON THE BASIS OF FOLLOWING FACTORS:-

- Estimated cost
- Expected success
- Degree of managerial control require

The Biggest Question.....

What is the difference between **MERGER & AMALGAMATION?**

The term "**Amalgamation**" and "**Merger**" are not defined anywhere in the co. Act 2013 and in many cases these are used interchangeably. However Two Concepts give quite similar definition of amalgamation i.e. Accounting Standard -14 and Income tax Act 1961 (but for their respective purposes)

As per Sec 2(1B) of Income tax Act 1961

"Amalgamation" in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company such a manner that—

1. All the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

2. All the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

3. Shareholders holding **not less than 3/4th in value of the shares** in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation. Thus, for a merger to be qualified as an

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'amalgamation' for the purpose of the Income Tax Act, the above 3 conditions have to be satisfied.

However,

Accounting Standard (AS)-14 recognizes two types of amalgamation:

1. Amalgamation in the nature of merger.
2. Amalgamation in the nature of purchase.

An amalgamation should be considered to be an amalgamation in the nature of merger when all the following conditions are satisfied:

1. All the assets and liabilities of the transferor company shall become, after amalgamation, the assets and liabilities of the transferee company.
2. Such assets and liabilities shall be transferred at Book Value.
3. Shareholders holding not less than 90% of the face value of the equity shares of the transferor company shall become equity shareholders of the transferee company by virtue of the amalgamation.(Except the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees)
4. The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.
5. The transfer shall be on going on concern basis.

An amalgamation should be considered to be an amalgamation in the nature of purchase, when any one or more of the conditions specified above is not satisfied.

REASONS / PURPOSE / MOTIVATION / RATIONALE /OBJECTIVES BEHIND MERGERS AND AMALGAMATIONS:

- Synergistic operational advantages
- Economies of scale (scale effect)
- Reduction in production, administrative, selling, legal and professional expenses.
- Benefits of integration
- Optimum use of capacities and factors of production.
- Tax advantages
- Financial constraints for expansion
- Strengthening financial position
- Diversification
- Advantage of brand-equity
- Loss of objectives with which several companies were set up as independent entities.
- Survival.
- Competitive advantage
- Eliminating or weakening competition
- Revival of a weak or sick company
- Sustaining growth
- Accelerating company's market power and reducing the severity of competition.

AMALGAMATION CAN BE IMPLEMENTED IN ANY OF FOLLOWING WAYS:

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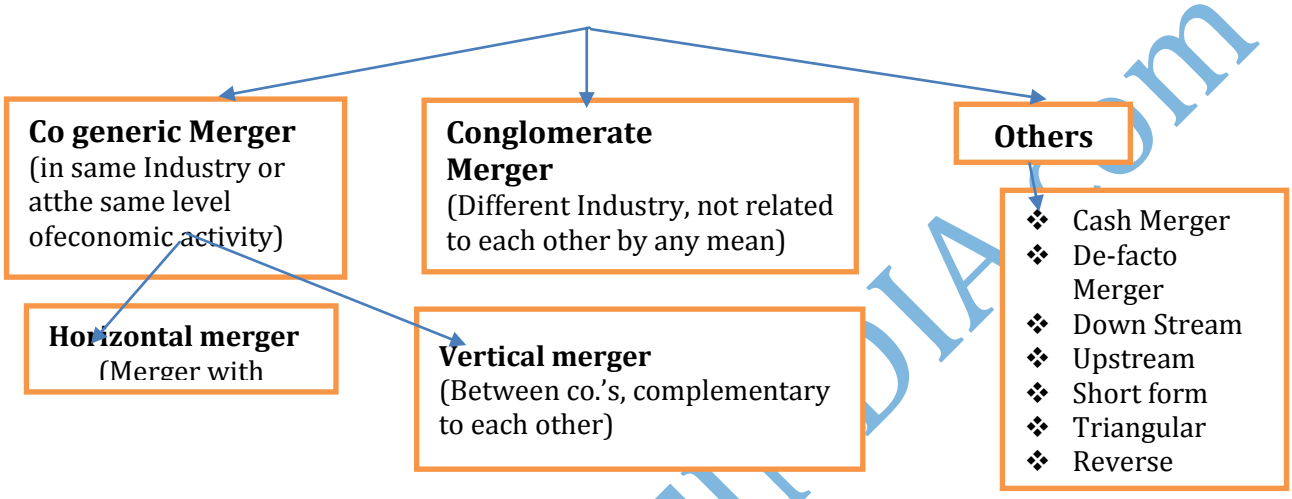
- Transfer of undertaking by order of NCLT (Sec 231)
- Purchase of shares of one company by another company (Sec 235)
- Amalgamation of companies in National Interest (sec 237)

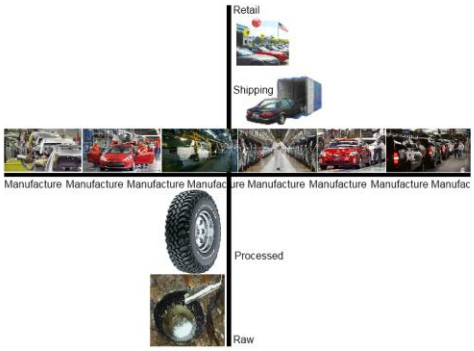
TYPES OF MERGER



Co-generic Mergers:

Co-generic merger means merger within same industry and taking place at the same level of economic activity.

Co-generic mergers are of two types: horizontal merger and vertical merger.



Horizontal Mergers:

A merger is horizontal if it involved the merger of two or more companies which are producing or rendering essentially the same products of services, or products and / or services which compete directly with each other. For e.g. sugar and artificial sweeteners Horizontal merger results in eliminating duplication of facilities and operations and

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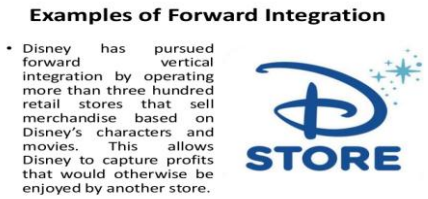
broadening the product line, reduction in finance for working capital, widening the market area and reducing unhealthy competition. Care should be taken while attempting horizontal mergers to avoid impediment to competition and result in monopolistic organisation, as this would attract governmental restraints.

Vertical Merger:



In a vertical merger, two or more companies which are complementary to each other join together. For instance, in a vertical merger, the two companies, out of which one is engaged in the manufacture of a particular and the other company Is established and expert in the marketing of that product or is engaged in the production of raw material, can merger together. Vertical merger may take the form of forward or backward merger. When a company combines with the supplier of materials, it is called backward merger and when it combined with the customer, it is known as forward merger.

Conglomerate Mergers:

Conglomerate merger means merger between unrelated businesses. This type of merger involves coming together of two or more companies engaged in different industries and / or services. Their business or services are, neither horizontally nor vertically, related to each other. They lack any commonality either in end product or in the rendering of specific type of service to society. This is type of merger of companies which are neither competitors, nor complementariness, nor suppliers of a particular raw materials nor consumers of a particular product.

Questions

June 2012 A conglomerate merger is neither vertical nor horizontal Discuss.

REGULATORY FRAMEWORK OF MERGER AND AMALGAMATION

- Companies Act 2013:- Chapter XV Comprising Sec 230 to 237 is a complete code itself.
- Companies (Compromise, Arrangement and Amalgamation) Rules, 2016
- National Company Law Tribunal Rules, 2016

Power to compromise or make arrangements with creditors and members [Sec 230]

(1) Where a compromise or arrangement is proposed –

- between a co. and its creditors or any class of them; or
- between a co. and its members or any class of them

The NCLT may on application in of

- Company
- Creditor/member
- Liquidator (in case of winding up)(appointed under Co. Act or IBC)

Order a meeting to be called, held and conducted in such manner as the NCLT directs

Note: -

1. Application to be filed in NCLT 1 along with
2. A notice of admission in Form No. NCLT-2
3. An affidavit in Form No. NCLT-6
4. A copy of scheme

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5. Disclosure related to basis on which each class of members or creditors has been identified for the purposes of approval of the scheme.
6. Fee as prescribed in the Schedule of Fees in Rules.

If applicant is more than one company, they may file Joint application.

If applicant is not company a copy of the notice of admission and of the affidavit shall be served on the company, or, where the company is being wound up, on its liquidator, not less than 14 days before the date fixed for the hearing of the notice of admission.

(2) Disclosure to be made along with application in Affidavit.

a. **all material facts** relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;
b. **Reduction of share capital** if any, included in the compromise or arrangement (C&A);
c. **Any scheme** of corporate debt restructuring **(CDR)** consented to by at least 75% of the secured creditors in value, including—
   i. A **Creditor's Responsibility Statement** (CRS) in the **Form CAA 1**;
   ii. **Safeguards for the protection** of other secured and unsecured creditors;
   iii. **Report by the auditor** that the fund requirements of the company after the **CDR** as approved shall conform to the liquidity test based upon the estimates provided to them by the **BOD**;
   iv. If company proposes to adopt the **CDR guidelines** specified by the RBI, a **statement to that effect**; and
   v. **A valuation report** in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Note: Here CDR means a scheme that restructures or varies the debt obligations of a company towards its creditors.

Directions at hearing of the application

Rule 5 of Co. (CAA) Rules 2016

Upon hearing the application u/s 230, the NCLT shall, unless it thinks fit for any reason to dismiss the application, give such directions as it may think necessary in respect of the following matters:-

a) Determining the class or classes of creditors or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement; or dispensing with the meeting or meetings for any class or classes of creditors in terms Sec 230(9);
b) Fixing the time and place of the meeting or meetings;
c) Appointing a Chairperson and scrutinizer for the meeting or meetings to be held, as the case may be and fixing the terms of his appointment including remuneration;
d) Fixing the quorum and the procedure to be followed at the meeting or meetings, including voting in person or by proxy or by postal ballot or by voting through electronic means;
e) Determining the values of the creditors or the members, or the creditors or members of any class, as the case may be, whose meetings have to be held;
f) Notice to be given of the meeting or meetings and the advertisement of such notice;
g) Notice to be given to sectorial regulators or authorities as required u/s 230(5);
h) The time within which the chairperson of the meeting is required to report the result of the meeting to the NCLT; and
i) Such other matters as the NCLT may deem necessary.

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(*3*) A notice of meeting shall be sent in Form No. CAA.2 by the chairman of meeting or other authorised person to

i. all the creditors or class of creditors and
ii. to all the members or class of members and
iii. the debenture-holders of the company,

Individually at the registered address by registered post or speed post or by courier or by email or by hand delivery or any other mode at least **1 month** before the date fixed for the meeting**, accompanied by –**

i. a statement disclosing the details of the compromise or arrangement,
ii. a copy of the valuation report, if any, and
iii. explaining their effect on creditors, KMP, promoters and non-promoter members, and the debenture-holders and
iv. the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
v. such other matters as may be prescribed:

Deemed service of Notice: →at the expiration of 48 hours after the letter containing the same is posted

Note:- Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to SEBI and SE where the securities are listed, for placing on their website and shall also be published in newspapers in prescribed manner:

Advertisement of the notice of the meeting Rule 7 of Co. (CAA) Rules 2016

The notice of the meeting shall be advertised in **Form No. CAA.2** in at least 1 English newspaper and in at least 1 vernacular newspaper having wide circulation in the State in which the registered office of the company is situated, or such newspapers as NCLT directs and shall also be placed, not less than 30 days before the date of meeting, on the website of the company (if any) and in case of listed companies also on the website of the SEBI and the RSE where the securities of the company are listed:
Provided that where separate meetings of classes of creditors or members are to be held, a joint advertisement for such meetings may be given.

Provided further that where the notice is issued by way of advertisement, it shall indicate the time within which copies of the C&A can be obtained by concerned persons free of charge from the R.O. of company.

(*4*) Notice shall provide that Voting can be done in the meeting either by themselves or through proxies or by postal ballot within 1 month from the date of receipt of such notice:

Provided that any objection can be raised only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.

(*5*) Notice in form NO. **CAA.3** along with all the documents shall also be sent to

i. the CG,
ii. the IT authorities,
iii. the RBI,

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iv. the SEBI,
v. the ROC,
vi. the respective SE,
vii. the Official Liquidator,
viii. the CCI, if necessary, and
ix. such other sectoral regulators or authorities

By registered post or by speed post or by courier or by hand delivery at the office of the authority.

Which are likely to be affected by the C&A and shall require that representations, if any, to be made by them shall be made within a period of **30 days** from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

Rule 6(3):→The notice of the meeting shall be accompanied by a copy of the scheme and a statement disclosing the following details if not already included in the said scheme:-
(i) Details of the order of the NCLT directing the calling, convening and conducting of the meeting:-
(a) Date of the Order;
(b) Date, time and venue of the meeting.
(ii) Details of the company including:
(a) CIN or GLN of the company;
(b) PAN;
(c) Name of the company;
(d) DOI;
(e) Type of the company (whether public or private or OPC);
(f) Registered office address and e-mail address;
(g) Summary of main object as per the MOA; and main business;
(h) Details of change of name, R.O. and objects of the company during the last 5 years;
(i) Name of the DSE, if applicable;
(j) Details of the capital structure of the company including authorised, issued, subscribed and paid up share capital; and
(k) Names of the promoters and directors along with their addresses.
(iii) If the scheme relates to more than 1 company, the fact and details of any relationship subsisting between such companies who are parties to such scheme, including holding, subsidiary or of associate companies;
(iv) the date of the BM at which the scheme was approved by the BOD including the name of the directors who voted in favour of the resolution, who voted against the resolution and who did not vote or participate on such resolution;
(v) Explanatory statement disclosing details of the scheme including:-

a. Parties involved;
b. In case of M&A, appointed date, effective date, share exchange ratio (if applicable) and other considerations, if any;
c. Summary of valuation report (if applicable) including basis of valuation and fairness opinion of the registered valuer, if any, and the declaration that the valuation report is available for inspection at the registered office of the company;
d. Details of capital or debt restructuring, if any;
e. Rationale for the compromise or arrangement;
f. Benefits of the compromise or arrangement as perceived by the Board of directors to the company, members, creditors and others (as applicable);
g. Amount due to unsecured creditors.

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(vi) Disclosure about the effect of the compromise or arrangement on:

a. KMP;
b. directors;
c. promoters;
d. non-promoter members;
e. depositors;
f. creditors;
g. debenture holders;
h. deposit trustee and debenture trustee;
i. employees of the company:

(Vii) Disclosure about effect of compromise or arrangement on material interests of directors, KMP and debenture trustee.

Note:→The valuation report shall be made by a registered valuer or by an independent merchant banker registered with SEBI an independent CA in practice having a minimum experience of 10 years.

(viii) Investigation or proceedings, if any, pending against the company under the Act.

(ix) Details of the availability of the following documents for obtaining extract from or for making or obtaining copies of or for inspection by the members and creditors, namely:

a. Latest audited financial statements of the company including CFS;
b. Copy of the order of NCLT;
c. Copy of scheme;
d. Contracts or agreements material to scheme;
e. the certificate issued by Auditor of Co. to the effect that the accounting treatment, if any, proposed in the scheme is in conformity with the prescribed AS under Section 133 of the Companies Act, 2013; and
f. Such other information or documents as the BOD believes necessary and relevant for making decision for or against the scheme;

(x) Details of approvals, sanctions or **NOC**, if any, from regulatory or any other authorities required, received or pending for the proposed scheme.

(xi) A statement to the effect that the persons to whom the notice is sent may vote in the meeting either in person or by proxies, or where applicable, by E voting.

Voting (Rule 9)

The person who receives the notice may within one month from the date of receipt of the notice vote in the meeting either in person or through proxy or through postal ballot or through electronic means to the adoption of the scheme of compromise and arrangement.

Note:

Shareholding → The shareholding of the members of the class who are entitled to vote on the proposal

Outstanding debt→ All debt owed by the company to the respective class of creditors that remains outstanding as per the latest audited accounts, or if such accounts is **more than 6 months old**, as per provisional financial statement not preceding the date of application by **more than 6 months.**

Rule 10 Regarding Proxies

(1) Voting by proxy shall be permitted if a proxy in the prescribed form duly signed by the person entitled to attend and vote at the meeting is filed with the company at its RO not later than 48 hours before the meeting.

(2) Where a body corporate which is a member or creditor of a company authorises a proxy, a copy of the resolution of the BOD authorising such person to act as its representative at the meeting, and certified to be a true copy by a director, the manager, the secretary, or other authorised officer of

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such body corporate shall be lodged with the company at its **R.O. not later than 48 hours** before the meeting.
(3) No person shall be appointed as a proxy who is a minor.
(4) The proxy of a member or creditor blind or incapable of writing may be accepted if such member or creditor has attached his signature or mark thereto in the presence of a witness who shall add to his signature his description and address which are in the handwriting of the witness and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request and in the presence of the member or creditor before he attached his signature or mark.
(5) The proxy of a member or creditor who does not know English may be accepted if it is executed in the manner prescribed in the preceding sub-rule and the witness certifies that it was explained to the member or creditor in the language known to him, and gives the member's or creditor's name in English below the signature.

(*6*) If, at meeting, majority of persons **representing 3/4th in value of the creditors, or members**, agree to any C & A and if such compromise or arrangement is sanctioned by NCLT by an order, the same shall be binding on the company, all the creditors or members or, in case of a company being wound up, on the liquidator and the contributories of the company.

(*7*) An order made by NCLT shall provide for all or any of the following matters —

a. If C&A provides for conversion of pref. shares into Eq. shares, such shareholders shall have an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
b. Protection of any class of creditors;
c. if the C&A results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;
d. if the C&A is agreed to by the creditors, any proceedings pending before the BIFR shall abate;
e. such other matters including exit offer to dissenting shareholders,

Provided that no C&A shall be sanctioned by the NCLT unless a certificate by the company's auditor has been filed with the NCLT to the effect that the accounting treatment, if any, proposed in the scheme of C&A is in conformity with the prescribed AS.

(*8*) The order of the NCLT shall be filed with the ROC by the company within a period of 30 days of the receipt of the order.

(*9*) The NCLT may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the scheme of C&A.

(*10*) C&A related to any buy-back of securities shall be sanctioned by the NCLT only if such buy-back is as per provisions of section 68.

(*11*) Any C&A may include **takeover offer** made in prescribed manner as may be:

Provided that for listed companies, takeover offer shall be as per the SEBI regulations.

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(*12*) Aggrieved party may apply to NCLT for grievances related to takeover offer of companies other than listed companies in prescribed manner and the NCLT may, on application, pass such order as it may deem fit.

Note: Sec 66 shall not apply to the reduction of share capital effected in pursuance of the order of the NCLT under this section.

Power of Tribunal to enforce compromise or arrangement [Sec 231]

(1) Where the NCLT makes an order u/s 230 sanctioning a compromise or an arrangement in respect of a company, it—
- *(a)* Shall have power to supervise the implementation of the C&A; and
- *(b)* May give such directions or make such modifications in C&A as it may consider necessary for the proper implementation of scheme.

(2) If the NCLT is satisfied that the scheme cannot be implemented satisfactorily and the company is unable to pay its debts as per the scheme, it may make an order for winding up the co. and such an order shall be deemed to be an order made u/s 273.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act sanctioning a C&A.

Merger and Amalgamation (M&A) of companies [Sec 232]

(1) Where an application is made to the NCLT u/s 230 for the sanctioning of a proposed scheme and it is shown to NCLT—
- a) That the C&A has been proposed for a scheme for the reconstruction of the companies involving M&A of 2 or more companies; and
- b) That under the scheme, the whole or any part of the undertaking, property or liabilities of any company (transferor company) is required to be transferred to another company (transferee company), or is proposed to be divided among and transferred to 2 or more companies,

The NCLT may on such application, **order a meeting** of
- The creditors or
- The members, as the case may be,
- **To be called, held and conducted** in such manner as the NCLT may direct and
- The provisions of Sec 230(3) to (6) shall apply *mutatis mutandis.*

(2) On passing of Order, merging companies or the companies in respect of which a division is proposed, shall circulate the following for the meeting so ordered by NCLT, namely:—
- a. Draft scheme drawn up and adopted by the BOD of the merging company;
- b. Confirmation that a copy of the draft scheme has been filed with the ROC;
- c. Report adopted by the BOD of the merging companies explaining effect of compromise on
  - i. Each class of shareholders,
  - ii. KMP,
  - iii. promoters and non-promoter shareholders

  laying out in particular the share exchange ratio, specifying any special valuation difficulties;
- d. Expert Report on valuation, if any;
- e. A supplementary accounting statement if the last annual accounts of any of the merging company relate to a FY ending more than 6 months before the 1st meeting of the company summoned for the purposes of approving the scheme.

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(3) NCLT, after ensuring the compliance of procedure. May sanction the scheme or by a subsequent order, make provision for the following matters, namely:—

a. The transfer to the Trf'ee Company of the whole or any part of the undertaking, property or liabilities of the Tfr'or Company from a date to be determined by the parties unless the NCLT, for reasons to be recorded by it in writing, decides otherwise;
b. The allotment or appropriation by the Trf'ee company of any shares, debentures, policies or other like instruments in the company which, under the Scheme, are to be allotted or appropriated by that Co. to or for any person:

   Provided that a trf'ee company shall not, as a result of the scheme, 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;
c. The continuation by or against the trf'ee company of any legal proceedings pending by or against any trf'or company on the date of transfer;
d. Dissolution, without winding-up, of any trf'or company;
e. The provision to be made for any persons who, within such time and in such manner as the NCLT directs, dissent from the compromise or arrangement;
f. Where share capital is held by any NR shareholder under the FDI norms or guidelines specified by the CG or as per any law for the time being in force, the allotment of shares of the trf'ee company to such shareholder shall be in specified manner;
g. The transfer of the employees of the trf'or company to the trf'ee company;
h. Where the trf'or company is a listed company and the trf'ee company is an unlisted company,—
   A. The trf'ee company shall remain an unlisted company until it becomes a listed company;
   B. if S/H of the trf'or company decide to opt out of the trf'ee company, provision shall be made for payment of the value of shares held by them and other benefits as per **pre-determined price formula** or after a valuation is made, and the arrangements under this provision may be made by the NCLT:

   Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the SEBI;
i. If trf'or company is dissolved, the fee, if any, paid by the trf'or company on its authorised capital shall be set-off against any fees payable by the trf'ee company on its authorised capital subsequent to the amalgamation; and
j. such incidental, consequential and supplemental matters as are deemed necessary to secure that the M&A is fully and effectively carried out:

Provided that no Scheme shall be sanctioned by the NCLT unless a certificate by the company's auditor has been filed with the NCLT to the effect that the accounting treatment, if any, proposed in the scheme is in conformity with the AS prescribed u/s133.

(4) If NCLT order provides for the transfer of any property or liabilities, then that property shall be transferred to the Trf'ee company and the liabilities shall be transferred to and become the

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liabilities of the Trf'ee Co. and any property may, if the order so directs, be freed from any charge which shall by virtue of the scheme, cease to have effect.

(5) Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

(6) The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

(7) Every company for which the order is made shall, until the completion of the scheme, file a statement in prescribed form and time with ROC every year duly certified by a CA or a CMA or a CS in practice indicating whether the scheme is being complied with as per the orders of the NCLT or not.

(8) In case of contravention, the trf'or company or the trf'ee company, shall be punishable with fine of at-least **Rs. 1 Lakh** up to **Rs. 25 Lakh** and every officer in default, shall be punishable with **imprisonment up to 1 year** or with fine of **Rs. 1 lakh to Rs. 3 lakh**, or with both.

Explanation.—For the purposes of this section,—

i. **A merger by absorption**:→ Where under the scheme the undertaking, property and liabilities of 1 or more companies, including the company in respect of which the C&A is proposed, are to be transferred to another existing company
Note: here merging co. Means both trf'or and trf'ee company.

ii. Merger by formation of a new company:→ where the undertaking, property and liabilities of 2 or more companies, including the company in respect of which the C&A is proposed, are to be transferred to a new company, whether or not a public company.
Note: here merging co. Means both trf'or and trf'ee company.

iii. A scheme involves a division, when under the scheme, the undertaking, property and liabilities of the Co. For which the scheme is proposed are to be divided among and transferred to 2 or more companies each of which is either an existing company or a new company; and

iv. Property includes assets, rights and interests of every description and liabilities include debts and obligations of every description.

Merger or Amalgamation of certain companies [Sec 233:]

(1) Notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between 2 or more **small companies** or between a holding Co. and its WOS company or such other class or classes of companies as may be prescribed, subject to the following, namely:—

a. a notice of the proposed scheme inviting objections or suggestions, if any, from the ROC and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within 30 days is issued by the trf'or company or companies and the trf'ee company;

b. The objections and suggestions received are considered by the companies in their respective GM and the scheme is approved by the respective members or class of members at a GM holding at least 90%. of the total no. of shares;

c. Files a declaration of solvency(DOS) in the prescribed form, with the concerned ROC; and

d. The scheme is approved by majority representing 9/10thin value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving

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a notice of 21 days along with the scheme to its creditors for the purpose or otherwise approved in writing.

(2) The trf'ee company shall file a copy of the scheme so approved in prescribed manner, with the CG, ROC and OL where the RO of the company is situated.
(3) On the receipt of the scheme, if the ROC or the OL has no objections or suggestions to the scheme, the CG shall register the same and issue a confirmation thereof to the companies.
(4) If the ROC or OL has any objections or suggestions, he may communicate the same in writing to the CG within a period of 30 days:
Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme.
(5) If CG is of the opinion that scheme is not in public interest or in the interest of the creditors, it may file an application before the NCLT within 60 days of the receipt of the scheme stating its objections and requesting that the NCLT may consider the scheme u/s 232.
(6) On receipt of an application from CG or from any person, if NCLT, for reasons to be recorded in writing, is of the opinion that the scheme should be considered u/s 232, the NCLT may direct accordingly or it may confirm the scheme by passing appropriate order:
Provided that if the CG does not have no objection or it does not file any application before NCLT, it shall be deemed that it has no objection to the scheme.
(7) A copy of the order confirming the scheme shall be communicated to the ROC having jurisdiction over the trf'ee company and the persons concerned and the ROC shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the ROCs where Trf'or Company or companies were situated.
(8) The registration of the scheme shall be deemed to have the effect of dissolution of the trf'or company without process of winding-up.
(9) The registration of the scheme shall have the following effects, namely:—
   a. Property or liabilities of the trf'or company shall be transferred to the trf'ee company;
   b. The charges, if any, on the property of the trf'or company shall be applicable and enforceable against and in favour of the trf'ee company;
   c. Pending legal proceedings by or against the trf'or company before any court of law shall be continued by or against the trf'ee company; and
   d. Where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the trf'ee company.
(10) A trf'ee company shall not on M&A, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.
(11) The transferee company shall file an application with the ROC along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital:
Provided that the fee, if any, paid by the trf'or company on its authorised capital prior to its M&A with the trf'ee company shall be set-off against the fees payable by the trf'ee company on its authorised capital enhanced by the M&A.
(12) The provisions of this section shall *mutatis mutandis* apply to a company or companies specified in Sec 230(1) or u/s 232(1)(b).
(13) The CG may provide for the M&A of companies in such manner as may be prescribed.
(14) A company covered under this section may use the provisions of section 232 for the approval of any scheme for M&A.

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Merger or amalgamation of company with foreign company [Sec 234]

(1) The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply ***mutatis mutandis*** to schemes of M&A between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the CG:

Provided that the CG may make rules, in consultation with the RBI, in connection with M&A provided under this section.

(2) Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the RBI, merge into a company registered under this Act or *vice versa* and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme.

***Explanation.* — Here**

Foreign company means →Any company or body corporate incorporated outside India whether having a place of business in India or not.

Registration of offer of schemes involving transfer of shares [238]

(1) In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the trf'or company to the trf'ee company u/s 235,—

a. Every circular containing such offer and recommendation to the members of the trf'or company by its directors to accept such offer shall be accompanied by such information and in such manner as may be prescribed;
b. Every such offer shall contain a statement by or on behalf of the trf'ee company, disclosing the steps it has taken to ensure that necessary cash will be available; and
c. Every such circular shall be presented to the ROC for registration and no such circular shall be issued until it is so registered:

Provided that the **ROC may refuse**, for reasons to be recorded in writing, to register any such circular which does not contain the information required or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties **within 30 days** of the application.

(2) An appeal shall lie to the NCLT against an order of the ROC refusing to register any circular.

(3) The director who issues a circular which has not been presented for registration and registered, shall be liable to **penalty of Rs. 1 Lakh.**

Preservation of books and papers of amalgamated companies [239]

The books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the prior permission of the CG and before granting such permission, that CG may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

Liability of officers in respect of offences committed prior to merger, amalgamation, etc. [240]

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Notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the trf'or company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

Incidence where NCLT do not sanction the scheme

a) If scheme is not bonafide but to cover the misdeeds of the delinquent directors
b) Scheme was meant for preventing investigation or Failure in management of the affairs of the company or disregard of law or withholding material information or the scheme is against public policy.
c) It petition shown malafied & purported to defeat the claims of certain creditors.
d) Some info not disclosed to court

NCLT may order winding up

If the NCLT is satisfied (on its own motion or on application) that the scheme cannot be carried out satisfactorily with or without modifications

Calcutta High Court laid down the following principles

Sanction by court cannot be withheld to a scheme if

- Scheme is not for evading law nor seeks to defraud shareholders
- Companies are under common management but engaged in dissimilar business
- Statutory majority u/s 230 approves the scheme

Circular issued by SEBI [dated 4th Feb, 2013] (10 days b4 valentine day)

Saying that,

All schemes of Merger/Demerger/Reduction of capital of listed company will require a NOC of Stock Exchange (SE) before filing the scheme to respective NCLT. And same is required for listing of unlisted company (but after approval of NCLT).

Effect of the amendment

- Stock exchange have to give the their reasoned observations on scheme and have to refer it to SEBI
- SEBI will analyse the scheme and valuation report.
- Meanwhile all the documents would be made public and comments/objections received within 21 days will be addressed by company and would be considered by SE & SEBI while granting NOC.
- Mandatory postal Ballot approval & E- Voting on scheme.
- Mandatory approval of scheme by at least 2/3rd of minority shareholders.

Note: - After this circular the process of merger have become much similar to takeover offers/ Right Issue.

Applicability of circular

- Listed company entering into scheme but have not filed scheme with NCLT.

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- Company that have submitted Draft Scheme with Stock Exchange but not submitted with NCLT. AND
- Schemes which got NOC from SE but not filed the scheme with NCLT.

Obligations of Listed Companies as per New Circular

- File Draft scheme with SE & immediately afterwards disclose the scheme & relevant documents on company's website.
- Place valuation report before Audit Committee which will furnish a report recommending the draft scheme.
- Ensure approval of scheme through Special Resolution of Shareholders though Postal Ballet and E-Voting.
- Submit "complaint Report" to Stock Exchange containing the details of complaints /comments received by it on the Draft Scheme from various sources prior to obtaining observation Letter from stock exchanges.
- 'Complaints Report' shall also be included in the notice sent to the shareholders while seeking approval of the Scheme.
- Complaints Report', shall be submitted to the stock exchanges within 7 days of expiry of 21 days from the date of filing of Draft Scheme with stock exchanges
- Upon sanction of Scheme by the NCLT, the listed company shall submit the documents, to the stock exchanges.
- The designated stock exchange shall forward its recommendations to SEBI.

SEBI shall endeavour to offer its comments/approval, to the designated stock exchange in 30 days.

IMPORTANT CASE LAWS

Feedback Research Pvt. Ltd.

Ruling held that there is no need to have in MOA clause empowering a company to amalgamate with other company & held:

"It is quite clear that the power u/s 230 – 231 is not circumscribed or predicated on the applicant company possessing powers under its objects clause to amalgamate with any other company."

AND

Where the written consent to the proposed scheme is granted by all the members & secured & unsecured creditors, No need of holding meeting

Centex Petro Chemical

It is not courts duty to launch an investigation into commercial merits or demerits of a scheme of amalgamation provided by shareholders when no lack of good faith was evident on the part of majority & provisions of the act has been complied with the court cannot substitute its wisdom for collective wisdom of shareholders when overwhelming majority has approved the scheme.

Hathisingh Manufacturing Co. Ltd.

The point to be considered included not merely the interests of shareholders & creditors but also wider interest of the workmen & of the community. Term of employment shall not be less favourable than that of Transferor Company.

Tax Dept. Related case Law

No special Notice need to be given to find out whether there is a motive of Tax evasion in the proposed amalgamation general public notice is sufficient in news papers

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Landmark case:

Miheer Mafatlal v. Mafatlal Industries Ltd

- The merits of the compromise or arrangement have to be judged by the parties who, with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgement and agree to be bound by such compromise or arrangement.
- The court has neither the expertise nor the jurisdiction to look into commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority
- Hence the court cannot scrutinise the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. (Here the court acts as an Umpire in a game just to ensure that both the team plays their fair game.)

Sanctioning NCLT just has to see the following requisite principles

- That the requisite statutory procedures have been complied with & requisite meeting have been called.
- Scheme is backed by the requisite majority vote
- That the concerned meeting should have the relevant material enable the voters to arrive at the informed decision i.e. just and fair to all (as well as legitimately bind even the dissenting member)
- That all requisite material has placed before the NCLT and the NCLT gets satisfied about the same.
- That proposed scheme is not found to be violative of any prov. Of law and not contrary to any public policy. If found, the NCLT can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X – ray the same.
- All the members, creditors should be acting bonafide and in good faith and not coercing the minority to promote adverse interest.
- Scheme as a whole should be just, fair and reasonable.

APPROVALS IN SCHEME OF AMALGAMATION

The companies are required to obtain following approvals in respect of the scheme of amalgamation:

Approval of Board of Directors

- The first step in carrying out amalgamation is approval of scheme of amalgamation by the Board of both the companies.
- Board resolution should, besides approving the scheme, authorise Director/Company Secretary/other officer to make application to court, to sign the application and other documents and to do everything necessary or expedient in connection therewith, including changes in the scheme.

Approval of Shareholders/Creditors

Members' and creditors' approval to the scheme of amalgamation is **sine qua non** for NCLT's sanction. Without that the NCLT cannot proceed, approval is to be obtained at specially convened meetings held as per NCLT's directions.

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However, it is a discretionary power of the NCLT for which a separate application must be made for NCLT's order.

The scheme of compromise or arrangement has to be approved as directed by the NCLT, by–
- the members of the company; or class
- the creditors; or class

The approval of the members and creditors (or each class of them) has to be obtained at specially convened meetings as per NCLT directions.

An application seeking directions to call, hold and conduct meetings is made to the NCLT, which has jurisdiction having regard to the location of the registered office of the company.

Kaveri Entertainment Ltd. Expounded the procedure required to be followed.

"A company which desires to enter into any arrangement with its members and/or creditors first makes an application to the NCLT for directions for convening of the meeting or meetings of the members and/or creditors, as the case may be, for considering the proposed scheme of arrangement.

Afterwards the NCLT, issues directions for convening of separate meetings of the members and/or creditors or different classes of members and/or creditors, as the case may be. In which meetings, the scheme of arrangement is required to be approved by majority in number representing 3/4th in value of the creditors or class of creditors or members or class of members as the case may be. Then a petition is presented to the court for sanctioning of the scheme of arrangement.

Hindustan Development Corporation Ltd. v. Shaw Wallace & Co. Ltd. Secured creditors should not be clubbed together with the unsecured creditors.

In the case of creditors, those voting in favour must have the claim not less than 75% of the total amount of claim of all the creditors present and voting. The majority is dual, in number and in value.

Punjab and Haryana High Court in Hind Lever Chemicals Limited present and voting & not all the members

Kaveri Entertainment Ltd. →Same held in cumulative Condition.

This is neither an ordinary resolution nor a special resolution within the purview of Section 114 of the Act. This is an extraordinary resolution. A copy of this resolution need not be filed with the ROC under Section 117. If scheme is not approved at a meeting, by the requisite majority, but is subsequently approved by individual affidavits, the NCLT may sanction the Scheme as Section 230(6) is not mandatory but is merely directory and there should be substantial compliance thereof. [SM Holdings Finance Pvt Ltd. v. Mysore Machinery Mfrs Ltd. **Sec. 230(6) is not mandatory].**

Hindustan General Electric Corporation Ltd. the members remaining neutral or not participating in voting are to be ignored.

In Re: Kirloskar Electric Company Ltd., The Karnataka High Court held that the three-fourth majority required under Sub-section (2) of Section 391 of the Act was of the value represented by the members who were not only present but who had also voted. In fact, it went a step further to hold that the creditors who were present and had even voted but whose votes had been found to be invalid, could not be said to have voted because casting an invalid vote is no voting in the eyes of law.

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Approval of the Stock Exchanges

Regulation 30 of LODR 2015→all the listed companies are required to file the scheme of merger or amalgamation with all the stock exchanges where it is listed at least 1 month prior to filing it with NCLT and obtain its No Objection to scheme.

Regulation 11 →Listed entity shall ensure that any scheme to be presented to NCLT does not in any way violate, override or limit the provisions of securities laws or requirements of the stock exchange(s)
Provided that this regulation shall not be applicable for the units issued by Mutual Fund which are listed on a recognised stock exchange(s).

Approval of Financial Institutions

The approval of the Financial Institutions, trustees to the debenture holders and banks, investment corporations would be required if the Company has borrowed funds either as term loans, working capital requirements and/or have issued debentures to the public and have appointed any one of them as trustees to the debenture holders.

Approval from the Land Holders

If the land on which the factory is situated is the lease-hold land and the terms of the lease deed so specifies, the approval from the lessor will be needed.

Approval of Reserve Bank of India

Where the scheme of amalgamation envisages issue of shares/cash option to Non- resident Indians, the amalgamated company is required to obtain the permission of Reserve Bank of India subject to conditions prescribed under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

Approvals from Competition Commission of India (CCI)

The provisions relating to regulation of combination as provided u/s5 and 6 of the Competition Act, 2002 would also be required to be complied with by companies, if applicable. These provisions would be effective from June 01, 2011.

Approval of the NCLT

- Both companies (amalgamating as well as amalgamated) involved in a scheme of compromise or arrangement or reconstruction or amalgamation is required to seek approval of the respective NCLT for sanctioning the scheme.

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- Every amalgamation, except those, which involve sick industrial companies, requires sanction of NCLT which has jurisdiction over the State/area where the registered office of a company is situated.
- If transferor and transferee companies are under the jurisdiction of different NCLT, separate approvals are necessary.
- If both are under jurisdiction of one NCLT, joint application may be made. [Mohan Exports Ltd. v. Tarun Overseas P. Ltd. dissenting from Re Electro Carbonium P. Ltd. wherein it was held that a joint application cannot be made]. Alternatively, where both the companies are situated in the same State and only one company moves the court u/s 391, the other company may be made a party to the petition.

- The notice of every application filed with the NCLT has to be given to the Central Government (Regional Director, having jurisdiction of the State concerned).

- After the hearing is over, the Court will pass an order sanctioning the Scheme of amalgamation, with such directions in regard to any matter and with such modifications in the Scheme as the NCLT may think fit to make for the proper working of the Scheme. [Section 391(2); Rule 81, Companies (Court) Rules 1959].

PROCESS OF MERGER & AMALGAMATION

- **Memorandum to authorize amalgamation**

The memorandum of association of most of the companies contains provisions in their objects clause, authorising amalgamation. If the memorandum of a company does not have such a provision in its objects clause, the company should alter the objects clause, for which the company is required to hold a general meeting of its shareholders, pass a special resolution **u/s 13** of the Companies Act, 2013 and file **Form No. MGT – 14** along with a certified copy of the special resolution along with copy of **Explanatory Statement u/s 102** and MOA&AOA and a copy of agreement with the concerned ROC and the prescribed filing fee by digitally signing the e-form

Alteration should be registered by the **ROC** and only on such registration the alteration will become effective. No confirmation by the **NCLT** or by any outside agency is now required.

It has been held by certain courts that there is no necessity to have special power in the objects clause of the MOA of a company for its amalgamation with another company as to amalgamate with another company, is a power of the company and not an object of the company. The **Karnataka High Court in Hindhivac (P) Ltd.** had sanctioned the scheme of amalgamation taking note of the fact that the shareholders of both the companies had unanimously approved the scheme.

In **Marybong & Kyel Tea Estates Ltd.,** previous decision in Hari Krishan Lohia v. Hoolungoree Tea Company, It is submitted that to amalgamate with another company is a power of the company and not an object of the company. Amalgamation may be effected by order of the NCLT.

- **Observing Memorandum of Association of Transferee Company**

It has to be ensured that the objects of the Memorandum of Association of the transferee company cover the objects of the Transferor Company or companies. If not then it will be necessary to follow the procedure for amendment of objects by passing a special resolution at an Extraordinary General Meeting convened for this purpose.

- **Convening a Board Meeting**

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To consider and approve in principle, amalgamation and appoint an expert for valuation of shares to determine the share exchange ratio. Later upon finalisation of scheme of amalgamation, another Board Meeting is to be held to approve the scheme.

- **Preparation of Valuation Report**

Simultaneously, CA's are requested to prepare a Valuation Report and the swap ratio for consideration by the Boards of both the transferor and transferee companies and if necessary it may be prudent to obtain confirmation from merchant bankers on the valuation to be made by the CA.

Case Law

Dinesh Vorajilal Lakhani vs. Parke Devis (India) Ltd

Swap Ratio cannot be changed on request of few shareholders as it will nullify the basis of valuation

- **Preparation of scheme of amalgamation or merger**

The Boards of the involved companies should discuss and determine details of the proposed scheme of amalgamation or merger and prepare a draft of the scheme of amalgamation or merger. The drafts of the scheme finally prepared by the Boards of both the companies should be exchanged and discussed in the irrespective Board meetings. After such meetings a final draft scheme will emerge. The scheme must define the "effective date" from which it shall take effect subject to the approval of the High Courts.

Contents of Amalgamation Scheme

- **Appointed Date or Transfer Date:** This is usually the first day of the financial year preceding the financial year for which audited accounts are available with the companies.
- In other words, this is a cut-off date from which all the movable and immovable properties including all rights, powers, privileges of every kind, nature and description of the transferor company shall be transferred or deemed to be transferred without any further act, deed or thing to the transferee company.
- **Effective Date:** This is the date on which the transfer and vesting of then undertaking of the transfer or company shall take effect i.e., all the requisite approvals would have been obtained, i.e., date of filing of NCLT order with ROC.
- Arrangement with secured and unsecured creditors including debenture holders.
- Arrangement with shareholders (equity and preference): This refers to the exchange ratio, which will have to be worked out based on the valuation of shares of the respective companies as per the audited accounts and accepted methods and valuation guidelines.
- Cancellation of share capital/reduction of share capital: This will be necessitated when the shares of the transferor company are held by the transferee company and/or its subsidiary or vice versa.
- Pending receipt of the requisite approvals to the amalgamation, the transferor-company possesses the property to be transferred and to carry on the business for and on behalf and in trust for the transferee-company.

11. Copy of compromise or arrangement to be furnished by the company. —

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Every creditor or member entitled to attend the meeting shall be furnished by the company, free of charge, within 1 day on a requisition being made for the same, with a copy of the scheme of the proposed scheme together with a copy of the statement required to be furnished **u/s 230** of Act.

12. Affidavit of service. —

(1) The Chairperson appointed for the meeting of the company or other person directed to issue the advertisement and the notices of the meeting shall file an affidavit before the Tribunal not less than **7 days before** the date fixed for the meeting or the date of the first of the meetings, as the case may be, stating that the directions regarding the issue of notices and the advertisement have been duly complied with.

(2) In case of default under sub-rule (1), the application along with copy of the last order issued shall be posted before the Tribunal for such orders as it may think fit to make.

13. Result of the meeting to be decided by voting.—

(1) The voting at the meeting or meetings held in pursuance of the directions of the **NCLT** u/r 5 on all resolutions shall take place by poll or E Voting.

(2) The report of the result of the meeting shall be in **Form No. CAA. 4** and shall state accurately the no. of creditors or class of creditors or the number of members or class of members, as the case may be, who were present and who voted at the meeting either in person or by proxy, and where applicable, who voted through electronic means, their individual values and the way they voted.

14. Report of the result of the meeting by Chairperson. —

The Chairperson of the meeting (or where there are separate meetings, the Chairperson of each meeting) shall, within the time fixed by the Tribunal, or where no time has been fixed, **within 3 days** after the conclusion of the meeting, submit a report to the Tribunal on the result of the meeting in **Form No. CAA.4**

15. Petition for confirming compromise or arrangement.—

(1) Where the proposed C&A is agreed to by the members or creditors or both as the case may be, with or without modification, the company (or its liquidator), shall, **within 7 days** of the filing of the report by the Chairperson, present a petition to **NCLT** in **Form No. CAA.5** for sanction of the scheme.

(2) Where a **C&A** is proposed for the purposes of or in connection with scheme, or for the amalgamation of any 2 or more companies, the petition shall pray for appropriate orders and directions u/s 230 read with sec 232 of the Act.

(3) Where the company fails to present the petition for confirmation of the C&A as aforesaid, it shall be open to any creditor or member as the case may be, with the leave (permission) of the Tribunal, to present the petition and the company shall be liable for the cost thereof.

16. Date and notice of hearing. —

(1) The **NCLT** shall fix a date for the hearing of the petition, and notice of the hearing shall be advertised in the same newspaper in which the notice of the meeting was advertised or in such other newspaper as **NCLT** may direct, **not less than 10 days** before the date fixed for the hearing.

(2) The notice of the hearing of the petition shall also be served **by NCLT** to the objectors or to their representatives **u/s 230 (4)** of the Act and to the **CG** and other authorities who have made representation u/r 8 and have desired to be heard in their representation.

17. Order on petition.—

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(1) Where the **NCLT** sanctions the **C&A**, the order shall include such directions in regard to any matter or such modifications in the **C&A** as the Tribunal may think fit to make for the proper working of the **C&A**.
(2) The order shall direct that a certified copy of the same shall be filed with the **ROC** within **30 days** from the date of the receipt of copy of the order, or such other time as may be fixed by the **NCLT**.
(3) The order shall be in **Form No. CAA. 6**, with such variations as may be necessary.

18. Application for directions under section 232 of the Act.—

(1) Where the **C&A** has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or the amalgamation of any two or more companies, and the matters involved cannot be dealt with or dealt with adequately on the petition for sanction of the **C&A**, an application shall be made to the Tribunal u/s 232 of the Act, by a notice of admission supported by an affidavit for directions of **NCLT** as to the proceedings to be taken.
(2) Notice of admission in such cases shall be given in such manner and to such persons as the **NCLT** may direct.

19. Directions at hearing of application.—

Upon the hearing of the notice of admission given **u/r 18** or upon any adjourned hearing thereof, the **NCLT** may make such order or give such directions as it may think fit, as to the proceedings to be taken for the purpose of reconstruction or amalgamation, as the case may be, including, where necessary, an inquiry as to the creditors of the transferor company and the securing of the debts and claims of any of the dissenting creditors in such manner as the Tribunal may think just and appropriate.

20. Order under section 232 of the Act.—An order made **u/s 232** read with section 230 of the Act shall be in **Form No.CAA.7** with such variation as the circumstances may require

21. Statement of compliance in mergers and amalgamations.—

For the purpose of section 232(7) of the Act, every company in relation to which an order is made shall until the scheme is fully implemented, file with the ROC, the statement in **Form No. CAA.8** along with such fee as specified in the Companies (Registration Offices and Fees) Rules, 2014 **within 210 days** from the end of each **FY**.

22. Report on working of C&A.—

At any time after issuing an order sanctioning the **C&A**, the **NCLT** may, either on its own motion or on the application of any interested person, make an order directing the company or where the company is being wound-up, its liquidator, to submit to the Tribunal within such time as the Tribunal may fix, a report on the working of the said C&A and on consideration of the report, the Tribunal may pass such orders or give such directions as it may think fit.

23. Liberty to apply.—

(1) The company, or any creditor or member thereof, or in case of a company which is being wound-up, its liquidator, may, at any time after the passing of the order sanctioning the **C&A**, apply to the Tribunal for the determination of any question relating to the working of the **C&A**.

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(2) The application shall in the first instance be posted before the Tribunal for directions as to the notices and the advertisement, if any, to be issued, as the Tribunal may direct.
(3) The Tribunal may, on such application, pass such orders and give such directions as it may think fit in regard to the matter, and may make such modifications in the **C&A** as it may consider necessary for the proper working thereof, or pass such orders as it may think fit in the circumstances of the case.

24. Liberty of the Tribunal.—

(1) At any time during the proceedings, if the Tribunal hearing a petition or application under these Rules is of the opinion that the petition or application or evidence or information or statement is required to be filed in the form of affidavit, the same may be ordered by the Tribunal in the manner as the Tribunal may think fit.

(2) The Tribunal may pass any direction(s) or order or dispense with any procedure prescribed by these rules in pursuance of the object of the provisions for implementation of the scheme of arrangement or compromise or restructuring or otherwise practicable except on those matters specifically provided in the Act.

25. Merger or Amalgamation of certain companies.—

(1) The notice of the proposed scheme, to invite objections or suggestions from the **ROC** and Official Liquidator or persons affected by the scheme shall be in **Form No. CAA.9**.

(2) The declaration of solvency (**DOS**) shall be filed by each of the companies involved in the scheme in **Form No. CAA.10** along with the provided fee, before convening the meeting of members and creditors for approval of the scheme.
(3) The notice of the meeting to the members and creditors shall be accompanied by -
(a) a statement,
(b) The declaration of solvency in **Form No. CAA.10**;
(c) a copy of the scheme.
(4)(a) The transferee company shall, **within 7 days** after the conclusion of the meeting of members or class of members or creditors or class of creditors, file a copy of the scheme as agreed to by the members and creditors, along with a report of the result of each of the meetings in **Form No. CAA.11**with the CG, along with the fees.
(b) Copy of the scheme shall also be filed, along with **Form No. CAA. 11** with -
(i) **The ROC** in **Form No. GNL-1** along with fees; and
(ii) The Official Liquidator through hand delivery or by registered post or speed post.
(5) Where no objection or suggestion is received to the scheme from the ROC and OL or where the objection or suggestion of ROC and OL is deemed to be not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, the Central Government shall issue a confirmation order of such scheme of merger or amalgamation in **Form No. CAA.12**.
(6) Where objections or suggestions are received and the CG is of the opinion, that the scheme is not in the public interest or in the interest of creditors, it may file an application before the Tribunal in **Form No. CAA.13 within 60 days** of the receipt of the scheme stating its objections or opinion and requesting that Tribunal may consider the scheme **u/s 232** of the Act.
(7) The confirmation order of the scheme issued by the **CG** or **NCLT u/s 233(7)** of the Act, shall be filed, **within 30 days** of the receipt of the order of confirmation, in **Form INC-28** along with the fees with the ROC having jurisdiction over the transferee and transferor companies respectively.

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(8) For the purpose of this rule, it is clarified that with respect to schemes of arrangement or compromise, the concerned companies may, at their discretion, opt to undertake such schemes, including where the condition prescribed has not been met.

26. Notice to dissenting shareholders for acquiring the shares.—

The transferee company shall send a notice to the dissenting shareholder(s) of the transferor company, in **Form No. CAA.14** at the last intimated address of such shareholder, for acquiring the shares of such dissenting shareholders.

27. Determination of price for purchase of minority shareholding.—

The registered valuer shall determine the price (hereinafter called as offer price) to be paid by the acquirer, person or group of persons for purchase of equity shares of the minority shareholders of the company, in accordance with the following rules:-

(1) In the case of a listed company,-

(i) The offer price shall be determined in the manner as may be specified by SEBI under the relevant regulations framed by it, as may be applicable; and

(ii) The registered valuer shall also provide a valuation report on the basis of valuation addressed to the BOD of the company giving justification for such valuation.

(2) In the case of an unlisted company and a private company,

(i) The offer price shall be determined after taking into account the following factors:-

(a) The highest price paid by the acquirer, person or group of persons for acquisition during last 12 months;

(b) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, EPS, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies; and

(ii) The registered valuer shall also provide a valuation report on the basis of valuation addressed to the BOD of the company giving justification for such valuation.

28. Circular containing scheme of amalgamation or merger.—

(1) Every circular containing the offer of scheme or contract involving transfer of shares or any class of shares and recommendation to the members of the transferor company by its directors to accept such offer, shall be accompanied by such information as set out in **Form No. CAA.15**.

(2) The circular shall be presented to the ROC for registration.

29. Appeal u/s 238(2) of the Act. —

Any aggrieved party may file an appeal in **Form No. NCLT.9** supported with an affidavit in the **Form No. NCLT.6**against the order of the ROC refusing to register any circular.

JUDICIAL PRONOUNCEMENTS

Broad Principles evolved by Courts in Sanctioning the Scheme

❖ The NCLT should not usurp the right of the members or creditors;

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- Those who took part in the meetings are fair representative of the class and the meetings should not coerce the minority in order to promote the adverse interest of those of the class whom they purport to represent;
- the scheme as a whole, is a reasonable one; it is not for NCLT to interfere with the collective wisdom of the shareholders of the
- Company. If the scheme as a whole is fair and reasonable, it is the duty of the court not to launch an investigation upon the commercial merits or demerits of the scheme which is the function of those who are interested in the arrangement;
- there is no lack of good faith on the part of the majority;
- the scheme is not contrary to public interest;
- The scheme should not be a device to evade law.

Landmark Case

In Miheer H Mafatlal v. Mafatlal Industries Ltd. (1996) 4 Comp. LJP. 124, the Supreme Court explained the contours of the court jurisdictions, as follows:

- Confirm if all the requisite statutory procedures have been complied with and the requisite meetings have been held.
- Confirm that scheme for sanction of the court is backed up by the requisite majority vote as required by Section 391(2) of the Act.
- Confirm that the concerned meetings of member/ creditors had the relevant material to enable the voters to arrive at an informed decision and that the majority is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
- Confirm that all the necessary material indicated by the Section 393(1)(a) of the Act is placed before the voters at the concerned meetings.
- That all the requisite material required is placed before the NCLT for sanctioning scheme and the NCLT gets satisfied about the same.
- Conform that the proposed scheme is not found to be violative of any provision of law and is not contrary to public policy or else the court can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

Forms to be filed

1. The following forms, reports, returns etc. are required to be filed with the ROC, SEBI and Stock Exchanges at various stages of the process of merger/amalgamation:

- For alteration of object clause u/s 13.
- For altering AOA u/s 14 to increase authorised share capital by passing Special Resolution.
- For SR u/s 62 the company's Board of directors to issue shares to the shareholders of the transferor company in exchange for the shares held by them in that company
- For a special resolution is passed under Section 11 for authorising COB of co.

The company should file with ROC within thirty days of passing of the aforementioned special resolutions, Form No. MGT – 14

The following documents should be annexed to the said e-form:

- Certified true copies of all the special resolutions;
- Certified true copy of the explanatory statement annexed to the notice for the general meeting should be digitally signed and certified by CS or CA or CMA (in whole time practice) by digitally signing the e-form.

Forms under Company (CAA) Rules 2016

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Form No.	Purpose
CAA1	Creditor's Responsibility Statement
CAA2	Notice and advertisement of notice of the meeting of creditors or members
CAA3	Notice to CG, Regulatory Authority
CAA4	Report of result of meeting by chairperson.
CAA5	Petition to sanction compromise or arrangement
CAA6	Sanction order of NCLT
CAA7	Order u/s 232
CAA8	Statement to be filed with ROC u/s 232(7) and Rule 21
CAA9	Notice of the scheme inviting objection or suggestions
CAA 10	Declaration of Solvency
CAA11	Notice of approval of scheme to CG,ROC and OL
CAA 12	Confirmation order of scheme of M&A
CAA 13	Application by CG to NCLT u/s 233(5) & Rule 25(6)
CAA 14	Notice to dissenting Shareholders u/s 235(1) & Rule 26
CAA 15	Information to be furnished along with circular in relation to any scheme or contract involving the transfer of shares or any class of shares in the trf'or co. to trf'ee co.

Forms under Company (NCLT) Rules 2016

Forms	Purpose
NCLT 1	Application to NCLT for Meeting to be called, held and conducted
NCLT 2	Notice of admission
NCLT 6	Affidavit
NCLT 9	Appeal against order of ROC refusing to register any circular.

Form No. INC – 28 – to file Sanction order to ROC

SCHEDULE OF FEES				
S. No.	**Sections of the Companies Act, 2013**	**Rule Number**	**Nature of application or petition**	**Fees**
1.	Sec 230(1)	3 (1)	Application for compromise arrangement andamalgamation	Rs. 5,000/-
2.	Sec 235(2)		Application by dissenting shareholders.	Rs. 1,000/-
3.	Sec 238(2)	29	Appeal against order of Registrar refusing to registerany circular.	Rs. 2,000/-

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Introduction to MCA - 21
E-Governance

INTRODUCTION

- India is today globally acknowledged as an IT Superpower.
- India software companies have carved a niche for themselves in the global markets.
- Being an IT superpower is one thing, but the real challenge is how to leverage the strengths and skills of India's globally competitive and recognised software companies to improve the lives of people through e- Governance.
- *"Developing and implementing IT governance design effectiveness and efficiency can be a multidirectional, interactive, iterative, and adaptive process."* - ***Robert E Dauis***
- MCA 21 is a step in this direction.

RATIONALE BEHIND MCA 21

- The number of companies has at increasing rate over the year. Monitoring such a large number of companies whether they regularly file returns or not- manually is a monumental task.
- Monitoring compliance with legal provisions of Companies Act, 2013 relating to healthy corporate governance etc. and taking action against violators-managing all this manually has become virtually impossible.
- The staff strength cannot be increased at the same pace in which number of companies increase. The existing resources (in terms of premises) would prove inadequate to store papers filed by a large number of corporate, seat the staff and also provide facilities for inspection of papers filed to the public at large.
- Corporate agonise over having to waste a lot of unproductive time on filing information with the Registrar of Companies.
- There is a plethora of forms to be filed with ROC in hard copy format.

- Very often, these forms involve duplication of effort and time. Under the present manual system, ROC cannot provide a scrutiny of forms at the point of acceptance itself.
- ROC personnel do not find it a particularly happy experience corresponding and following - up to tie up things. Interface with Roc personnel to rectify deficiencies in forms filed has not been a happy experience either for corporate and professionals.
- There are allegations of harassment and delays. Moreover, companies do not exist for compliance with formalities of the companies Act.
- Companies exist basically to do business and compliance with formalities should not consume a disproportionate portion of their time. Only then, companies can be productive.
- The ROC offices are not open 24 x 7 365 days in a year and cannot be kept open on a 24 x 7 basis to provide the facility of filing forms at one's own convenience.
- Banks also cannot be kept open 24 x 7 to accept filing fees.

***(MCA 21) SMART GOVERNANCE*: The Sanjivani**

A solution to all the above -mentioned difficulties cannot be found with the frame work of the current manual filing system. Hence, the need for e-Governance. Realising the need for e-Governance, the Ministry of Corporate Affairs has embarked on an ambitious e-Governance project. The MCA 21 on 20th February, 2006. The MCA deserves to be complimented for this bold initiative. In a couple of months from the launch, physical filing of documents under the Companies Act, 1956 has been discontinued and e-filing of documents through the new portal is made compulsory.

E-governance is the application of information technology to the government functioning in order to bring about Simple, Moral, Accountable, Responsive and Transparent (SMART) Governance. The system aims at moving from paper based to nearly paperless environment. It is based on the Government's vision of National e-Governance in the country.

Highlights of the System

- The filing of forms (E-Forms) with ROC can be done from the comforts of one's home or office through the interned. There is no need to visit the ROC's office for filing various documents.
- The payment of filing fees can also be made over the internet through credit card/ internet banking without queuing up at the banks. The filing will be valid only when filing fee is paid.
- Pre - scrutiny of filled - up forms is done in the portals before final submission.
- Many of these e Forms require certification by CA/CWA/CS (in whole time practice). Certification must be done by signing digitally.
- DIN (Directors Identification Number) is compulsory for all directors.
- Every signatory of e Form must obtain DSC (Digital Signature Certificate).

Advantages of e-Filing

1) The advantages this system offers to Corporate and Professionals are:

- Filing of documents without visiting the ROC office, sitting in the comfort of one's office or home.
- No need to stand in long queues for filing documents or paying filing fee.
- Filing will be open on a 24 X 7 basis. This affords one the flexibility to do this work at one's convenience.
- Pre-scrutiny of forms filed will be done in the portals itself at the point of filing. So, once the form is filed, a need to interact with ROC personnel to rectify deficiencies in filings will be minimized to a great extent.

- Filing fees can be paid from the comforts of one's office / home using credit card / internet banking.

2) To the public

The portal offers inspection of documents filed by companies on a 24 X 7 basis from the comforts of one's home/ office.

3) The advantages flowing to the Government are tremendous:

- Better utilization of existing staff and space resources.
- The DIN - Director's Identification Number (Which is compulsory for all existing and prospective directors to obtain) will help enforce accountability of directors.
- Time and energy spend in mundane (ordinary) tasks of accepting documents, filing them, corresponding with companies will be drastically reduced and channelized towards taking action against errant corporate.

Digital Signature Certificate (DSC)

The e - forms are required to be authenticated by the authorized signatories using digital signatures as defined under the Information Technology Act, 2000. A digital signature is the electronic signature duly issued by a certifying authority that shows the authority of the person signing the same. It is an electronic equivalent of a written signature. Every user who is required to sign an e - form for submission with MCA is required to obtain a Digital Signature Certificate.

For MCA-21, the following four types of users are identified as users of Digital Signatures and are required to obtain digital signature certificate:

- MCA (Government) Employees.
- Professionals like Company Secretaries, Chartered Accountants, Cost Accountants and Lawyers who interact with MCA and companies in the context of Companies Act.
- Authorized signatories of the Company including Managing Director, Directors, Managers or Secretary.
- Representatives of banks and Financial Institutions.

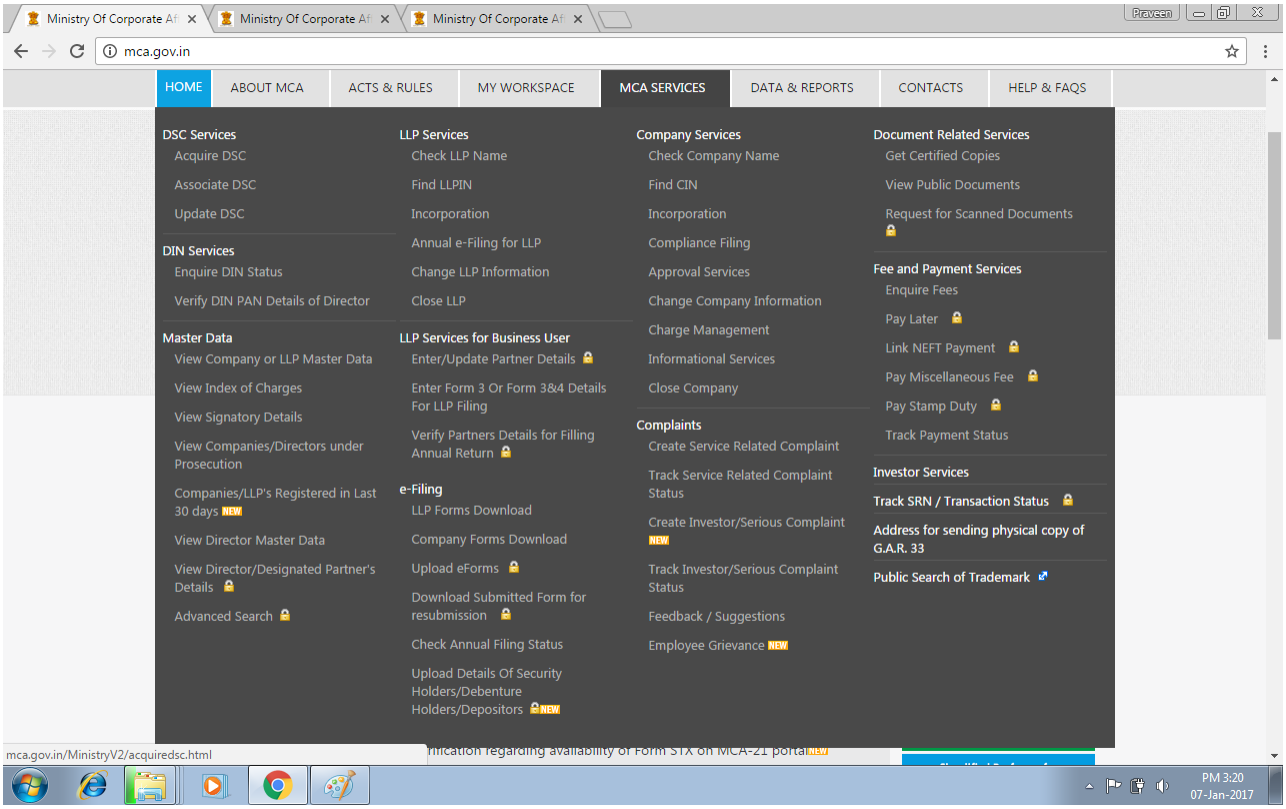
A person requiring a Digital Signature Certificate can approach any of the Certifying authorities identified by the MCA for issuance of Digital Signature Certificate.

Note: Registration of DSE is a one-time activity on the MCA portal. (Roll Check)

Services Available on MCA21

The following services will be available under the MCA21 Project:-

- Registration and incorporation of new companies.
- Filing of Annual Returns and Balance Sheets.
- Filing of forms for change of names, address and other Director's details.
- Registration and verification of charges.
- Inspection of documents.
- Applications for various statutory services from MCA.
- Investor Grievance Redressal.



Organization of ROC Office under MCA:

The ROC office working from its present address will virtually become the Bank Office of the Ministry. Since number of companies /entities may find it difficult to switch over an e-filing at the initial stage. Facilitation Centres known as Physical Front Offices (PFOs) have been set-up throughout the country to provide requisite comfort for e-filing to such companies.

Organization of ROC office under MCA:

- The Front Office represents the interface of the corporate and public user with MCA21 system. This comprises of Virtual Front Office and Physical Front Office.
- Virtual Front Office merely represents a computer facility for filing of digitally signed e-forms by accessing the My MCA portal through internet.
- It also pre-supposes availability of related facilities to convert documents into PDF format and scanning of documents wherever required.
- When a company or user does not have these computer facilities, it can avail of these facilities at the designed facilitation centres, known as the Physical Front Offices.

Organization of ROC Office under MCA:

- Virtual Front Office facilities online filing of the forms using internet.
- The system automatically does not pre scrutiny of the forms filed and indicates error messages in case of incomplete or invalid particulars. Upon successful submission, a service Request Number (SRN) will be generated by the system for the user, which will be used for future correspondence with MCA.
- Virtual Front Office is meant for electronically delivering services at a place and time convenient to the business community through the Front Office portal.

Back office:

- Back office represents the officers of Registrar of companies, RD and Headquarters and takes care of internal processing of the form filed by the corporate user as per MCA norms and guidelines.

The e-forms are routed dynamically to the concerned authority for processing depending upon the assigned role. All the e-forms along with attachments are stores in the electronics depository which the staff of MCA can view depending upon the access right.

Important Terms Relating to E-Filing

1. **E-form** - An e-form is the electronic equivalent of the paper form. The Ministry of corporate Affairs has recently launched a major e-governance initiative MCA 21. In the new system, it is envisaged that all company related documents would be filed electronically. The new e-forms have been devised and notified by the Ministry for this purpose.

2. **Pre-fill**- Pre-fill is a functionality in an e-Form that is used for filing automatically, the requisite data from the system without repeatedly entering the same. For example, by entering the CIN. Of the company, the name and registered office address of the company shall automatically be pre-filed by the system without any fresh entry.

3. **Attachment** - An attachment refers to a document that is sent as an enclosure with an e- Form by means of an attached file. The objective of the attachment is to provide details relevant to the e-Form for processing.

4. **Check form** - By clicking "check form'; the user will be in a position to find out whether the mandatory fields in an e-form are duly filed-in. For example, in the user enters alphabets in "Date of appointment of Director" field, he/she will be asked to correct to entered information.
   If the size of e- Form including attachment is of bigger size then the attachment may be filed through an addendum. If the size of attachment is even bigger in size then the details may be submitted in a floppy or compact disc at the ROC office.

5. **Modify** - Once the user has done 'Check Form; the form gets locked and it cannot be edited. If the user wishes to make any alteration, the form can be over written by clicking "Modify" button. If the user wants to modify the form after pre- scrutiny failure, that user can get the e-form and whichever fields have to be changed only those may be modified by using the 'Modify' button

6. **Pre scrutiny**- Pre-scrutiny is a functionality that is used for checking whether certain core aspects are properly filed the -e-Form. The user has to make the necessary attachments, in PDF format before submitting the e-Form for pre-scrutiny

7. **Service Request Number (SRN)** - Each transaction under e-filing is, uniquely identified by a Service Request Number (SRN). On filing of an e-form, the system will generate and provide a Service Request Number (SRN). A user can check the status of the document or transaction, by entering the SRN

8. **Addendum to e-Form** - The user may have to submit some additional supporting documents that are not submitted during the e-Form (application) filing but are required for the processing of the e-Form. MCA may also ask the applicant to provide some additional documents in support of the e-Form already filed so as to expedite the processing of the same.

The user can initiate this on their own by checking the track transaction status on My MCA portal or on being notified by MCA through email. Payment of fees is not required for filing an addendum. The supporting documents that the applicant uploads, as an addendum, gets duly associated with the e-Form that was submitted earlier with the given SRN.

Miscellaneous

1. **General Structure of e-filing process under MCA - 21**
   E-filing or electronic filing is a key feature of the MCA-21 system. An e-form contains certain standardized feature. Each e-form contains guidelines for filing up the form. An e-form may be filed in either on line or off line. On line filing implies that the e-form is filed while being connected to by MCA portal through the internet. Off line filing denotes that the e-form is downloaded into user's computer and filed later without being connected to internet.

2. **The other requirements includes**
   E-form requires some mandatory attachments, declaration to the effect that the information and attachments are correct and complete, digital signatures of third parties may be required. Prescribed fees as application will be made either on line or off line. After completion of filing e-form duly signed (Digital Signature), an acknowledgement email is sent to user regarding its approval/rejection.

3. **Monetary limit**
   The Ministry of Corporate Affairs vide its Circular dated 9th March, 2011 has decided to accept payments of value upto Rs. 50,000, for MCA 21 services, only in electronic mode w.e.f 27th March, 2011. For the payments of value above Rs. 50,000, stakeholders have the option to either make the payment in electronic mode, or paper challan. However such payments can also be made in electronic mode w.e.f. 1st October, 2011. This has improved the service delivery time and lead to speedier disposal of an application/e-form leading to convenience of stakeholders.

4. **Payment of Stamp Duty**
   Stamp duty is a state subject. It is payable on Memorandum and Articles of Association of every Company. In some states, duty is also payable on the authorized capital mentioned in the Memorandum of Association of the Company. Some states have authorized MCA to collect the stamp duty on their behalf and to remit the same to them.

Infrastructure for e-filing

The minimum system requirements for e-filing are:

- P-4 computer with printer;
- Windows 2000/Windows XP/Windows Vista/Windows 7;
- Internet Explorer 6.0 version and above;
- Above Acrobat Reader 9.4 and lower versions;
- Scanner; and
- Java Runtime Environment ORE) 1.6 updated version 30.

Extensible Business Mark-up Language (XBRL):

XBRL is a language for the electronic communication of business and financial data which is revolutionizing business reporting around the world. It provides major benefits in the preparation, analysis and communication of business information.

- It offers cost savings, greater efficiency and improved accuracy and reliability to all those involved in supplying or using financial data.
- It is an open standard, free of licence fees, being developed by a non-profit making international consortium. Other pages on this web site provide detailed information on XBRL, its technical features and its business opportunities.
- XBRL is a data-rich dialect of XML (Extensible Markup Language), the universally preferred language fir transmitting information via the internet.

- It was developed specifically to communicate information between businesses and other users of financial information, such as analysts, investors and regulators.
- XBRL provides a common, electronic format for business reporting. It does not change what is being reported.
- XBRL is a world-wide standard, developed by an international, non-profit making consortium XBRL International Inc. (XII)
- XII is made up of many members, including government agencies, accounting firms, software companies, large and small corporations, academics and business reporting experts.
- XII has agreed the basic specifications which define how XBRL works.

Benefits of XBRL:

- XBRL offers major benefits at all stages of business reporting and analysis.
- The benefits are seen in automation, cost, saving, faster, more reliable and more accurate handling of data, improved analysis and is better quality of information and decision making.
- All types of organizations can use XBRL to save costs and improve efficiency in handling business and financial information.
- Because XBRL is extensible and flexible, it can be adapted to a wide variety of different requirements. All participants in the financial information supply chain can benefit, whether they are preparers, transmitters or users of business data.
- XBRL enables producers and consumers of financial data to switch resources away from costly manual processes, typically involving time-consuming comparison, assembly and re-entry of data. They are able to concentrate effort on analysis, aided by software which can validate and manipulate XBRL information.

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GLOBAL DEVELOPMENTS

MODERNIZATION OF COMPANY LAW FOR GLOBAL COMPETITIVENESS

Most of the countries in the world today including UK, Hong Kong, Singapore, Australia and Canada are in the various stages of modernizing their company law. A fair modern and effective framework of company law is crucial to the performance of any economy and society. To achieve competitiveness, it is essential that while the law must balance the needs of many interests, for example, shareholders, directors, employees, creditors and customers, it must also avoid unnecessary burdens.

In the current national and international scenario of complex business operations, there is a need for simplifying corporate laws so that they are amenable to clear interpretation and provide a framework that would facilitate faster economic growth. It is also being recognised that the framework for regulation of corporate entities has not only to be in tune with the emerging economic scenario, it must also encourage good corporate governance and enable protection of the interests of investors and other stakeholders.

Salient features of Company Law in United Kingdom (Companies Act, 2006)

Mode of forming incorporated company (Section 7)

Any one or more persons associated for a lawful purpose may, by subscribing their names to the MOA and otherwise complying with the requirement of the Act in respect of registration, form an incorporated company, with or without limited liability. A company may not be so formed for an unlawful purpose.

Minimum Authorized capital (public companies) (Section 763)

The amount of share capital with which the public company is proposed to be registered, must not be less than the authorized minimum (£50,000 or the prescribed euro equivalent or such other sum as the Secretary of State may by order specify).

Minimum membership (for carrying on business)

If a company, other than a private company limited by shares or by guarantee, carries on business without having at least 2 members and does so for more than 6 months, a person who, for the whole or any part of the period that it so carries on business after those 6 months

a) is a member of the company and
b) knows that it is carrying on business with only one member, is liable (jointly and severally with the company) for the payment of the company's debts contracted during the period or, as the case may, that part of it.

For the purpose of the said provision, references to a member of a company do not include the company itself where it is such a member only by virtue of its holding shares as treasury shares.

Directors (Section 154)

Every public company shall have at least two directors and every private company is required to have at least one director.

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Secretary (Section 270, 271, 273)

A Private Company is not required to have a Secretary. A public company must have a secretary. It is the duty of the directors of a public company to take all reasonable steps to secure that the secretary (or each joint secretary) of the company –

1. is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company, and
2. has one or more of the following qualifications.

The qualifications are–

1. That he has held the office of secretary of a public company for atleast 3 of the 5 years immediately preceding his appointment as secretary;
2. that he is a member of any of the bodies specified as below–
    1. the Institute of Chartered Accountants in England and Wales;
    2. the Institute of Chartered Accountants of Scotland;
    3. the Association of Chartered Certified Accountants;
    4. the Institute of Chartered Accountants in Ireland;
    5. the Institute of Chartered Secretaries and Administrators;
    6. the Chartered Institute of Management Accountants;
    7. the Chartered Institute of Public Finance and Accountancy.
3. that he is a barrister, advocate or solicitor called or admitted in any part of the United Kingdom;
4. that he is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging the functions of secretary of the company.

Duty to deliver Annual Return (Section 854)

Every company must deliver to the registrar successive annual return each of which is made up to a date not later than the date that is the Company's return date.

The Company's return date is the anniversary of the Company's incorporation or if the Company's last return delivered in accordance with this part was made up to a different date, then the anniversary of that date.

Salient features of MBCA of US Corporations

A model corporation statute compiled by the American Bar Association has been adopted in whole or in part by or has influenced the statutes of many states.

Secretary (1.40)

"Secretary" means the corporate officer to whom the board of directors has delegated responsibility under section 8.40(c) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

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Required Officers (Section 8.40)

1. A corporation has the officers described in its by-laws or appointed by the board of directors in accordance with the by-laws.
2. The board of directors may elect individuals to fill one or more offices of the corporation. An officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.
3. The bylaws or the board of directors shall assign to one of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation.
4. Unless the byelaws provided otherwise, the same individual may simultaneously hold more than one office in a corporation.

Annual Meeting (Section 7.01)

1. A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws.
2. Annual shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.
3. The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's by laws doesn't affect the validity of any corporate action.

Number and Election of Directors (Section 8.03)

1. A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or by laws.
2. If a board of directors has power to fix or change the number of directors, the board may increase or decrease by 30 percent or less the number of directors last approved by the shareholders, but only the shareholders may increase or decrease by more than 30 percent the number of directors last approved by the shareholders.
3. Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under section 8.06.

Meetings (Section 8.20)

- The board of directors may hold regular or special meetings in or out of this state.
- Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting.
- A direct or participating in a meeting by this means is deemed to be present in person at the meeting.

Salient features of Australian Corporations Act

Structure and functions of the Board

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Under the Corporations Act, a proprietary company must have at least one director. That director must ordinarily reside in Australia. For this purpose, a proprietary company is a company that is registered as, or converts to, a proprietary company under this Act.
A proprietary company must:

- be limited by shares or be an unlimited company with a share capital;
- have no more than 50 non-employee shareholders;
- not do anything that would require disclosure to investors under the Chapter of the Act (except in limited circumstances).

Further, a public company must have at least 3 directors (not counting alternate directors). At least 2 directors must ordinarily reside in Australia. Only an individual who is at least 18 may be appointed as a director of a company. A person who is disqualified from managing corporations may only be appointed as director of a company if the appointment is made with permission granted by Australian Securities and Investments Commission under the leave granted by the Court.

Appointment of Directors

Special Rules for the appointment of public company directors

There are special rules for appointment of directors of public company and the appointment of directors for single director/single shareholder proprietary companies. A resolution passed at a general meeting of a public company appointing or confirming the appointment of 2 or more directors is void unless:

1. the meeting has resolved that the appointments or confirmations may be voted on together; and
2. no votes were cast against their solution.

Therefore, said requirement does not affect

a) a resolution to appoint directors by an amendment to the company's constitution (if any); or
b) a ballot or poll to elect two or more directors if the ballot or poll does not require members voting for one candidate to vote for another candidate.

For aforesaid purposes, a ballot or poll does not require a member to vote for a candidate merely because the member is required to express a preference among individual candidates in order to cast a valid vote.

Company Secretaries

A company other than a proprietary company must have a company secretary. However, a proprietary company may choose to have a company secretary.
A company secretary must be at least eighteen years old.
If a company has only one company secretary, they must ordinarily reside in Australia.
If a company has more than one company secretary, at least 1 of them must ordinarily reside in Australia.
A company secretary must consent in writing to holding the position of company secretary.
The company must keep the consent and must notify ASIC of the appointment.
The same person may be both a director of a company and the company secretary.

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Generally, a company secretary may resign by giving written notice of resignation to the company. A company secretary who resigns may notify ASIC of the resignation. If the company secretary does not do so, the company must notify ASIC of the company secretary's resignation. The company secretary is an officer of the company and, in that capacity, may be subject to the requirements imposed by the Corporations Act on company officers.

Salient features of Canadian Business Corporations Act

Structure and functions of the Board

Under the CBCA, the articles of incorporation are to set out the number of directors or the minimum and maximum number of directors of the incorporation. A corporation may have one or more directors but if any of its issued securities are or were part of a distribution to the public and remain outstanding and are held by more than one person, the corporation is to have atleast 3 directors, atleast 2 of whom are not to be officers or employees of the corporation or its affiliates

Incorporators

1. One or more individuals not one of whom
   - is less than eighteen years of age,
   - is of unsound mind and has been so found by a court in Canada or elsewhere, or
   - has the status of bankrupt,

   may incorporate a corporation by signing articles of incorporation and complying with section 7.

Bodies Corporate

One or more bodies corporate may incorporate a corporation by signing articles of incorporation and complying with section 7.

Salient features of Hong Kong Companies Ordinance

Types of companies (Section 66)

1. Only the following companies may be formed under this Ordinance –
2. a public company limited by shares;
3. a private company limited by shares;
4. a public unlimited company with a share capital;
5. a private unlimited company with a share capital;
6. a company limited by guarantee without a share capital.

Directors and Company Secretaries Requirement to have Directors Public company and company limited by guarantee required to have at least 2 directors (Section 453)

Minimum age for appointment as director (Section 459)

(1) A person must not be appointed a director of a company unless at the time of appointment the person has attained the age of 18years.
(2) An appointment made in contravention of subsection (1) is void.
(3) Nothing in this section affects any liability of a person under any provision of this Ordinance or the Companies (Winding-Up and Miscellaneous Provisions) Ordinance if the person–
   a) purports to act as a director; or

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b) acts as a shadow director,

although the person could not, by virtue of this section, be appointed as a director.

SINGAPORE

Salient features of Singapore Companies Act

Minimum of one member

A company must have at least one member.

Directors (Section 145)

(1) Every company must have atleast one director who is ordinarily resident in Singapore and, where the company has only one member, that sole director may also be the sole member of the company.

(2) No person other than a natural person who has attained the age of 18 years & who is otherwise of full legal capacity shall be a director of a company.

Secretary (Section 171)

(1) Every company shall have one or more secretaries each of whom shall be a natural person who has his principal or only place of residence in Singapore.

(2) It shall be the duty of the directors of a company to take all reasonable steps to secure that each secretary of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company.

Annual general meeting (Section 175)

(1) A general meeting of every company to be called the "annual general meeting" shall in addition to any other meeting be held once in every calendar year and not more than 15 months after the holding of the last preceding annual general meeting, but so long as a company holds its first annual general meeting within 18 months of its incorporation, it need not hold it in the year of its incorporation or in the following year.

(2) Notwithstanding sub section (1), the Registrar may extend the period of 15 months or 18 months referred to in that subsection, notwithstanding that the period is so extended beyond the calendar year–

1. (a) upon an application by the company, if the registrar thinks there are special reasons to do so; **OR**
2. (b) in respect of any class of companies.

A private company may, by resolution passed by all of such members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy present at the meeting, dispense with the holding of annual general meetings. (Section175A)

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MEETING OF BOARD AND ITS POWERS

Introduction

The affairs of a company are managed by the Board of Directors. It is, therefore, necessary that the directors should often meet to discuss various matters regarding the management and administration of the affairs of the company in the best interest of the shareholders and the public interest.

Board Meeting and Essentials of a valid Board Meeting [Section 173 to 176]

To constitute a valid Board Meeting, there are certain conditions, which have to be complied with. They are: -

- Proper constitution of the Board of Directors.
- Due notice must have been issued by an authorized person.
- Presence of a properly elected or chosen person in the chair.
- Proper quorum must be present for due transaction of business.

Number of Board Meetings

[Sec 173(1) & (5) Read with[Rule 3 and 4]

- Every company,
- Private or Public,

Shall hold the 1st Board Meeting within 30 days of the Date of Incorporation (DOI)
And
Thereafter hold a minimum number of 4 Board Meeting every year. There should not be gap of more than 120 days between 2 consecutive Board meetings.

The participation of directors in a board meeting may be either in person or through video conference or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meeting along with date and time:

Provided that CG may, by notification, specify such matters which shall not be dealt with a meeting through video conferencing or other audio visual means.

Provided further that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso.

A OPC, small company, dormant company and a private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least 1 meeting of the Board has been conducted in each half of a calendar year and the gap between the 2 meetings is not less than 90 days:

Provided that nothing contained in this sub-section and in section 174 shall apply to OPC in which there is only one director on its Board of Directors. (2018)

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An adjourned Meeting being a continuation of the original Meeting, the interval period in such a case, shall be counted from the date of the original Meeting. [SS 1]

MEETINGS OF THE INDEPENDENT DIRECTORS:

Where a company is required to appoint Independent Directors under the Act, such **Independent Directors shall meet at least once in a Calendar year.**

CONVENING A MEETING SS - 1

Any **Director of a company may, at any time, summon a Board Meeting** and the CS or any authorized person, shall convene Board Meeting, in consultation with the Chairman or in his absence, the MD or in his absence, the WTD, where there is any, unless otherwise provided in the AOA.

DAY, TIME, PLACE, MODE AND SERIAL NUMBER OF MEETING:

- Every Meeting **shall have a serial number.**
- A Meeting may be convened at **any time and any place, on any day.**

Notice of Board Meeting [Section 173(3) & (4)]

- ✓ Notice of Board Meeting shall be at least 7 days before BM.
- ✓ Shall be in writing
- ✓ To Every Director at his registered address, by hand delivery or post or by E-mode.
- ✓ In case of shorter notice, at least **1Independent Director** shall be present at the meeting. If he is not present, then Decision of meeting shall be circulated to all directors and it shall be final only after ratification of decision by at least **1 Independent Director**.
- ✓ Every authorised officer who fails to do so, shall be punishable with fine up to Rs. 25,000/-

NOTICE OF BOARD MEETING as per SS - 1

Notice, Agenda and Notes of Agenda in writing of every Meeting shall be given to EVERY DIRECTOR by following ways

- By hand or by Speed Post or by Registered Post or
- By Courier or by fax or by Email or by any other electronic mode.
- **In case the company sends the Agenda and Notes on Agenda by speed post or by registered post or by courier, an additional 2 days shall be added for the service of Agenda and Notes on Agenda.**
- **Where a Director specifies a particular means of delivery of Notice, the Notice shall be given to him by such means. However, in case of a Meeting conducted at a shorter notice, the Company may choose an expedient mode of sending notice.**
- **Proof of sending Notice and its delivery shall be maintained by the company for such period as decided by the Board, which shall be at least 3 years from the date of the Meeting.**
- Notice shall be issued by CS/Director/any other authorized officer.
- **Notice shall be sent even if meeting is held on pre determined dates or at pre determined intervals.**

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- **Notice on items of business which are in the nature of unpublished price sensitive information may be given at a shorter period of time but only with consent of a majority of the directors, which shall include at least 1 Independent Director.**
- **Any item not included in the Agenda may be taken up for consideration with the permission of the Chairman and with the consent of a majority of the Directors present in the Meeting.**

The decision taken in respect of any other item shall be final only on its ratification by a majority of the Directors of the company, unless such item was approved at the Meeting itself by a majority of Directors of the company.

Quorum of Board Meeting [Sec 174]

Meaning→The minimum number of the directors required to be present to validity transact any Business in meeting is called Quorum.

Section 174 states that-

1. The quorum for Board Meeting shall be 1/3rd(any fraction contained in that 1/3rdbeing rounded off as **1**) of its total strength or 2 Directors (whichever is higher) AND
2. The participation of the directors by video conferencing or by other audio visual means also shall be counted for the purpose of quorum.
3. The continuing directors may act notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or directors may act for the purpose of increasing the number of directors to that fixed for the quorum OR of summoning a general meeting of the company and for no other purpose.
4. Where at any time the number of interested directors ≥ 2/3rdof the total strength of Board of Directors, the number of directors who are not interested directors and present at the meeting, being not less than 2 shall be the quorum during such time.
   In case of Private Company, interested director shall be counted for quorum after disclosure of his interest pursuant to section 184. (2018)
5. Where a Board Meeting could not be held for want of quorum, then, unless the AOA of the company otherwise provide, the meeting **shall automatically stand adjourned** to the same day at the same time and place in the next week at the same time at the place.

Interested Director

Any director **whose presence cannot be counted** for the purpose of forming a quorum at a meeting of the board, at the time of discussion or vote on any matter, i.e. a contract or arrangement, in which he is in anyway, whether directly or indirectly concerned or interested.

6. Thus, it follows that quorum at a board meeting must be a "disinterested quorum". In other words, it must consist of directors who are entitled to vote on the particular motion before the Board.

Note: In case of board meetings, Quorum is required throughout the meeting.

CHAIRMAN OF BOARD MEETING [Reg 70 of Table F & SS – 1]

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1. The Chairman of the Board shall conduct the Board Meeting. If no such Chairman is elected or if the Chairman is unable to attend the Meeting, the Directors present at the Meeting shall elect one of themselves to chair and conduct the Meeting, unless otherwise provided in the AOA
2. **If the Chairman is interested in an item of business, he shall, with the consent of the members present, entrust the conduct of the proceedings in respect of such item to any Non-Interested Director with the consent of the majority of Directors present and resume the chair after that item of business has been transacted. However, in case of a private company, the Chairman may continue to chair and participate in the Meeting after disclosure of his interest.**
3. **If the item of business is a related party transaction, the Chairman shall also not be present at the Meeting, whether physically or through Electronic Mode, during discussions and voting on such items.**
4. In case some of the Directors participate through Electronic Mode, the Chairman and the Company Secretary shall take due and reasonable care to safeguard the integrity of the Meeting by ensuring sufficient security and identification procedures to record proceedings and safe keeping of the recordings. No person other than the Director concerned shall be allowed access to the proceedings of the Meeting where Director (s) participate through Electronic Mode, except a Director who is differently abled, provided such Director requests the Board to allow a person to accompany him and ensures that such person maintains confidentiality of the matters discussed at the Meeting.
5. The Chairman shall ensure that the required Quorum is present throughout the Meeting and at the end of discussion on each agenda item the Chairman shall announce the summary of the decision taken thereon
6. The Chairman of the Board or in his absence, the MD or in their absence, the MD or in their absence, the WTD and where there is none, any Director other than an Interested Director, shall decide, before the draft Resolution is circulated to all the Directors, whether the approval of the Board for a particular business shall be obtained by means of a Resolution by circulation.

Casting Vote of Chairman

Regulation 68 of Table F of Schedule I to the Companies Act, 2013 provides that in the case of an equality of votes, the Chairman of the Board shall have a second or casting vote.

Resolution by Circulation [Section 175 Read with Rule 5& SS 1]

The Act requires certain business to be approved **only at Meetings of the Board**. However, other **business that requires urgent decisions can be approved by means of Resolutions passed by circulation.** Resolutions passed by circulation are deemed to be passed at a duly convened Board Meeting and have equal authority.

Subject to following conditions

- The resolution shall be circulated in draft, together with the necessary papers, if any,
- to all the directors, or members of the committee, as the case may be,

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- at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed **AND**
- **It shall be** approved by a majority of the directors, who are entitled to vote on the resolution.

However, where **not less than 1/3rd of the total number of directors** of the company for the time being require that any resolution under circulation must be decided at a meeting, the Chairperson shall put the resolution to be decided at a Board Meeting.

The Resolution, if passed, shall be deemed to have been passed on the earlier of:

a) The last date specified for signifying assent or dissent by the Directors or
b) The date on which assent has been received from the required majority, provided that on that date the number of directors, who have not yet responded on the resolution under circulation, along with the Directors who have expressed their desire that the resolution under circulation be decided at a Meeting of the Board, shall not be one third or more of the total number of directors whichever is earlier and shall be effective from that date, if no other effective date is specified in such Resolution.

Note: A resolution passed by circulation shall be noted at a subsequent Board Meeting or the committee thereof, as the case may be, and made part of the minutes of such meeting.

Validity of Acts of Directors [Sec 176]

Acts done by a person, as a director shall be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the AOA:

Provided that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been noticed by a company to be invalid or to have terminated.

Meeting not to be dealt in a meeting through video conferencing or other Audio-Visual Means

Directors may participate in the meeting either in person or through video conferencing or other audio visual means.

Rule 4, however, provides that the following matters shall not be dealt with any meeting through video conferencing or other audio visual means.

- The approval of the annual financial statements.
- The approval of the Board's report.
- The approval of the prospectus.
- The Audit Committee Meeting for consideration of accounts.

The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

As per the Companies (Meetings of Board and Its Powers) Amendment Rules, 2018, Dated: 07-05-2018, the following proviso has been inserted, namely:

"Provided that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means." (2018)

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MINUTES & MINUTE BOOK [SS – 1]

1. Minutes **shall be recorded** in books maintained for that purpose.
2. A **distinct Minutes Book shall be maintained** for Meetings of the Board and each of its Committees.
3. The **pages** of the Minutes Books shall be **consecutively numbered.**
4. **Minutes shall not be pasted or attached to the Minutes Books, or tampered with in any manner.**
5. Minutes shall **state**, at the Beginning the **serial number** and **type of the Meeting, name of the company, day, date, venue and time** of commencement and conclusion of the Meeting.
6. **Minutes shall be written in third person and past tense. Resolutions shall however be written in present tense. Minutes need not be an exact transcript of the proceedings at the Meeting.**
7. **Within 15 days** from the date of the conclusion of the Board Meeting or Committee Meeting, the **draft Minutes** shall be circulated to all the Directors for their comments.
8. **Proof of sending** draft Minutes and its delivery **shall be maintained** by the company for **at least 3 years** from the date of the Meeting.
9. The Directors, (whether present at the Meeting or not), **shall communicate their comments**, if any, **in writing** on the draft Minutes **within 7 days** from the date of circulation. If no comment from director, the draft minutes shall be deemed to be approved.
10. **If any Director communicates** his comments **after the expiry of 7 days**, if so authorized by the Board, the Chairman shall have the discretion to consider such comments.
11. **A Director, who ceases to be a Director after a Meeting of the Board is entitled to receive the draft Minutes of that particular Meeting and to offer comments thereon, irrespective of whether he attended such Meeting or not.**
12. Minutes shall be entered in the Minutes Book **within 30 days** from the date of conclusion of the Meeting.
13. **A Member of the company is not entitled to inspect the Minutes of the Meetings of the Board.**
14. The Board Report shall include a statement on compliances of applicable Secretarial Standards.

In case a Meeting is adjourned, the Minutes shall be entered in respect of the original Meeting as well as the adjourned Meeting. In respect of a Meeting convened but adjourned for want of Quorum, a statement to that effect by the Chairman or in his absence, by any other Director present at the Meeting shall be recorded in the Minutes.

Committees of Board

Audit Committee of Directors [Section 177]

The Audit committee meeting is usually held once in 3 months. Generally, policy matters are discussed at the Board level. The Board does not have the benefit of in depth study of the affairs of the company, especially the financial matters. This lacuna has been rectified now to some

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extent by the constitution of Audit Committee. This will also help in providing more transparency and better Corporate Governance in financial matters.

Following are the important provisions pertaining to Audit Committee of Directors:

1. The requirement of constitution of Audit Committee has been limited to:
   a. Every **listed public Companies** or
   b. The following **class of companies**-
      - All public companies with a Paid up Capital ≥ Rs. 10 Cr.
      - All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits ≥ Rs. 50 Cr.
      - All public companies having turnover ≥ Rs. 100 Cr.
2. The Committee shall comprise of **minimum 3 directors with majority of the directors being Independent Directors.** The majority of members of audit committee including its chairperson shall be person with ability to read and understand the financial statement.
3. **Transition period of 1 year from the date on which the new Act comes into effect** has been provided to enable companies to reconstitute the Audit Committee.
4. The **terms** of reference **of the Audit Committee** inter alia includes-
   - The recommendation for appointment, remuneration and terms of appointment of auditors of the company.
   - Review and monitor the auditor's independence and performance and effectiveness of audit process.
   - Examination of the financial statement and the auditor's report thereon.
   - Approval or any subsequent modification of transactions of the company with related parties.

     Provided further that in case of transaction, other than transactions covered u/s 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board.

     Provided also that in case any transaction involving any amount not exceeding Rs. 1 Cr. is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within 3 months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it.

     Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction covered u/s 188, between a holding company and its wholly owned subsidiary company.
   - Scrutiny of inter-corporate loans and investments.
   - Valuation of undertaking or assets of the company, wherever it is necessary.
   - Evaluation of internal financial controls and risk management systems.
   - Monitoring the end use of funds raised through public offers and related matters.

   The Audit Committee **may call for the comments of the auditors about internal control system,** the scope of audit, including the observations of the auditors and review

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of financial statement before submission to the Board and may also discuss

5. Any related issues with the internal and statutory auditors and the management of the company.
   The audit committee may hold the authority to **investigate into matters** or referred by the Board and have the powers to obtain professional advice from external sources and have full access to records of the company
6. In addition to the auditor, the **KMP shall also have a right to be heard in the meetings of the Audit Committee** when it considers the auditor's report, though they shall **not have voting rights.**
7. The composition of Audit Committee shall be disclosed in Boards' Report and where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in report with reason.
8. Every **listed company** and the companies belonging to the following class or classes shall establish a **vigil mechanism for their directors** and employees to report genuine concerns or grievances: -
   a. The companies which accept **deposit from the public.**
   b. The companies which have **borrowed money from banks and public financial institutions** in excess **of Rs. 50 Cr**.
9. The **companies.** Which are required to constitute an audit committee **shall oversee the vigil mechanism through the committee** and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the other on the committee would deal with the matter on hand.
   In case of other companies, the **Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism** to whom other directors and employees may report their concerns.
   This vigil mechanism shall provide for **adequate safeguards against victimization of employees** and director who avail of the vigil mechanism and also provide for direct access to the chairperson of the Audit committee or the director nominated to play the role of audit committee, as the case may be, in exception cases.

   In case of **repeated frivolous complaints being filed by a director or an employee, the audit committee** or the director nominated to play the role of audit committee may take **suitable action against the concerned director** or employee including reprimand.

10. The Vigil Mechanism shall operate for directors and employees to enable them to bring to report genuine concerns. Further the said mechanism shall provide safeguards against victimization and provide for direct access to the chairperson of the audit Committee in appropriate or exceptional cases.
11. The details of establishment of the Vigil Mechanism is required to be disclosed by the company on its website, if any and in the Board's report.

Nomination and Remuneration Committee (NRC) [Section 178(1) to (4)]

The NRC helps the BOD in the preparations relating to the election of members of the BOD
And
In handling matters within its scope of responsibility that relate to the conditions of employment and remuneration of senior management, and to management's and personnel's remuneration and incentive schemes. The responsibilities of the NRC are defined in its

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policy document.

The Board of directors of following companies shall constitute NRC of the Board:

- **Every listed Public companies or**
- The following class of companies-
  - ✓ All public companies with a PSC≥10 Cr.
  - ✓ All public companies having in aggregate, outstanding loans or borrowings or debentures of deposits ≥ Rs. 50 Cr.
  - ✓ All public companies having turnover ≥ Rs. 100 Cr.

The committee shall consist of 3 or more Non Executive Director out of which not less than **half** shall be independent directors.

Note: The chairperson of the company may be appointed as member, but shall not chair such committee.

The Committee shall identify the persons qualified to become directors and may be appointed in senior management and recommend their appointment and removal and also carry out evaluation of every director.

The Committee shall formulate the criteria, for determining qualifications, positive attributes and independence of a director and recommend to the Board the policy relating to remuneration for directors, KMPs and other employees.

The Chairperson of the Committee or, in his absence, any other member of the committee authorized by him in this behalf shall attend the general meeting ofthe company.

Stakeholders Relationship Committee (SRC) [Section 178 (5) to (8)]

- ✓ The BOD of a company that has more than 1000 shareholders, debenture-holders, deposit- holders and any other security holders at any time during a financial year is required to constitute a SRC consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board.
- ✓ The SRC shall consider and resolve the grievances of security holders of the company.
- ✓ The Chairperson of the SRC or in his absence, any other member of the committee authorized by him in his behalf shall attend the general meeting of the company.

Note: Vigil mechanism shall provide for adequate safeguard against victimization of employees and directors who avail of the vigil mechanism.

Board's Powers and Restrictions there on [Section 179 to 183]

General Powers of Board [Section 179 (1) and (2)]

Subject to the provisions of the Companies Act, the **Board** of Directors **of a company shall be entitled to exercise all such powers, and to do all such acts** and things, as the company is authorized to exercise and do any act or thing which is directed or required, whether by this or any other Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

The **relationship** of the Board of directors with the **shareholders is more of federation than one of sub- ordinate and superior.**

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Some powers are especially reserved for the Board and on the other hand, some powers are exclusively reserved for the members in general meeting,

However, in the following exceptional cases, the general body of shareholders is competent to act even in matters delegated to the Board, for the inherent residuary and ultimate powers of a company lie with the general body of shareholders:

1. **Director acting mala fide**

Case Law **Satya Charan Lal vs. Romeshnwar Prasad Bajoria**

The general body of shareholders can intervene when it is proved that the directors have acted for improper motive or arbitrarily or capriciously.

2. **Incompetent Board**

The general body of shareholders may exercise the powers vested in the Board when the Board is incompetent to act, for instance, where all the directors are interested in the transaction or the Board is unwilling to act, or when there are no validly appointed directors functioning.

Case Law **Vishwnathan Vs. Tiffins B.A and P.Ltd.**

Here, the shareholders in general meeting appointed a director in casual vacancy, a
s there was no validly appointed director functioning

3. **Deadlock in management**

If the directors are unable to act, on account of deadlock, the shareholders have the inherent power to act.

Case Law **Barron Vs. Potter**

Here, the shareholder in general meeting appointed additional director, as the two existing directors were not on talking terms.

[Section 179(2)]

The Board shall exercise any power subject to the regulations made by the company in general meeting. However, it may be noted that no regulation made by the company in general meeting, shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

Certain Powers to be Exercise by Board only at a Board Meeting [Section 179 (3) and (4) Read with Rule 8 of Companies (Meetings of Board and it's Powers) Rules 2014]

Board of directors of a company shall exercise the following powers on behalf of the company, and it shall to do so only by means of resolution passed at the meetings of the Board and not by circulation: -

a. To make calls on shareholders in respect of money unpaid on their shares.
b. To authorize buy-back of securities u/s 68.
c. To issue securities, including debentures, whether in or outside India.

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d. To borrow monies.
e. To invest the funds of the company.
f. To grant loans or given guarantee or provide security in respect ofloans.
g. To approve financial statement and the Board's report.
h. To diversity the business of the company.
i. To approve amalgamation, merger or reconstruction.
j. To take over a company or acquire a controlling or substantial stake in another company.
k. Any other matter which may be prescribed.

The Board may, however, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of branch office of the company, a principal officer of the branch office, **the powers specified in clauses (d), (e) and (f)** to such an extent and on such conditions as the board may prescribe.

Note: The acceptance by a banking company in the ordinary course of business of deposits of money from public repayable on demand or otherwise or the placing of monies on deposit by a banking company with another banking company on such conditions as the board prescribe, shall not be deemed to be borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

Section 179(4)

Empowers the **company in general meeting to impose restrictions** and conditions on the exercise by the **Board** of any of the **powers** specified in sub-section (3}.

Other Powers to be exercised at Board Meeting [Rule 8 of Companies (Meeting of Board and its powers) Rules, 2014]

In addition to the powers specified under sub-section (3) of section 179 of the Act, the following powers shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:

a. To make **political contributions.**
b. To **appoint or remove** key managerial personal **(KMP).**
To appoint **internal auditors** and **secretarial auditor.**

Restriction of powers of Boards [Section 180]

1. The Board of Directors of a company shall exercise the following powers only with the consent of the company by a SR, namely: -

a. To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole of any of such undertakings.

For the purposes of this clause -

- "Undertaking" shall mean an undertaking in which the investment of the company exceeds 20% of its net worth as per the audited balance sheet of the preceding financial year or
  An undertaking which generates 20% of the total income of the company during the previous financial year;
- The expression "substantially the whole of the undertaking" in any financial year

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shall mean 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.

b. To invest otherwise in trust securities, the amount of compensation received by it as a result of any merger or amalgamation.
c. To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid up share capital and free reserves and security premium, apart from temporary loans (to be paid within 6 months) obtained from the company's bankers in the ordinary course of business.

Provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and with draw available by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

d. To remit, or give time for the repayment of any debt due from a director.

2. Every special resolution passed by the company in general meeting shall specify the total amount up to which monies may be borrowed by the Board of Directors.
3. Nothing contained in clause (a) of sub-section (1) shall affect-
   - The title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith.
     OR
   - The sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.
4. Any special resolution passed by the company consenting to the transaction, may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transaction.

No debt incurred by the company in excess of the limit imposed shall be valid or effective, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause has been exceeded

This section is not applicable on Private Companies (exemption notification).

Company to Contribute to Bona Fide and Charitable Funds [Sec 181]

The BOD may contribute to bona fide charitable and other funds. However, prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceeds 5% of its average net profits for the 3 immediately preceding financial year.

Prohibitions and Restrictions Regarding Political Contributions [Sec 182]

- Government companies and other companies, which have been in existence for less than 3 financial years, cannot make any contribution to political party.
- Thus, other Companies which are in existence for not less than 3 financial years may make contributions **of any amount** **(by Finance Act 2017)**, directly or indirectly, in any financial year, to any political party.
- Further it provides that no such contribution shall be made by a company unless a resolution authorizing the making of such contribution is passed at a meeting of the BOD, and such resolutions shall, subject to other provision of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorized by it.

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- Any donation made to a person who is carrying on any activity, which can reasonably be regarded as likely to affect public support for a political party, is deemed to be contribution under the law for political purpose.
- Such contributions include the amount of expenditure incurred by a company, on advertisement in any publication, souvenir, brochure, pamphlet or the like on behalf of political party or for its advantage.
- Such contributions are required to be disclosed by every company in its profit and loss account, giving particulars of the total amount contributed and the name of the party to whom such amount has been contributed.
- **Punishment in Default:** Fine up - to 5 times the amount, so contributed.
  Further, every officer of the company, who is in default, is also punishable with imprisonment up to 6 months, **AND** also with fine, which may extend to 5 times the amount, so contributed.

Power of Board to make Contributions to National Defence Fund etc. [Sec 183]

The BOD of any company may contribute such amount as it thinks fit to the National defence fund or any other Fund approved by the CG for the purpose of national defence. This Section has the overriding effect over the provision of Section 180, 181, and 182 of the Companies Act, 2013.

The amount of contributions made for this purpose are required to be disclosed by the company in its profit and loss account of the financial year during which the contributions are made.

Disclosure of interest by Director[Section 184 read with Rule 9]

1. Every director shall at the 1st Board Meeting in which he participates as a director and thereafter at the 1st Board Meeting in every financial year or whenever there is any change in the disclosures already made, then at the 1st Board meeting held after such change disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding in such manner as may be prescribed.
2. Every director of a company who is in any way, whether directly or indirectly, concerned or interest in a contract or arrangement or proposed contract or arrangement entered into or to be entered into-
   a. With a body corporate in which such director or director in association with any other director, holds **more than 2%**. Shareholding of that body corporate or is a promoter, manager, CEO of that body corporate; or
   b. With a firm or other entity in which such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at Board Meeting in which the contract or arrangement is discussed and shall not participate in such meeting:

Provided that where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first Board Meeting held after he becomes so concerned or interested.

3. A contract or arrangement entered into by the company without disclosure under sub-section (2) or with participation by a director who is concerned or interested in any way directly or

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indirectly in the contract or arrangement shall be voidable at the option of the company.

4. If a director of the company contravenes, such director shall be punishable with imprisonment for a term which may extend to **1** year or with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 1 Lakh, or with both.
5. Nothing in this section-
   a) Shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company;
   b) Shall apply to any contract or arrangement entered into or be entered into between 2 companies or between 1 or more companies and 1 or more body corporate where any of the directors of the 1 company or body corporate or 2 or more of them together holds or hold **not more than 2%** of the paid up share capital in the other company or body corporate.

Rule 9 provides that every director shall disclose his concern or interest in any company or companies or bodies corporate (including shareholding interest), firms or other association of individuals, by giving a notice in writing in **Form MBP 1.**

It shall be the duty of the director giving notice of interest to cause it to be disclosed at the meeting held immediately after the date of the notice.

All notices shall be kept at the registered office and such notices shall be preserved for **8 years** from the end of the financial year to which it relates and shall be kept in the custody of the **CS** of the company or any other person authorized by the Board for the purpose.

Loan to Directors etc.

[Section 185 Read with Rule10, 11 and 13]

1. No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by—
   a) Any director of company, or of a company which is its HC or any partner or relative of any such director; or
   b) Any firm in which any such director or relative is a partner.

2. A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that—
   a) a special resolution is passed by the company in general meeting:
   Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and
   b) the loans are utilised by the borrowing company for its principal business activities.

Explanation: For the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means—

a. any private company of which any such director is a director or member;

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b. any body-corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
c. any body-corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

3. Nothing contained in sub-sections (1) and (2) shall apply to—
a) the giving of any loan to a managing or whole-time director—
i. as a part of the conditions of service extended by the company to all its employees; or
ii. pursuant to any scheme approved by the members by a special resolution; or
b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or
c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or
d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company: Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

4. If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,
i. the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees;
ii. every officer of the company who is in default shall be punishable with imprisonment up to 6 months **OR** with fine which shall not be less than Rs. 5 Lakh but which may extend to Rs. 25 Lakh; and
iii. The director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment up to 6 months **OR** with fine which shall not be less than Rs. 5 Lakh but which may extend to Rs. 25 Lakh **OR** with both.

Provided that nothing contained in this sub- section shall apply to-

a. The giving of any loan to a MD or Whole Time Director-
i. As a part of the conditions of service extended by the company to all its employees; or
ii. Pursuant to any scheme approved by the members by **a special resolution**; or
b. A company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the RBI.
c. Any loan made by a holding company to its WOS company or any guarantee given or security provided by a holding company in respect of any loan made to its WOS company.
d. Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company.
Provided that the loans made under c) & d) are utilised by the subsidiary co. for its principle business activities.
Explanation. –

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For the purposes of this section, the expression "to any other person in whom director is interested" means-

a) Any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;
b) Any firm in which any such director or relative is a partner;
c) Any private company of which any such director is a director or member;
d) Anybody corporate at a general meeting of which not less than 25% of the total voting power may be exercised or controlled by any such director, or by 2 or more such directors, together; or
e) Anybody corporate, the BOD, MD or manager, where of is accustomed to act in accordance with the directions or instructions of the Board, or of any director of the lending company.

(2) If any loans is advanced or a guarantee or security is given or provided in contravention, the company shall be punishable with fine which shall not be less than Rs. 5 Lakh but which may extend to Rs. 25 Lakh, and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to 6 months or with fine which shall not be less than Rs. 5 Lakh but which may extend to Rs. 25 Lakh or with both.

Rule 10 provides that any loan made **by a holding company to its WOS** company or any guarantee given or security provided by a holding company in respect of any load made to its WOS company is exempted from the requirements under this section, subject to the condition that such loans are utilized by the wholly owned subsidiary company for its principle business activities.

Further, any guarantee given or security provided by a holding company in respect of loan made any bank or financial institution to its subsidiary company is exempted from the requirements under this section, subject to the condition that such loans are utilized by the subsidiary company for its principle business activities.

Loan and investment by Company [Sec 186 read with Rule 11 and 12]

Introduction

Section 186 of the Companies Act, 2013 deals with inter-corporate loans (including guarantee and security) and inter-corporate investments and also with loans and investments to any person. A company shall, unless otherwise prescribed make investment through not more than two layers of investments companies.

Provided that the provisions of this sub-section shall not affect-

i. A company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond 2 layers as per laws of such country.
ii. A subsidiary company from having any investment subsidiary for the purpose of meeting the requirements under any law or under any rule or regulation framed any law for the time being in force.

2)No company shall directly or indirectly –
a) give any loan to any person or other body corporate;
b) give any guarantee or provide any security in connection with a loan to any other body

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corporate or person; and
c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding 60% of its PSC, FR & Sec Premium a/c or 100% of its FR+ sec premium whichever is more.
Here person does not include any individual who is in employment of the company.

3) where the aggregate of loan and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the board, exceed the above specified limits, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution in GM.
A resolution passed at a general meeting in terms of section 186(3) shall specify the total amount up to which the Board of Directors are authorized to give such loan or guarantee, to provide such security or make such acquisition. (2018)
Provided that where a loan or guarantee is given or where a security has been provided by a co. to its wholly owned subsidiary co. or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its WOS, the requirement of this sub section shall not apply.
Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub section 4.

Approval of Public Financial Institution

If any term loan a public financial institution is subsisting, then:

- ❖ No prior approval of public financial institution is required, if the inter-corporate loans/ investments and other loans is only up-to 60% or 100%; as the case may be; provided there is no default in repayment of loan instalment or payment of interest thereon.
- ❖ If the inter-corporate loans/investments and other loans is beyond 60% or 100% as the case may be, then prior approval of the public financial institution is required in all cases.

Rate

No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, 3years, 5 year or 10 years Government Security closest to the tenure of the loan.

Register of Loans or Investments

- Every company shall keep from the date of its incorporation a register of loans/ investments in form **MBP 2** at its registered office in which entry shall be made **within 7 days** of making loans or investments.
- This register shall be open for free inspection to every member of the company.
- This register shall be preserved permanently and shall be in the custody of CS or any other person authorized by the Board.
- Every member may also take extracts on payment of such fees as may be prescribed in the AOA of the Company, which shall not exceed 10 per page.
- Further a member may demand for a copy of the register on payment of such fees as may prescribed by companies (Registration Offices and fees) Rules, 2014.

Nothing contained in this section shall apply –
a) To any loan made, any guarantee given or any security provided or any investment

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made by a banking co., or an insurance co, or a housing finance co. in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;

b) To any investment –

i) Made by an investment company;

ii) Made in shares allotted in pursuance of sec 62(1)(a) or in shares allotted in pursuance of right issues made by a body corporate;

iii) Made, in respect of investment or lending activities, by a NBFC registered u/c IIIB of the RBI Act 1934 and whose principal business is acquisition of securities

Here investment company means, a co. whose principal business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in such form constitute not less than 50% of its total assets, or if its income derived from investment business constitute not less than 50% as proportion of its gross income.

Restriction on giving Loans or making Investments

No company, which has defaulted in complying with the provisions relating to public deposits (Section 73 &74) shall, directly or indirectly, make any loans/ investments, till such default is subsisting

Penalty

If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than Rs. 5000/-but which may extend to Rs. 5lakh

AND

Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than Rs. 25000/- but which may extend to Rs. 1 Lakh.

Investments of Company to tie Held in its\Own Name

[Sec 187 Read with Rule 14]

The company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do; to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

Following are the exceptions to the aforesaid provisions:

1. A company may deposit with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon.

2. A company may deposit with, or transferring to, holding **in the name of SBI** or a scheduled bank, being the bankers of the company any shares or securities in order to facilitate the transfer thereof, but required to again hold the shares or securities in its own name within 6 months.

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A company may deposit with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it
A company may hold investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.

Maintenance of Register

- Every company shall maintain a register in **Form MBP 3** and enter therein, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name and the relationship or contract under which the investment is held in the name of any other person.
- The register shall be maintained at the registered office of the company.
- The register shall be preserved permanently and shall be kept in the custody of Company Secretary or any other person authorized by the Board.
- The said register shall be open to free inspection by any member or debenture holder of the company during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting imposes.

Penalty

In case of contravention of this section, the company shall be punishable with fine which shall not be less than Rs. 25000/- but which may extend to Rs. 25 Lakh
And
Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than Rs. 25000/- but which may extend to Rs. 1 Lakh, or with both.

Related Party Transactions[Sec 188 read with Rule 15]

1. Except with the consent of the Board of directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to-
   a. Sale, purchase or supply of any goods or materials;
   b. Selling or otherwise disposing of, or buying, property of any kind;
   c. Leasing of property of any kind;
   d. Availing or rendering of any services;
   e. Appointment of any agent for purchase or sale of goods, materials, services or property;
   f. Such related party's appointment to any office Or place of profit in the company, its subsidiary company or associate company; and
   g. Underwriting the subscription of any securities or derivatives thereof, of the company:

Provided that no contract or arrangement in, the case of a company having a paid - up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by Ordinary resolution:

Provided further that no member of the company shall vote on such special resolutions, to approve any contract or arrangement which may be entered into by the company, if such member is a related party (this proviso is not applicable on private companies):

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Provided also that nothing contained in the 2nd proviso shall apply to a company in which 90% or more members, in number, are relatives of promoters or are related parties:

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

Provided also that the requirement of passing resolution of passing resolution shall not be applicable for transaction b/w holding & WOS, whose accounts are consolidated with such holding Co. and place before the shareholders at GM for approval. [25th may 2015]

Explanation - In this sub-section, -

a. The expression "office or place of profit" means any office or place-
   1. Where such office or place is held by a director, if the holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;
   2. Where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent- free accommodation, or otherwise;

b. The expression "arm's length transaction" means a transaction between 2 related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

2. Every contract or arrangement entered, shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.
3. Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting and if it is not ratified by the Board or, as the case may be, by the shareholders oat a meeting **within 3 months** from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board or of shareholders as the case may be and if the contract or arrangement is with a related party to any director or is authorized by any other director, the directors concerned shall indemnify the company against any loss incurred by it.
4. Without prejudice to anything contained in sub-section (3), it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.
5. Any director or any other employee of a company, who had entered into or authorized the contract or arrangement in violation of the provisions of this section shall-
   1) In case of listed company, be punishable either imprisonment for a term which may extend to one year or with fine which shall not be less than twenty- five thousand rupees but which may extend to five lakh rupees, or with both; and
   2) In case of any other company, be punishable with which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

Note: In case of WOS, the Ordinary resolution passed by the holding company shall be sufficient for the purpose of ° entering into the transactions between WOS & the holding Company.

When prior approval of company by ordinary resolution is required for

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related party transaction [Rule 15 of companies (Meeting of Board and its Powers) Rules, 20141

For the purpose of first proviso to section 188(1), except with the prior approval of the company by an ordinary resolution-

(1) A company shall not enter into a transaction, where the transaction or transactions to be entered into-

(a) As contracts or arrangements, with criteria, as mentioned below-

i. Sale, purchase or supply of any goods or material directly or through appointment of agents exceeding 10% of the annual turnover ~~or Rs. 100 crore, whichever is lower.~~
ii. Selling or otherwise disposing of, or buying, property of any kind directly or through appointment of agent, **exceeding 10%** of net worth of the company ~~or Rs.100 crore, whichever is lower;~~
iii. Leasing of property of any kind exceeding 10% of the net worth or ten percent of turnover ~~or Rs. 100 crore, whichever is lower;~~
iv. Availing or rendering of any services directly or through appointment of agents exceeding 10% of turnover of the company ~~or Rs. 50 Crore, whichever is lower.~~

Above changes are made by co. (Meeting of Board and its powers) Amendment Rules 2019

Note: The above limits shall apply for transaction or transactions to be entered into either individually or taken together with the previous transaction during the FY.

(b) Appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding Rs. 2.5 Lakh; **OR**

(c) Remuneration for underwriting the subscription of any securities or derivatives thereof of the company exceeding one percent of the net worth.

Meaning of ' Related Party'

The term 'Related Party' has been defined u/s 2(76) of the Companies Act, 2013. As per this, "related party'; with reference to a company, means-

i. A director or his relative.
ii. A key managerial personnel or his relative;
iii. A firm, in which a director, manager or his relative is a partner;
iv. A private company in which a director or manager or his relative is a member or director;
v. A public company in which a director or manager is a member or director and holds along with his relatives, more than two per cent of its paid- up share capital;
vi. Anybody corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
vii. Any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-section (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

viii. Any company which is-
   a. A holding, subsidiary or an associate company of such company; or
   b. A subsidiary of a holding company to which it is also a subsidiary;
ix. Such other person as may be prescribed.

It may be noted that for the purpose of sec 2(76)(ix), a director (other than an independent director) or KMP of the holding company or his relative with reference to a company, shall be

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deemed to be a related party. [Rule 3 of Companies (specification of definitions detail) Rules, 2014]

Meaning of 'Relative'

The term 'Relative' has been defined under Section 2(77) of the Companies Act, 2013.
As per this a person shall be deemed to a relative of another if, and only if,-

- They are the members of HUF.
- They are husband and wife.

The one is related to the other in the manner indicated in Rule 4 of Companies (Specification of definitions details) Rules, 2014.
As per foresaid **Rule 4,** a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:

- Father (includes step-father).
- Mother (includes step-mother).
- Son (includes step-son).
- Son's wife
- Daughter
- Daughter's husband
- Brother (includes step-brother)
- Sister (includes step-sister)

Register of Contracts or Arrangements in which Directors are Interested

Section 189 read with Rule 16

- Every company is required to keep one or more registers in Form MBP 4 giving separately the particulars of all contracts or arrangements to which Section 184 or Section 188 applies.
- Such register is required to be placed before the next Board Meeting, whenever a new entry is made in this Register, and shall be signed by all the directors present at the meeting.
- Every director within 30 days of his appointment or relinquishment is required to disclose his concern or interest in other associations, which are required to be included in the register.
- The register be kept at the registered office of the company and also open for inspection during business hours.
- The company shall provide extracts from such register to a member of the company on his request, within 7 days from the date on which such request is made upon the payment of such fee as may be specified in the articles of the company but not exceeding 10/ - per page.
- Maintenance of register shall not apply to any contract or arrangement -
- For the same, purchase or supply of any goods, materials or services, if the value of such gods and materials or the cost of such services does not exceed five lakh rupees in the aggregate in any year: or
- By a banking company for the collection of bills in the ordinary course of business.
- Every director who fails to comply is liable to a penalty of Rs. 25000/-.

Contract of Employment with MD or WTD [Sec 190]

- Every **company, which is not a private** company, is required to keep the **copy of contract, if in writing, with a MD or WTD** for contract of service or
  If not in writing, then a written memorandum setting its terms, if contract not in writing.
- The **copies** of above mentioned are required to be kept open to **inspection** for any **member** of

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the company **free** of cost.

- **Penalty:** The default in complying with the provisions of this section, The **company** is liable to a penalty of 25,000 rupees **AND**
  Every **officer** of the company who is in default liable to a penalty of 5000 rupees for each default.
  This section is not applicable on Private Companies.

Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares

[Section 191 Read with Rule 17]

No director of a company shall receive any payment by way of compensation in case of transfer of the whole or any part of any under taking or property of the company or the transfer to any person of all or any of the shares in a company; the following particulars are required to be disclosed to the members of the company and they pass a resolution at a general meeting approving the payment of such amount:-

a. Name of the director
b. Amount proposed to be paid;
c. Event due to which compensation become payable;
d. Date of Board meeting recommending such payment;
e. Basis for the amount determined;
f. Reason/justification for the payment;
g. Manner of payment - whether payable in cash or otherwise and how;
h. Sources of payment; and
i. Any other relevant particulars as the Board may think fit.

No payment shall be made to the MD or WTD or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (Rule 17(3)) (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement

If the company is in default in

a. Repayment of public deposits or
b. payment of interest thereon;
c. Redemption of debentures or payment of interest thereon;
d. Repayment of any liability, secured or unsecured, payable to any bank, public financial institution or any other financial institution;
e. Payment of any dues towards income tax, VAT, excise duty, service tax or any other tax or duty, by whatever name called, payable to the Central Government or any State Government, statutory authority or local authority (other than in cases where the company has disputed the liability to pay such dues);
f. there are outstanding statutory dues to the employees or workmen of the company which have not been paid by the company (other than in cases where the company has disputed the liability to pay such dues); and
g. The company has not paid dividend on preference shares or not redeemed preference shares on due date.

If the payment is not approved for want of quorum either in a meeting or an adjourned meeting, the

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proposal shall not be deemed to have been approved.
If a director of a company receives payment of any amount in contravention of sub-section (1) or the proposed payment is made before it is approved in the meeting, the amount so received by the director shall be deemed to have been received by him in trust for the company.

Default

If a director of the company makes any default in complying with the provisions of this section, such director shall be liable to a penalty of Rs. 1 Lakh.

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Appointment and Qualification of Directors

Definition and Meaning of Director

Section 2(34)➔ A director appointment to the BOD of a Company.
Section 2(10)➔"Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company.

- A company is an artificial person. So, it acts through an agency of human beings.
- The directors of a company serve the purpose of agency for the company i.e., they act as an agent for performing various activities of the company.

Position of directors

Directors as Trustees
Directors as Agents

Case Law **Feguson vs. wilson**

The true position of company directors is that of agent and their real relationship with the company is governed by the arrangement of agency as governed by the Contract Act.

Case Law **Smith Vs. Anderson**

To some extent, directors are also trustees for the properties of the company and of the rights, which are conferred on them by law and conventions. Directors stand in **fiduciary position** towards the company in regard to the powers, conferred on them the Companies Act or by the articles of the company; and also with regard to the funds of the company, Whereas the property of a trust is vested in its trustees and they, manage the same.

Case law **DesiRajuVenkata Krishna Sharma**

It was held that dir3ectors being agents of the company, there could be no personal liability or obligation on them to pay the taxes payable by the company.

Case Law **RamaswamyLyenger vs. Brahmayya and co.**

The directors of company are trustees for the company and with reference to their power of applying funds of the company and misuse of the power they could be rendered liable as trustee and on their death the cause of action survives against their legal representatives.

Types of Director (one point of view)

There are **two** types of company directors. They are

- **Full time directors** (Executive Directors) with their designation as Managing Directors, Whole-Time Directors, Technical Directors, etc.
- **Part-time directors** (Non- executive Directors) who for their in livelihood do not depend upon one company but serve on the Board of directors of a large number of companies.

Number of Directors: Sec 149(1)

[Section 149(1)] Minimum and Maximum Number of Directors)
According to section 149 of the Companies Act, 2013,

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- Every OPC shall have at least 1 director
- Every Private Company shall have at least 2 directors.
- Every Public Company shall have at least 3 directors.

A company can appoint maximum 15 directors.

Note: A company may appoint more than 15 directors after passing a special resolution in general meeting.

TYPES OF DIRECTORS:(another point of view)

Woman Director 2nd Proviso to Sec 149(1)

Following class of companies shall appoint at least one-woman director-

(I) Every listed company

(II) Every other public company having:

- Paid - up share capital of Rs. 100 Cr. or more **OR**
- Turnover of Rs. 300 Cr. or more

within 1 year from the date of commencement of 2nd proviso to section 149(1) of the Act.

Further if there is any intermittent vacancy of a woman director then it shall be filled up by the board of directors within 3 months from the date of such vacancy or not late than immediate next board meeting, whichever is later.

Resident director Sec 149(3)

Every company shall have at least one director who stays in India for a total period of not less than 182 days during the financial year

Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.

Independent Director (Sec 149(4))

Every listed company shall have at least 1/3rd of the total number of directors as independent directors AND the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Small Shareholder's Directors [Section 151 & Rule 7]

A **listed company may** have 1 director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed. Small shareholder means a shareholder holding shares of **nominal value** of not **more than Rs. 20,000/-** or such other sum as may be prescribed.

Conditions

- Notice shall be given by at-least 1000 OR 1/10th of total no. of small shareholders, (w.i.L).
- Such notice shall be given to company at least 14 days before the meeting.
- The notice shall be accompanied by a statement signed by the proposed director for the post of small shareholder's director stating -
  a) His DIN.
  b) That he is not disqualified to become a director under the Act.
  c) His consent to act as a director of the company.
- If proposed director is qualified u/s 149 (6) for appointment as an independent director &has given declaration for his independence u/s 149 (7) then such director shall be

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considered as an independent director.

- His tenure shall not be for more than 3 years and he shall not be liable to retire by rotation &shall not be eligible for re-appointment.
- He shall not be disqualified u/s 164.
- Small shareholder's director shall vacate the office if-
  a) He ceases to be a small shareholder, on and from the date of cessation.
  b) He is disqualified u/s 164
  c) The office of the director becomes vacant u/s 167
  d) He ceases to meet the criteria of independence u/s149(6).
- Simultaneously he shall not hold the office of small shareholders' director in more than 2 companies. If second company is in competitive business or is in conflict with business of the 1st company, then he shall not be appointed in 2nd company.
- He shall directly or indirectly not be appointed or associated in any other capacity with the company for a **period of 3 years** from the date of cessation as a small shareholder's director.
- If he fulfils the criteria of independent director as per Sec 149(6) then, he may be treated as independent director.

Appointment of Directors Sec 152

Directors may be appointed in the following ways:

1. By subscribers to the memorandum. (sec 152)
2. By members in General Meeting (Sec 152,160,163)
3. By Board of directors (Sec 161)
4. By small shareholders if the articles provide (sec 151)
5. Director appointed by National Company Law Tribunal. u/s 242 [notified]

General Provisions

- Except as provided in the Act, every director shall be appointed by the company in GM.
- DIN **(or any other number prescribed u/s 153)**is compulsory for appointment of director of company.
- Every person proposed to be appointed as a director shall furnish his DIN(or any other number prescribed u/s 153) and a declaration that he is not disqualified.
- Appointed director shall on or before the appointment give his written consent in physical form DIR-2.
- The company shall, within 30 days of the appointment of a director, file such consent with the ROC in form DIR-12.
- **If any company fails to furnish the DIN, such company shall be liable to a penalty of Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 1,00,000, and every officer in default shall be liable to a penalty of not less than Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 1,00,000.**

Appointment of First Directors

- ✓ The first directors of a company may be named in its AOA.
- ✓ In case no directors are so named in the articles, the AOA may authorize the subscribers to

the MOA to appoint the 1st directors.

- ✓ Regulation 60 of table F of schedule I provides that the number of directors and the names of 1st directors shall be determined in writing by the subscribers of the MOA or a majority of them.
- ✓ In the absence of any such provision in AOA, the subscribers to the MOA, who are individuals, shall be deemed to be the first directors of the company until the subsequent directors are duly appointed.
- ✓ In case of OPC, an Individual, shall be deemed to be its 1st director until the director or directors are duly appointed by the member u/s152.

Appointment of Subsequent Directors

Unless the AOA provide for the retirement of all directors at every AGM,
Not less than 2/3rd of the total no. of directors of a public company shall-

i. Be person whose period of office is liable to determination by retirement of directors by rotation (i.e., only 1/3rd can be non-retiring directors); and
ii. Save as otherwise expressly provided in this Act, be appointed by the company in GM.

The remaining directors (i.e., non-rotational/non-retiring/Permanent directors) in the case of public company shall be appointed as per the provisions contained in the AOA of the company.

Note: In case there are no such provisions in the AOA, these directors shall also be appointed by the company in GM.
At the 1st AGM held next after the date of GM at which the 1st directors are appointed in accordance with aforesaid provisions and at every subsequent AGM, 1/3rd of the rotational directors shall retire at every AGM, OR

As between persons who become directors on the same day, retirement, in the absence of an agreement, will be determined by lot.

Where a director retires by rotation at the annual general meeting of a company, the company at the same meeting may appoint:

i. The retiring director or
ii. Some other person in the vacancy.

Note: If the AGM of the company is not held or cannot be held, the directors due to retire by rotation shall retire on the last day on which the AGM should have been held.

Case Law	**Consolidated Nickel Mines Ltd.**
If AGM is adjourned, then he will retire at the adjourned AGM; provided it is within the prescribed time.	

Consequences of Non-appointment of Directors at an AGM u/s 152 [Section 152 (7)]

If at the said AGM, the vacancy is not so filled and meeting has not expressly resolved not to fill the vacancy, the meeting (though it has disposed of all other matters on the agenda), shall stand adjourned till the same day in the week, at the same time and place, or if that day be a

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national holiday, till the next succeeding day which is not a national holiday, at the same time and place.

Note: Automatic Reappointment

If at the adjourned meeting also, the vacancy is not so filled and a resolution not to fill the vacancy is not passed, the retiring directors shall be deemed to have been re-appointed (i.e. Automatic re-appointment).

Exceptions

- ✓ If at that meeting or at a previous meeting, a resolution for the re-appointment of such a director has been put to the meeting and lost.
- ✓ If the retiring director has by a notice in writing addressed to the company, or to its Board of directors, expressed his unwillingness to be - reappointed.
- ✓ If he is not qualified or disqualified for appointment;
- ✓ When a resolution, whether special or ordinary is required for his appointment or re-appointment;
- ✓ If Section 162 is applicable to the case. [Enbloc -Voting]

Note 1: The re-appointment as above shall be effective from the day of the adjourned meeting.
Note 2: In case the vacancy is not filled at the AGM and also the retiring directors do not get automatically re-appointment, the vacancies may be filled by the Board of Directors.

Appointment of Person as a Director, who is not a Retiring Director [Sec 160 & Rule 3]

- ✓ A written notice shall be sent to company's office at least 14 days before the meeting by him or any member who intend to propose his appointment.
- ✓ A deposit of Rs. 1 lakh or such higher amount as may be prescribed shall be deposited.
- ✓ Company must inform other members at least 7 days before meeting either by individual notices OR by advertisement of this fact in at least 2 newspapers circulating in the place where the registered office of the company is situated, of which 1 must be in English and the other in regional language of that place.
- ✓ If proposed director get elected OR get more than 25% of total valid votes cast, deposit shall be refunded. Otherwise, the aforesaid deposit shall be forfeited by the company.
- ✓ The provisions of this section are not applicable to Private Companies.
- ✓ Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the NRC, (if any), constituted u/s 178(1) or a director recommended by BOD of co.

Appointment of Directors by the Board [Sec 161]

Appointment of Additional Directors [Section 161 (1)]

- The BOD may, **if authorized by AOA,** appoint additional directors. Such additional shall hold office **only up to the date of ensuing AGM.**
- If such a person, while he was the additional director of a company, had been appointed the MD, the latter appointment (i.e that of MD) also ceases simultaneously with the termination of his directorship, if such appointment is not regularized at the AGM.

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- However, if such person is elected as full- fledged director, after regularization by members at the AGM, he will continue to be a director of the company and also as its MD for the period for which he is so elected as a director and for the period for which his appointment as MD has been made.
  This is known as **regularization of additional director** and in this case **again Form No. DIR-12** is required to be filed with ROC, however if he has been appointed as MD then the form DIR-12 is not required to be filed.

Case Law **Krishna Prasad Pilania vs. Colaba Land and Mills co.**
If the **AGM of the company is not held** or cannot be held the person appointed as additional **director vacates his office** on the last day on which AGM should have been held.

Note: A person who **fails to get appointed** as a director in a general meeting **cannot be appointed as the Additional Director.**

Alternate Director [Section 161 (2)]

The BOD can appoint, **if the AOA or member's resolution so authorizes,** an alternate director to act **in place of director during his absence for at least 3 months from India.**

Note: No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director.

An alternate director **shall not hold office for a period longer than that permissible to the original director**& **Shall vacate** the office if and when the director in whose place he has been appointed **returns to India.**

Note: If the term of office of the **original director is determined before he so returns to India,** any provision for the **automatic re-appointment** of retiring directors in default of another appointment **shall apply to the original** and **not to the alternate director.**

Appointment of Nominee Directors [Section 161 (3))

Subject to the AOA of a company, the **Board may appoint any person as a director nominated by any institution** in pursuance of the provision of any law for the time being in force or of any agreement or by the CG or the SG by virtue of its shareholding in a Government Company.

Appointment of Director to fill Casual Vacancies [Section 161 (4))

If the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may in default of and subject to any regulations in AOA be **filled by the Board of directors at a Board Meeting** which shall be subsequently approved by members in the immediate next GM.
It means resolutions to fill casual vacancy must be passed at the Board Meeting only &not by circulation.
The person so appointed to fill the casual vacancy will hold office until the expiry of the period for which the outgoing director would have held office; if it had not been vacated.

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Note: It may be noted that this provision of Section 161 (4) does not apply to private company.

Case Study

"X", a director of a company, was appointed at the AGM. Due to some reason, X resigned from the Board and casual vacancy thus created was filed by the appointment of Y at a meeting of BOD. Necessary return concerning this change was filed with the Registrar. Later on, Y resigned and the Directors again invited X to fill the vacancy created by the resignation of Y. The question is: is the action I the Board in Appointing X, in the 2nd instance particularly considering the fact that the appointment of X consequent upon the resignation of Y, for the purpose of filing the casual vacancy at a Board meeting does not, in effect, satisfy the statutory requirement which states" if the office of any director appointed by the company in general meeting is vacated?"

The Department of Company Affairs gave the following reply:
"The Department's view on the point raised is that the appointment of X, by the Board, in the Second instance, in the vacancy caused in the Board by the resignation of Y cannot, strictly speaking, be deemed to be an appointment to a casual vacancy in the office of director appointed by the company in GM, the appointment of Y himself was not originally made by the company in GM. However, in the interest of the smooth working of the company, if the casual vacancy is in an office which was filled by election at a GM, the department would have no objection to the BOD of the company filing that casual vacancy as many times as may be necessary."

Appointment of Directors to be voted on Individually [Sec 162]

1. The Directors are usually elected by shareholders in general meeting by an ordinary resolution passed by simple majority of votes.
2. 2 or more directors should not be elected lien bloc" or by a single resolution.
3. At general meeting of a company, a motion shall not be made for the appointment of two or more persons as directors of the company by a single resolution, unless a resolution that it shall be made has first been agreed to, in meeting without any vote being cast against it.
4. Resolution in contravention shall be void, whether or not objection was taken at the time of its being so moved.
5. The provisions of this section are not applicable on private companies.

Option to Adopt Principle of Proportional Representation [Section 163]

Normally, directors are appointment by simple majority on a direct vote of the members of the company by an ordinary resolution.

As a result of this method of simple majority, a substantial minority may not be able to succeed in placing even a single director of its choice on the Board.

Section 163 of the Companies Act affords an opportunity to the minority shareholders to have their representations on the Board of directors.

In accordance with the said section, a company may provide in its articles for the appointment of **not less than** 2/3 **of the total number of its directors according to the principle of proportional representation,** whether by single transferable vote or by a system of cumulative voting or otherwise, the **appointments being made once in 3 years** and interim casual vacancies being filled in accordance with the provisions, mutatis mutandis (with appropriate changes), of Section 161

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(4) of the Act.

The directors appointed according to this principle hold office for 3 years and **cannot be removed by the company in** general meeting under **Section 169.**

Note: Section 163 starts with a non-obstante clause i.e. "Notwithstanding anything contained in the Act "It means that if there is any inconsistency/ conflict or contradiction between Section 163 and any other provision of Companies Act, then provisions of **Section 163 shall prevail.**

Procedure for Application for Allotment of DIN [Section 153 and Rule 9]

1. Every individual, who is to be appointed as director of a company shall make an application electronically in Form DIR-3 (Application for allotment of director identification number) to the Central Government for the allotment of a Director Identification Number (DIN).
2. The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the web site of the Ministry of Corporate Affairs.
3. (a) The applicant shall download Form DIR- 3 from the portal, fill in the required particulars and attach
   - ✓ Photograph
   - ✓ Proof of identity (PAN is mandatory for Indian national)
   - ✓ Proof of residence

   (b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified by:
   - ✓ A Chartered Accountant in practice or a Company Secretary in practice or a Cost Accountant in practice OR
   - ✓ A company secretary in full time employment of the company OR
   - ✓ The managing director OR
   - ✓ Director of the company in which the applicant is to be appointed as a director.

Provided that the CG may prescribe any identification number which shall be treated as DIN for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed.

The CG shall, **within 1 month** from the receipt of the application u/s 153, allot a DIN to an applicant in prescribed manner.
No individual, who has already been allotted a DIN shall apply to obtain or posses another DIN.
Every existing director shall, within 1 month of the receipt of DIN intimate his DIN to co. or all companies wherein he is a director.

If any individual or director of a company makes any default in complying with any of the provisions of sec 152, 155 & 156, such individual or director of the company shall be liable to a penalty which may extend to Rs. 50,000 and where the default is a continuing one, with a

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further penalty which may extend to Rs. 500 for each day after the first during which such default continues.".

Companies (Appointment and Qualification of Directors) fourth Amendment Rules, 2018 (2018)
Rule 12A - Directors KYC:-
As per the rule, "every individual who has been allotted a DIN as on 31st March of a financial year as per these rules shall, submit e-form DIR-3-KYC to the Central Government on or before 30th April of immediate next financial year.
Provided that every individual who has already been allotted a DIN as at 31st March, 2018, shall submit e-form DIR-3 KYC on or before 5th October, 2018."

Provided further that where an individual who has already submitted e form DIR 3 KYC for previous FY, submits web form DIR-3 KYC WEB through the web service in relation to subsequent FY it shall be deemed to be compliance of the provisions of this rule for the said FY.

Provided also that in case an individual desire to update his personal mobile no. or the mail ID, he shall update it by submitting e form DIR 3 KYC only;

Provided also that fees shall be as prescribed in co. (Registration office and Fees) Rules 2014.

Rule 12B: Directors of company required to file E form ACTIVE –

1. Where a co. governed by Rule 25 A of co.(incorporation) Rules 2014, fails to file the ACTIVE form within prescribed time period, the DIR of such directors shall be marked as "Director of ACTIVE non-compliant company".
2. Such marked director shall take all necessary steps to ensure that all relevant companies where such director has been appointed, file E-Form ACTIVE.
3. After all the companies file the ACTIVE form, the DIN of such director shall be marked as "Director of Active compliant company"

Disqualifications of Director (Sec 164)

Section 164 (1)& Rule 14
A person shall not be eligible for appointment as a director or a company, if –

a. He is of unsound mind and stands so declared by a competent court.
b. He is an undischarged insolvent.
c. He has applied to be adjudicated as an insolvent and his application is pending.
d. He has been convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not been lapsed from the date of expiry of sentence.
   Note: However, if a person has been sentenced to imprisonment for not less than 7 years, he shall not be eligible to be appointment as a director in any company forever.
e. An order disqualified him for appointment as director has been passed by a Court or NCLT and the order is in force.
f. He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with other, and six months have elapsed from the last day fixed for the payment of the call.
g. He has been convicted of the offence dealing with Related Party Transactions u/s188 at any time during the last preceding five years.

h. He has not got the DIN.
i. he accepts directorships exceeding the maximum number of directorships provided in section 165. (2018)

Section 164(2) provides that no person who is or has been a director of a company which-

a. Has not filed financial statements or annual returns for any continuous period of three financial years or
b. Has failed to repay the deposits accepted by it or
c. Pay interest thereon or
d. To redeem any debentures on the due date or
e. Pay interest due thereon or
f. Pay any dividend declared And

Such failure to pay or redeem continuous for one year or more, shall be eligible to be re-appointment as a director of that company or Appointment in other company for a period of 5 years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default, he shall not incur the disqualification for a period of 6 months from the date of his appointment.";

Section 164(3)
A Private Company may, by its AOA, provide that a person shall be disqualified for appointment as a director on any grounds in addition to those specified in Section 164(1) & (2).
Proviso to Sec 164(3)
Provided that the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

Rule 14 of Companies (Appointment and Qualification of Directors) Rules, 2014

- Disqualified Director shall inform to the company concerned in form DIR-8 before he is appointed or re- appointed.
- Whenever a company fails to file the financial statements or annual returns or fails to repay any deposit or to pay interest, dividend or fails to redeem its debentures the company shall immediately file **Form DIR-9**furnishing therein the names and address of all the directors of the company during the relevant financial years.
- But when a company fails to file the form **DIR-9** within **a period of 30 days** of the failure it would attract the disqualification u/s 164(2), officers of the company as specified u/s 2 (60) shall be the officers in default.
- Upon receipt of the DIR-9 the registrar shall immediately register the document and place it in the document file for public inspection.
- Any application for removal of disqualification of directors shall be made in Form DIR-10

Number of Directorships [Section 165]

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1. **No person,** after the commencement of this Act, shall hold office as a **director, including any alternate** directorship, in **more than 20 companies** at the same time.
   Provided that the **maximum number of public companies** in which a person can be appointed as a director shall **not exceed 10.**
   Note: For reckoning the limit of public companies in which a person can be appointed as a director, directorship in **private companies that are holding or subsidiary company of a public company shall be included.**
   For reckoning the limit of directorship in 20 companies, directorship in Dormant co. shall not be included.
2. However, the members of a company may, by **special resolution, specify any lesser number of companies in which a director** of the company **may act** as directors.
3. **Any person holding office as director in companies more than the limits**, immediately before the commencement of this Act, shall, **within a period of 1 year from such commencement: -**
   - **Choose not more than the specified limit** of those companies, as companies in which he wishes to continue to hold the office of director;
   - **Resign his office** as director in the other remaining companies; and
   - **Intimate the choice made by him**, **to each of the companies** in which he was holding the office of director before such commencement and to the registrar having jurisdiction in respect of each such company.
4. Any **resignation** made, shall become **effective immediately** on the dispatch thereof to the company concerned.
5. **No such person shall act as director in more than the specified** number of companies-
   - **After dispatching the registration** of his office as director or non-executive director thereof;
     OR
   - **After the expiry of 1 year form the** commencement of this Act, whichever is **earlier.**

If a person accepts an appointment as a director in contravention, he shall be liable to a penalty of five thousand rupees for each day after the first during which such contravention continues.

AMENDMENT BY THE COMPANIES (AMENDMENT) ACT 2017

In section 165 of the principal Act, in sub-section (1), the Explanation shall be renumbered as Explanation I and after Explanation I as so numbered, the following Explanation shall be inserted, namely:-

Explanation II: For reckoning the limit of directorships of 20 companies, the directorship in a dormant company shall not be included.

Duties of Directors. [Section 166]

1. Subject to the provisions of this Act, a director of company shall act in accordance with the **articles** of the company.
2. A director of a company shall act in **good faith** in order to promote the objects of the company for the benefit of its members as whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
3. A director of a company shall exercise his duties with **due and reasonable care, skill and**

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diligence and shall exercise independent Judgment.

4. A director of company shall not involve in a situation in which he may have a direct or indirect **interests that conflict with the interests of the company.** .
5. A director of a company **shall not achieve or attempt to achieve any undue gain** or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
6. A director of a company **shall not assign his office** and any assignment so made shall be void.

If a director of the company contravenes the provisions of this section such director shall be punishable with **fine** which shall **not be less than 1 lakh rupees** but which may **extend to 5 lakh rupees.**

Vacation of office of Directors [Section 167

1) The office of a director shall become vacant in case-
   a) He incurs any of the disqualifications specified u/s 164;
   Provided, where he incurs disqualification u/s 164(2), the office of the director shall become vacant in all the companies, other than the co. which is in default u/s 164(2).
   b) He absents himself from all the Board Meetings held during a period of twelve months (with or without seeking leave of absence of the Board).
   c) He acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested.
   d) He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184.
   e) He becomes disqualified by an order of a court or the Tribunal.
   f) He is convicted by court of any offence, whether involving moral turpitude or otherwise & sentenced to imprisonment for not less than 6 months:
   Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) & (f):
      i) For 30 days from the date of conviction or order of disqualification;
      ii) Where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed of; or
      iii) Where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed of.
   g) He is removed in pursuance of provision of Co. Act.
   h) He, having been appointed a director by virtue of his holding any office or other employment in HC, SC or AC, ceases to hold such office or other employment in that co.

If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified above, he shall be punishable with imprisonment for a term which may extend to 1 year **OR** with fine which shall not be less than Rs. 1,00,000/- but which may extend to Rs. 5,00,000/- or with both.

Note: A director who has resigned shall be liable even after his resignation for the offence which occurred during his tenure.

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Resignation of Director [Section 168]

1. A director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company:
   Provided that a director **may** (2018) also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days of resignation in such manner as may be prescribed.
2. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later:
   Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
3. Where all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

Removal of Directors [Section 169]

- The shareholders of a company may, by passing an ordinary resolution at a general meeting, remove a director (not being a director appointed by NCLT u/s 242) before the expiry of the period of his office.
- Provided that nothing of this section shall apply where the company has availed itself of the option to appoint not less than 2/3rd directors according to the principle of proportional representation u/s 163.
- A special notice shall be required of the intention to move any resolution for the removal of a director not less than 14 days (excluding the day of service &the date of meeting) before the meeting.
- On receipt of the notice, the company shall forthwith send a copy of the same to the director concerned and the director concerned, such director is entitled to be heard on the resolution at the general meeting.
- Where the notice is received well in advance, the company can conveniently send the notice of the resolution to the members by including the same in the notice of general meeting. Otherwise, the company has to notify the same by way of two newspapers advertisement, one in English and another in vernacular language, at least 7 days before the meeting.
- Where the director makes representations in writing to the company (Subject to reasonable length) and request for circulation of the same the members, the company is duty bound to do so, unless it is received by it too late.
- If a copy of the representations is not sent to the members as aforesaid because they were received too late or because of the company's default, the direction may require that the representations shall be read out at the meeting.
- However, a copy of the representations shall neither be send to members nor be read out at the meeting, if on the application, either of the company or of the aggrieved party, the NCLT is satisfied that the rights so conferred are being abused to secure needless publicity

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for defamatory matter.

- The company shall, in its general meeting, discuss the proposal and pass the necessary resolution.
- The vacancy caused by such removal may be filled at the same meeting; provided special notice of the proposed appointment has also been given. If the vacancy is not filled at the meeting, it may be filled by the Board as a casual vacancy. However, the director who has been removed shall not be appointment.
- The director so appointment shall hold office till the removed director could have held office, had he not been removed.

It may be noted that the provisions of this Section shall not deprive a person removed under this section of any compensation or damages payable to him in respect of the termination of his appointment as director as per terms of contract or terms of his appointment as director, or of any other appointment terminating with that as director.

Companies (Removal of Difficulty) Order, 2018 dated 21st February, 2018 has amended Section 169 of the Companies Act, 2013, to provide for **removal of re-appointed independent director** by way of a **special resolution.**

Revised section shall be read as under:
"A company may, by **ordinary resolution**, remove a director, not being a director appointed by the Tribunal u/s 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.

Provided that an independent director re-appointed for 2nd term u/s 149(10) shall be removed by the company only by passing a **special resolution** and after giving him a reasonable opportunity of being heard:

Provided further that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it u/s 163 to appoint not less than 2/3rd of the total number of directors according to the principle of proportional representation." (2018)

Register of Directors and Key Managerial Personnel

[Section 170 Read with Rule 17 and 18]
Every company shall keep at its registered office a register containing such particulars of its directors and KMP in the manner as prescribed under Rule 17, which shall include the details of securities held by each of them in the company or its holding, subsidiary, subsidiary of company's holding company or associate companies.

Contents of the Register of Directors and KMPRule 17(1),

Every company shall **keep at its registered office** a register of its directors and KMP containing the following particulars:

- DIN (optional for key managerial personnel).
- Present name and surname in full.
- Any former name or surname in full.
- Father's name, mothers name and spouse's name (if married) and surnames in full.

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- D.O.B.
- Residential address (present as well as permanent).
- Nationality (including the nationality of origin, if different).
- Occupation.
- Date of the BR in which the appointment was made.
- Date of appointment and reappointment in the company.
- Date of cessation of office and reasons therefor.
- Office of director or KMP held or relinquished in any other body corporate.
- Membership number of the ICSI in case of CS, if applicable;
- PAN (mandatory for KMP, if not having DIN)

Register of Directors and KMP Shareholding

Rule 17(2) provides that in addition to the details of the directors or KMP, the company shall also include in the aforesaid Register the details of securities held by them in the company, its holding company, subsidiaries, subsidiaries of the company's holding company and associate companies relating to:

a. The number, description and nominal value of securities;
b. The date of acquisition and the price or other consideration paid
c. Date of disposal and price and other consideration received;
d. Cumulative balance and number of securities held after each transaction;
e. Mode of acquisition of securities;
f. Mode of holding - physical or in de materialized form; and
g. Whether securities have been pledged or any encumbrance has been created on the securities.

Return Containing the Particulars of Directors and the KMP [Section 170(2) read with Rule 18]

It states that a return containing the particulars of appointment of director or key managerial personnel and changes therein, shall be filed with the Registrar in Form **DIR-12** along with such fee **within 30 days** of such appointment or change, as the case maybe.

Inspection of Register of Directors and KMP [Section 171]

Register Kept under Section 170 (1)-

a) shall be open for inspection during business hours and the members shall have a right to take extracts there from and copies thereof, on a request by the members, be provided to them free of cost within **30** days
AND
b) Shall also be kept open for inspection at every AGM of the company and shall be made accessible to any person attending the meeting.

Powers of the Registrar for Order for Allowing Inspection of the Register

If any inspection is refused, or if any copy required under that clause is not sent within thirty days from the date of receipt of such request, the Registrar shall on an application made to him order immediate inspection and supply of copies required there under.

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Penalty [Section 172]

It provides that if a company contravenes any of the provisions of this Chapter and for which no specific punishment is provided therein,
Company and Every Officer in default → Fine → Min – Rs. 50,000, Max – Rs.5lakh.

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Independent directors

Independent Directors

[Section 149(4) to (13), 150 **READ WITH**
Rule 4 and 5 Companies (Appointment and Qualification of Directors) Rules 2014]

Number of Independent Directors

Every listed public company shall have at least 1/3rd of the total number of directors as independent directors and the CG may prescribe the minimum number of Independent directors in case of any class or classes of public companies.

Rule 4, provides that the following class of companies shall have at least 2 directors as Independent directors-

- The public Companies having paid up share capital of **Rs. 10 Cr. of more**; **OR**
- The Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding **Rs. 50 Cr. OR**
- The public Companies having **turnover of ≥ Rs. 100 Cr.**

Note:
An unlisted public company which is a JV, WOS or a dormant co. will not be required to appoint Independent Directors.
Here Joint venture means a joint arrangement, entered into in writing, whereby the parties that have joint control of the arrangement, have rights to the net assets of the arrangement. The usage of the term is similar to that under the AS. (5th July 2017)

Meaning of Independent Director [Section 149(6)]

An independent director in relation to a company, means a director other than a MD or a WTD or a Nominee Director -

a. Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience.
b. Who is or was not a promoter of the company or its holding, subsidiary or associate company;
c. Is not related to promoters or directors in the company, its holding, subsidiary or associate company
d. Who has or had no pecuniary relationship (other than remuneration as such director or having transaction not exceeding 10% of Total Income or other prescribed amount) with the company, its holding, subsidiary or associate company during 2 immediately preceding financial years or during the current financial year.
e. None of whose relatives –
    1) is holding any security or interest in the co., its HC, SC, AC during 2 immediately preceding years or during current year, of face value of more than Rs. 50 Lakh or 2% of of PSC of co. or its HC or its SC of is AC or such higher amount as may be prescribed.
    2) Is indebted to co., its HC, SC, AC, or their promoters, directors in excess of prescribed amount during immediately preceding 2 FY or during current FY.
    3) Has given a guarantee or provided any security in connection to indebtedness of any 3rd person to the co., its HC, SC or AC or their promoter, directors in excess of

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prescribed amount during immediately preceding 2 FY or during current FY.

4) Has any other pecuniary transaction or relationship with the co., or its SC or its HC or AC amounting to 2% or more of gross T.O. or T.I. singly or in combination with the above referred transactions.

f. Who, neither himself nor any of his relatives-

i. Holds or has held the position of a KMP or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.
Provided, in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding 3 FY.

ii. Is or has been an employee or proprietor or a partner, in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, of-
- A firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company or
- Any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to **≥ 10% of the gross turnover** of such firm;

iii. Holds together with his relatives **≥ 2% of the total voting power** of company

iv. Is a Chief Executive or Director, by whatever name called, of any non-profit organization that receives **≥25% of its receipts** from the company, any of its promoters, directors or its holding, subsidiary or associate company or that hold **≥ 2% of total voting power** of the company.

g. Who possesses such other qualifications as may be prescribed.

Qualification of Independent Director [Rule 5]

An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

Manner of Selection of an independent Director [Sec 150(1)]

Independent directors may be selected from a data bank of eligible and willing persons maintained by the agency (Anybody, institute or association as may be authorized by CG):

- Such agency shall put data bank of independent directors on the website of **MCA** or any notified web site.
- Company must exercise due diligence before selecting a person from the data bank referred to above, as an independent director.
- This section further stipulates that the appointment of independent directors has to be approved by members in a GM and the explanatory statement annexed to the notice must indicate justification for such appointment and a statement by board forming their opinion about independence of such director.
- Any person who desires to get his name included in the data bank of independent directors shall make an application to the agency in Form **DIR-1** i.e. application for inclusion of name in the data bank of Independent Directors which includes the personal, educational, professional, work experience, other broad details of the

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appointment.

Declaration of Independence [Sec 149(7)]

•Every independent director shall at the 1st Board Meeting in which he participates as director and thereafter at the 1st BM in every financial year or whenever there is any change in the circumstance which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (6).

Code for Independent Directors [Section 149 (8)]

The company and independent directors shall abide by the provisions specified in

- Schedule IV regarding code for independent directors.
- Schedule IV is a guide to professional conduct for independent directors.
- Adherence to these standards by independent directors and fulfilment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.

Tenure of Independent Director Section 149(10)

Subject to the provisions of section 152 (Appointment of Directors), an independent director shall hold office for a term up **to 5 consecutive years** on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

Section 149(11) states that notwithstanding anything contained in section 149(10), No independent director shall hold office for more than 2 consecutive terms, but such independent director shall be eligible for appointment after the expiration of 3 years of ceasing to become an independent director.

Note: An Independent Director shall not, during the said period of 3 years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Liability of Independent Director [Section 149(12)]

It provides that, notwithstanding anything contained in this Act,

- An independent director
- A non-executive director not being promoter or KMP, shall be held liable, 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.

Remuneration of Independent Director [Sec 149]

Notwithstanding anything contained in any other provision of this act, but subject to provisions of section 197 and 198, an Independent director

- ➢ Shall not be entitled to any stock option
- ➢ May receive remuneration by way of fee provided u/s 197(5), reimbursement of expense for participation in board or other meeting
- ➢ Profit related commission as may be approved by the members.

Retirement by Rotation not applicable to independent Directors [Sec 149(13)]

Rule 6. Compliances required by a person eligible and willing to be appointed as an independent director. —

(1) Every individual –

a) who has been appointed as an independent director in a company, on the date of commencement of these Amendment Rules, shall within of **10 months** from such commencement; **OR**
b) who intends to get appointed as an independent director in a company after such commencement, shall before such appointment,

Apply online to the institute for inclusion of his name in the data bank for 1 year or 5 years or for his life-time, and from time to time take necessary steps till he continues to hold the office of an independent director in any company:

Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

(2)Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of 1 year or 5 years or for his life-time, **within 30 days** from the date of expiry of the period up-to which the name of the individual was applied for inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute:

Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

(3) Every independent director shall submit a declaration of compliance of above 2 provisions to the BOD, each time he submits the declaration u/s 149(7).

(4) Every individual whose name is so included in the data bank shall pass an online proficiency self-assessment test conducted by the institute within 1 year from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the data bank of the institute.

Provided that an individual shall not be required to pass the online proficiency self-assessment test, when he has served as a director or KMP, for a total period of not less than 10 years, as on the date of inclusion of his name in the databank, in one or more of the following, namely:

a) listed public company; or
b) unlisted public company having a PSC of Rs. 10 Cr. or more; **OR**
c) body corporate listed on a recognized stock exchange:

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~~Provided that the individual who has served for not less than~~ 10~~years as on the date of inclusion of his name in the databank as director or~~ KMP ~~in a listed public company or in an unlisted public company having a~~ PSC ~~of~~ Rs. 10 Cr ~~or more shall not be required to pass the online proficiency self-assessment test:~~

Provided further that for the purpose of calculation of the period of 10 years, any period during which an individual was acting as a director or as a KMP in 2 or more **companies or bodies corporate** at the same time shall be counted only once.

Explanation: For the purposes of this rule,-

(a) the expression "institute" means the 'Indian Institute of Corporate Affairs at Manesar' as the institute for the creation and maintenance of data bank of Independent Directors;

(b) an individual who has obtained a score of not less than 60% in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;

(c) there shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.

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Appointment and Remuneration of KMP

Definition of Key Managerial Personnel (KMP) Section 2 (51)

In relation to a company, KMP means-

- The Chief Executive Officer (CEO) or the MD or the Manager.
- The Company Secretary (CS).
- The Whole-Time Director (WTD).
- The Chief Financial Officer (CFO).
- Such other officer as may be prescribed.

Managing Director Section 2(54)

1) A 'Managing Director' means a **director who is entrusted with substantial powers of management.**
   The substantial powers of management can be entrusted to a MD of a company in any of the following 4 ways -
   - ✓ By way of an **agreement** with the company.
   - ✓ By **board resolution.**
   - ✓ By **general meeting** resolutions.
   - ✓ By **articles** of association.

   Note: The expression Managing Director shall also include a **director occupying the position of a MD, by whatever name called.**
2) For instance, **President, COO, CEO,** in the case of multinational companies **shall be considered as the MD** for the purpose of companies Act, although they are not designed as such.
3) The **administrative acts of a routine nature** such as affixing common seal, if any, draw and endorse any cheque or negotiable instrument, signing share certificates, etc. **are excluded from the sphere of substantial powers** to be exercised by the MD.
4) **A person has to be a director before he can be appointed MD.**
   Therefore, if a co. wants to appoint a person as MD who is not a director of the co., he has first to be appointed as an **additional director** in accordance with the provisions of section 161 of the Act.
5) **MD** is vested with substantial powers of management, but he need not necessarily have the whole or substantially the whole of the affairs of a company under his management.
6) A co. may, therefore, have more than 1 MD.

Whole-time Director WTD [Section 2(94)]

It provides that a "whole-time director" includes a director in the whole-time employment of a co.

1) This means that any person, who is a part- time director of the co. as well as in the full time employment of the co. in some other capacity, shall be considered as a WTD.
2) WTD's devote their entire time and attention to the business and affairs of the co. They cannot accept the office of WTD in any other co.
3) They may however, accept ordinary (Part Time) directorships in other companies, within the limits prescribed by Section 165 of the companies Act, 2013.
4) It may further be noted that a person has to be a director before he can be appointed WTD.

Therefore, if a co. wants to appoint a person as WTD who is not a director of the co., he has first to be appointed as additional director u/s 161.

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Manager [Section 2(53)]

an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole or substantially the whole of the affairs of a co., and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not.

Note: The manager of a company need not be a director of that company. He may be a director as well as the manager or only the manager of a company.

A co. shall have only one manager at a time because a manager has the management of the whole of the affairs of a co.,

Note: As per the provisions of section 196, a co. shall not have both MD and Manager at the same time.

Chief Executive Officer [Section 2(18)]

an officer of a company, who has been designated as such by it.

Chief Financial Officer [Section 2(19)]

a person appointed as the Chief Financial Officer of a co.

Company Secretary or Secretary [Section 2(24)]

A CS as defined u/s 2(1) (c) of the company Secretaries Act, 1980 who is appointed by a Co. to perform the functions of a company secretary under this Act.

APPOINTMENT OF MD, WTD OR OF MANAGER

Section 196 of Companies Act, 2013 read with Rule 3

1) No co. shall appoint or employ at the same time a MD and a Manager.
2) No co. shall appoint or re-appoint any person as its MD, WTD or manager for a term exceeding 5 years at a time.
   Provided that no re-appointment shall be made earlier than 1 year before the expiry of his term.
3) No Co. shall appoint or continue the employment of any person as MD, WTD or manager who-
   a) Is below the age of 21 years
      Or
   b) Has attained the age of 70 years.

   Provided that appointment of a person who has attained the age of 70 years may be made **by passing a special resolution** in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

   Provided further that where no such special Resolution is passed but votes cast in favour of the motion exceeds the votes, if any, cast against the motion and the CG is satisfied, on an application by BOD, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of 70 years may be made.

   Shall not be appointed if:

   a) Is an un-discharged insolvent or has at any time been adjudged as an insolvent.

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b) Has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them.
c) Has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

4) Subject to the provisions of **section 197 and Schedule V**, a MD, WTD or manager shall be appointed by the terms and conditions of such appointment and remuneration payable be approved
   i. by the BOD at a Board Meeting
   ii. which shall be subject to approval by a resolution at the next general meeting of the company and
   iii. By the CG in case such appointment is at variance to the conditions specified in part 1 of that schedule.

   Provided that a notice convening Board or General Meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointment, if any.

   Provided further that a return in the prescribed form **(MR-1)** shall be filed **within 60 days** of such appointment with the Registrar.
5) Subject to the provisions of this Act, where an appointment of a MD, WTD or manager is not approved by the co. at a GM, his appointment shall stand void.

Rule 3 of Companies (Appointment & Remuneration of Managerial Personnel) Rules, 2014

A co. shall file a return of appointment of MD, WTD or Manager, CEO (CEO), CS and CFO within **60days** of the appointment, with the ROC in **Form No. MR.1** along with such fee as prescribed under Companies (Registration Offices and Fees) Rules, 2014.

Part I of Schedule V to the Companies Act, 2013

Apart from this, Part I of Schedule V contains certain conditions, which must be satisfied by a person to be eligible for appointment as MD or WTD or Manager without the approval of the CG.

Part I of Schedule V Reads

No person shall be eligible for appointment as a MD or a WTD or a Manager of a company, unless he satisfies the following conditions, namely:

a. He had not been sentenced to imprisonment for any period, or to a fine exceeding Rs. 1,000, for the conviction of an offence under any of the following 16 Acts, namely,
   1) Indian Stamp Act 1899
   2) Central Excises Act 1944
   3) IDRA 1951
   4) Prevention of Food Adulteration Act 1954
   5) Essential Commodities Act 1955
   6) Companies Act 2013
   7) SCRA 1956
   8) Wealth-tax Act 1957
   9) Income-tax Act 1961
   10) Customs Act 1962
   11) Competition Act 2002

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12) FEMA 1999
13) SICA 1985
14) SEBI Act 1992
15) Prevention of Money Laundering Act, 2002
16) IBC 2016
17) GST 2017
18) Fugitive Offenders act 2018

Provided that where the CG has given its approval to the appointment of a person convicted or detained, no further approval of the CG shall be necessary for the subsequent appointment of that person, if he had not been so convicted subsequent to such approval.

b. He had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities, 1974.
Provided that where the CG has given its approval to the appointment of a person detained, no further approval of the CG shall be necessary for the subsequent appointment of that person, if he had not been so detained subsequent to such approval.

c. He has completed the age of 21 years but has not attained the age of 70 yrs.
However, a person who has attained the age of 70 years can be appointed as a managerial person without the approval of the CG; if his appointment is approved by a special resolution passed by the company in general meeting.

~~**d.** Where he is a managerial person in more than one company, he draws remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible (Section V of Part 11) from any of the companies of which he is a managerial person.~~ Omitted from 12.08.18

e. He is resident of India.
Here, resident in India includes a person who has been staying in India for a continuous period of not less than 12 months immediately preceding the date of his appointment as a managerial person and who has come to stay in India ----
a) For taking up employment in India; or
b) For carrying on a business or vacation in India;

It may be noted that this condition shall not apply to the companies is SEZ as notified by DOC (Department of Commerce).

Remuneration 'of Director, MD, WTD and Manager [Section 197 Read with Rule 4,5& 7]

1. The total managerial remuneration payable by a public company, to its directors, including MD and WTD, and its manager in respect of any financial year shall not exceed **11 % of the net profits** of that company for that financial year computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

Provided that the co. in GM may, authorise the payment remuneration exceeding **11 % of the net profits** of the co., subject to the provisions of Schedule V.

Provided further that, except with the approval of the co. in GM by a Special Resolution -
a) The remuneration payable to any **ONE MD**; or **WTD** or manager **shall not exceed 5% of the net profits** of the company and
b) If there is **MORE THAN ONE** such director, remuneration shall **not exceed 10%**

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of the net profits to all such directors and manager taken together.

c) The remuneration payable to directors who are neither MD nor WTD shall not exceed -
   i. 1% of the net profits of the company, if there is a MD or WTD or manager;
   ii. 3% of the net profits in any other case.

Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non convertible debenture holders or any other secured creditors, the prior approval of Bank or PFI concerned or the non convertible debenture holders or other secured creditors, as the case may be obtained by the company before obtaining the approval in General Meeting.

2. The percentages aforesaid shall be exclusive of any fees payable to directors under sub-section (5) i.e. sitting fees.
3. If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any MD or WTD or manager, by way of remuneration any sum exclusive of any fees payable to directors hereunder except in accordance with the provisions of Part 11 of Schedule V.

4. The remuneration payable to the directors of a company, including any MD or WTD or manager, shall be determined, in accordance with and subject to the provisions of this section, either
   - By the AOA of the company or
   - By a resolution or
   - If the AOA so require, by a special resolution, passed by the company in general meeting

   And

   The remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

   Provided that any remuneration for services rendered by any such director in other capacity shall not be so included if-
   - The services rendered are of a professional nature

   And
   - In the opinion of the NRC, if the company is covered u/s 178(1), or the BOD in other cases, the director possesses the requisite qualification for the practice of the profession.
5. A director may receive remuneration by way of fee for attending Board Meeting or Committee Meeting or for any other purpose whatsoever as may be decided by the Board.

   Provided that the amount of such fees shall not exceed the amount as may be prescribed (Rs. 1 Lakh).

   Provided further that different fees for different classes of companies and fees in respect of independent director may be such as may be prescribed.
6. A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by the other.
7. ~~**Notwithstanding anything contained in any other provision of this Act but subject to the provisions of this section, an independent director shall not be entitled to any stock option and may receive remuneration by way of fees provided under sub-section (5), reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.**~~

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(OMITTED)

8. The net profits for the purposes of this section shall be computed in the manner referred to in section 198.
9. If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or **without approval required under this section**, he shall refund such sums to the company **within 2 years or such lesser period as may be allowed by the company** and until such sum is refunded, hold it in trust for the company.
10. The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless approved by company by special resolution within 2 years form the date the sum becomes refundable.
    Provided that where the company has defaulted in payment of deus to bank / PFI or non convertible debenture hoders or any other secured creditors, the prior approval of the bank or PFI concerned or the non convertible debenture holders or other secured creditors as the case may be, shall be obtained by the company before obtaining approval of such waiver.
11. In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof,
    - ✓ Whether the provision be contained in the company's memorandum or
    - ✓ Articles of Association or
    - ✓ In an agreement entered into by it or
    - ✓ In any resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule ~~and if such conditions are not being complied, the approval of the CG has been obtained.~~ (Omitted w.e.f 3/1/18)
12. Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed.
13. Where any insurance is taken by a company on behalf of its MD, WTD, Manager, CEO, CFO or CS for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.
    Provided that if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.
14. Subject to the provisions of this section, any director who is in receipt of any commission from the company and who is a MD or WTD of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report.
15. If any person contravenes, he shall be he shall be liable to a penalty of Rs. 1 Lakh and where any default has been made by a company, the company shall be liable to a penalty of **Rs. 5 lakhs.**
16. **The auditor of the company shall in his report, make a statement as to whether the remuneration paid by the company to its directors is in accordance with the provision of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such ot he details as may be prescribed.**

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17. **On and from the commencement of companies (Amendment) act 2016, any application made to CG under the provisions of this section [as it stood before such commencement], which is pending with the CG shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with provisions of this section, as so amended.**

Part II of Schedule V to the Companies Act, 2013

Section 1: Remuneration by Companies having adequate Profits
A company having profits in a financial year may pay remuneration to its managerial persons in accordance with Section 197 i.e. not exceeding the specified limits.

Section 2- Remuneration by Companies having no profits or inadequate profits ~~without CG approval~~
Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it, may, ~~without CG approval,~~ pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) below:

(A) Where the effective capital of a Company is - Yearly remuneration per person payable shall not exceed-
1. Negative or Less than Rs. 5 Cr. → Rs. 60 Lakhs
2. Rs. 5 Cr or more but less than Rs. 100 Cr. → Rs 84 Lakhs
3. Rs. 100 Cr. or more but less that Rs. 250 cr. → Rs. 120 lakh
4. Rs. 250 Cr or more but less than Rs. 500 Cr. → Rs. 120 Lakhs plus 0.01 % of the effective capital in excess of the Rs. 250 Cr.

Provided that the remuneration in excess of above limits may be paid if the resolution passed by shareholders is a special Resolution. (w.e.f. 12/09/18)
Note 2: For any period less than one year, the aforesaid limits shall be pro-rated.

Basic Conditions
1. Company has to pass a Board Resolution
2. Approval from NRC, if applicable
3. No default in repayment of any of its debts of interest thereon for continuous period of 30 days in FY prior to date of appointment AND if default was made, take approval of secured creditors.
4. If Remuneration is to be paid for a period of up to 3 years, pass ordinary resolution or special resolution as the case may be.

(B) In case of managerial person who is functioning in a professional capacity, then remuneration as per item (A) may be paid, subject to following conditions -
- ✓ Such person shall not have any interest in capital of company, holding company, Subsidiary Company (directly or indirectly) or through other statutory Structure. **AND**
- ✓ Such person shall not be directly or indirectly related to director or promoter of co. holding co. subsidiary co. at any time during last 2 years before or on or after the date of appointment. **AND**
- ✓ Such person shall possess graduate level qualification with expertise and specialised knowledge in the field in which company operates.

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Provided that Any employee of company holding shares of company not more than 0.5% of its paid up share capital under any scheme including ESOP or by way of qualification shall not be deemed to be interested in capital of company.

In order to pay the remuneration as per the aforesaid limits, following conditions must be satisfied:

- ✓ The payment of remuneration is to be approved by a resolution passed by the Board **OR**
- ✓ In the case of a company covered u/s 178(1) also by the NRC of Directors.
- ✓ The company has not defaulted in repayment of any of its dues to any bank & PFI or non convertible debenture holders or any other secured creditors and in case of default, the prior approval of such creditor shall be obtained by the company before obtaining the approval of members in GM.
- ✓ **An Ordinary Resolution or Special Resolution** is to be passed for the payment of remuneration as per item (A) OR special Resolution has been passed for the payment of Remuneration as per Item (B) at the general meeting for a **period not exceeding 3 years.**

A Statement, along with the Notice calling the General Meeting, is to be given to the shareholders along with certain specified information about the Company, the appointee, the reasons for loss or inadequate profits and the remuneration package of the managerial person.

Note: Rule 7 states that a company, other than a listed company and subsidiary of a listed company, may, without CG approval, pay remuneration to its managerial personnel. in the event of no profit or inadequate profit, beyond ceiling specified in **Section II of Part II of Schedule V**, subject to complying with the aforesaid conditions and an additional condition that the company has filed Balance Sheet and Annual Return which are due to be filed with the **ROC**.

Following points may be noted in regard to Section II of Part II of Schedule V:

1) 'Remuneration' means remuneration as defined in Section 2(78) and includes re-imbursement of any direct taxes to the managerial person.
   Section 2(78) provides that 'remuneration' means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income- tax Act, 1961.
2) Effective capital means -
   Firstly, the aggregate of the following amounts should be found out -
   a) Paid-up share capital (excluding share application money or advances against shares).
   b) Share Premium Account.
   c) Reserves and Surplus (excluding revaluation reserves).
   d) Long - term loans.
   e) Deposits repayable after one year (excluding working capital loan, overdraft, etc.)
   f) Then from the aggregate of the above, the aggregate of the following amounts shall be deducted:
   g) Investments (other than investments of an 'Investment Company').
   h) Accumulated losses, if any.
   i) Preliminary expenses not written off, if any.

Note: The 'effective capital' shall be calculated on the basis of the last audited Balance Sheet available for the financial year, preceding the financial year in which the appointment is made.

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Where, however, the appointment is made in the year of incorporation of the company, the effective capital shall be calculated as on the date of appointment.

3) 'Negative Effective Capital' means the effective capital, which is calculated in the above manner and is less than zero.

'Current Relevant Profit' means the profit as calculated u/s 198 without deducting the excess of expenditure over income referred to in Section 198(4) (1) thereof in respect of those years during which the managerial person was not an employee, director or shareholder of the company or its holding or subsidiary companies.

Section III - Remuneration Payable by companies having no profit or inadequate profit in certain Special Circumstances

This Section of Part II of Schedule V prescribes certain circumstances where a company may, ~~without CG approval~~, pay remuneration to a managerial person in excess of the amounts prescribed in Section II of Part II of Schedule V.

Section IV - Perquisites not included in Managerial Remuneration:

Para 1

A managerial person shall also be eligible to the following perquisites, which shall not be included in the computation of the ceiling on remuneration specified in Section II above:

a. Contribution to PF, SPF or annuity fund to the extent these either singly or put together are not taxable under the Income - Tax Act, 1961;
b. Gratuity payable at a rate not exceeding half a month's salary for each completed year of service; and
c. Encashment of leave at the end of the tenure.

Para 2

In addition to above perquisites, an expatriate managerial person (including an NRI) shall be eligible to the following perquisites, which shall not be included in the computation of the ceiling on remuneration specified in Section II above:

a. **Children Education Allowance:** In the case of children studying in India or outside India, an allowance limited to a maximum of Rs. 12,000 per month per child Or Actual expenses incurred whichever is less. Such allowance is admissible up to a maximum of two children.
b. **Holiday package for children studying outside India or family staying abroad:** Return holiday passage once in a year by economy class OR Once in 2 years by 1st class to children and to the members of the family from the place of their study or stay abroad to India, if they are not residing in India with the managerial person.
c. **Leave travel concession:** Return package for self and family in accordance with the rules specified by the company, where it is proposed that the leave be spent in home country instead of anywhere in India.
   Here 'family' means the spouse, dependent children and dependent parents of the managerial person.

Section V - Remuneration payable to a managerial person in 2 companies:

Subject to the provisions of Sections of I to IV, a managerial person shall draw remuneration from **ONE OR BOTH COMPANIES**; provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any of the companies of which he is managerial person.

Part III of Schedule V to the Companies Act, 2013

1. The appointment and remuneration referred to in Part I and Part II of Schedule V shall be subject to approval by a resolution of the shareholders in general meeting.
2. The Auditor or CS of the Co. Or where the co. is not required to appoint a CS, a CS in whole-time practice shall certify that the requirement of Schedule V have been complied with and such certificate shall be incorporated in the return (Form No. MR.1) filed with the ROC.

Part IV of Schedule V to the Companies Act, 2013:
Exemption to certain companies

The CG may, be notification, exempt any class or classes of companies from any of the requirements contained in Schedule V.

Rule 4

A co. may pay a sitting fee to a director for attending Board Meeting or committee Meeting thereof, such sum as may be decided by the BOD thereof which shall not exceed **Rs. 1 Lakh per** Meeting thereof.

Note: For Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors

Calculation of Net Profit for the Purpose of Managerial Remuneration [Section 198]

Section 198 of the Companies Act, 2013 lays down the manner of calculations of net profits of a company any financial year for purposes of Section 197.

Sub-Section (2) specifies the sums for which credit shall be given and
Sub-section (3) specifies the sums for which credit shall not be given while calculating the net profit.
Sub-section (4) & (5) specifies the sums which shall be deducted & not deducted respectively while calculating the net profit.

Recovery of Managerial Remuneration in Certain Cases [Section 199]

This is a new provision introduced in the new Act. It provides for recovery of remuneration including stock options received by the specified Managerial Personnel, where the benefits given to them are found to be in excess of what is reflected in the restated financial statements.

It states that without prejudice to any liability incurred under the provisions of this Act or any other law for the time being in force, where a co. is required to re-state its financial statements due to fraud or noncompliance with any requirement under this Act and the rules made there under, the co. shall recover from any past or present MD or WTD or manager or CEO (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

CG or Co. to Fix Remuneration limit [Sec 200 Read with Rule 6]

Notwithstanding anything contained in this chapter, ~~the CG or~~ a co. may fix the remuneration

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within the limits specified in the Act. While doing so, ~~the CG or~~ the company shall have regard to-

a. The financial position of the co.;
b. The remuneration or commission drawn by the individual concerned in any other capacity;
c. The remuneration or commission drawn by him from any other co.;
d. Professional qualifications and experience of the individual concerned;
e. Such other matters as may be prescribed.

Rule 6: The CG or the Co. shall have Regard to the Following Matters While Granting Approval

1. Financial and operating performance of the co. during the **3** preceding financial years.
2. Relationship between remuneration and performance.
3. The principle of proportionality of remuneration within the co., ideally by a rating methodology which compares the remuneration of directors to that of other executive directors on the board who receives remuneration & employees or executives of the co.
4. Whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.
5. The securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

Forms and Procedure in Relation with Certain Applications [Sec 201 Read with Rule 7]

The application to the CG, shall be made, **within 90 days** from the date of appointment of MD/WTD/Manager, **in Form No. MR. 2** along with the fees prescribed.

Before any application is made to the CG, a general notice shall be given to the members, indicating the nature of the application proposed to be made, by way of 2 newspaper advertisements, 1 in an English language newspaper and another in the principal language newspaper of the district in which the registered office of the co. is situated.

Rule 7: Remuneration by Unlisted Companies in Case of Inadequacy of Profits

It is further prescribed that the companies other than listed companies and subsidiary of a listed co. may without CG approval pay remuneration to-its managerial person in the event of no profit or inadequate profit beyond ceiling prescribed in **section II part II of Schedule V** subject to complying with the **following conditions.**

a. Payment of remuneration is approved by a resolution passed by the Board and, in the case of a co. covered u/s 178 (1) also by NRC, if any and while doing so record in writing clear reason and justification for payment of remuneration beyond the said limit;
b. The co. has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable there on for a **continuous period of 30 days** in the preceding financial year before the date of appointment of such managerial personnel; Prior approval of shareholders by way of a special resolution at a general meeting of the co. for payment of remuneration for a period **not exceeding 3 years**;
c. A statement along-With a notice calling the GM referred to clause (iii) of sub-rule (2) above, shall contain the information as per sub clause (iv) of 2nd proviso to clause (B) of section II of part-II of Schedule V of the Act including reasons and justification for payment of remuneration beyond the said limit.

d. The co. has filed balance sheet and annual return which are due to be filed with ROC

ii. Compensation for Loss of office of MD or WTD or manager

1. Section 202 provides that a co. may make payment to a MD or WTD or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
2. No payment shall be made in the following cases: -
   a. where the director resigns from his office as a result of the reconstruction/amalgamation of the company and is appointed as the MD or WTD, manager or other officer of the reconstructed company/of resulting company from the amalgamation;
   b. where the director resigns from his office otherwise than on the reconstruction/ amalgamation of the company;
   c. Where the office of the director is vacated u/s 167(1) i.e. due to disqualification;
   d. where the company is being wound up due to the negligence or default of the director;
   e. where the director has been guilty of fraud or breach of trust or gross negligence or mismanagement of the conduct of the affairs of the company or any subsidiary company or holding company; and
   f. Where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.
3. Any payment made to a MD or WTD or manager shall not exceed the remuneration which he would have earned if he had been in office **for the remainder of his term or for 3 years**, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during **a period of 3 years immediately preceding** the date on which he ceased to hold office, or where he held the office for **a lesser period than 3 years**, during such period.
   Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before or **at any time within 12 months after**, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the shareholders the share capital, including the premiums, if any, contributed by them.
4. Nothing in this section shall be deemed to prohibit the payment to **a MD or WTD**, or manager, of any remuneration for services rendered by him to the company in any other capacity.

Appointment of KMP [Sec 203 read with Rule 8 & 8A]

1) Every co. belonging to such class or classes of co. as may be prescribed shall have following whole-time KMP:
   i. MD, or CEO, or Manager & in their absence, a WTD
   ii. CS
   iii. CFO

Provided that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the AOA of the co., as well as the MD or CEO of the co. at the same time after the date of commencement of this Act unless-

- The AOA of such a co. provide otherwise or
- The co. does not carry multiple business.

Provided further that nothing contained in the 1st proviso shall apply to such class of companies engaged in multiple business and which has appointed one or more CEO for each such business as may be notified by the CG.

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2) Every whole-time KMP of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

3) A W***hole-Time KMP*** shall not hold office in **more than 1 company** except in its subsidiary company at the same time.
Provided that nothing contained in this sub-section shall disentitle a KMP from being a director of any company with the permission of the Board.
Provided further that whole-time KMP holding office in more than one company at the same time on the date of commencement of this Act, shall, **within 6 months** from such commencement, choose one company, in which he wishes to continue to hold the office of KMP. **[Transition Period]**
Provided also that a company may appoint or employ a person as its *MD*, if he is the *MD or manager* of *one*, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a Board Meeting with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved there at, specific notice has been given to all the directors then in India.

4) If the office of any whole-time KMP is vacated, the resulting vacancy shall be filled-up by the Board at a Board Meeting within a period of **6** months from the date of such vacancy.

5) Default: If any company makes any default, such company shall be liable to a penalty of Rs. 5 Lakhs and every director and KMP of the company who is in default shall be liable to a penalty of Rs. 50,000 and where the default is a continuing one, with a further penalty of Rs. 1000 for each day after the first during which such default continues but not exceeding Rs. 5 Lakhs.

Rule (8 and 8A)

Rule 8 provides that every listed company and every other public co. having a paid-up share capital of Rs. 10 cr. or more shall have whole-time KMP.

Rule 8A further provides that a co., other than a co. covered under Rule 8, which has a paid-up share capital of **Rs. 10 Cr. or more** shall have a whole-time CS.

Secretarial Audit for Bigger Companies [Section 204 read with Rule 9]

(1) Every listed co. and a co. belonging to other class of co. as may be prescribed shall annex with its Board's report, a secretarial audit report, given by a CS in practice, in such form as may be prescribed.

(2) It shall be the duty of the co. to give all assistance and facilities to the CS in practice, for auditing the secretarial and related records of the co.

(3) The BOD, in their report, shall explain in full any qualification or observation or other remarks made by the CS in practice in his report under sub-section (1).

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(4) **Default:** If a Co. or
Any Officer of the co. or
The CS in Practice contravenes the provisions of this section, the co., every officer of the co. or the CS in practice, who is in default, shall be punishable with fine which shall not be less than **Rs. 1** lakh but which may extend to Rs. 5 lakhs.

Rule 9

(1) For the purposes of section 204(1), the other class of companies shall be as under-
   a. Every public co. having a paid-up share capital of Rs. 50 Cr. or more **OR**
   b. Every public co. having a turnover ≥ Rs. 250 Cr. OR
   c. **Every company having outstanding loans or borrowings from banks or PFI of Rs. 100 Cr. or more**
      As on the last date of latest audited financial statement.

(2) The format of the Secretarial Audit Report shall be **in Form No. MR 3**.

Functions of Company Secretary [Section 205 Read with Rule 10]

1) The functions of the CS shall include-
   a. To report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
   b. To ensure that the company complies with the applicable secretarial standards;
   c. To discharge such other duties as may be prescribed.
   For the purpose of this section, the expression "secretarial standards" means secretarial standards issued by the ICSI constituted u/s 3 of the Company Secretaries Act, 1980 and approved by the CG.
2) The provisions contained in Sec 204 and Sec 205 shall not affect the duties and functions of the BOD, Chairperson of the Co., MD or Whole-Time Director under this Act, or any other law for the time being force.

Rule 10

CS shall also discharge the following additional duties, namely:

1. To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers.
2. To facilitates the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings.
3. To obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act.
4. To represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act.
5. To assist the Board in the conduct of the affairs of the company.
6. To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices.
7. To discharge such other duties as have been specified under the Act or rules.
8. Such other duties as may be assigned by the Board from time to time.

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General Meetings

Ram Ban –
Sec 96 to Sec 122 of Companies Act 2013
Companies (Management and Administration) Rules 2014

INTRODUCTION:

The decision making powers of a company are vested in the Members and the Directors and they exercise their powers collectively through resolutions passed in various meetings.

Requisites of Valid General Meeting

1) Properly called
2) Properly conveyed
3) Properly conducted

MEANING OF MEETING:

There must be at least two persons to constitute a meeting. Therefore, one shareholder usually cannot constitute a company meeting even if he holds proxies for other shareholders subject to certain exceptions.

Type of share holders meeting

1) Annual General Meeting
2) Extra ordinary General Meeting

ANNUAL GENERAL MEETING SEC 96:

Annual General Meeting is a regular meeting of the members of the company held annually for the purpose of transacting mainly ordinary business of the company.
Every company other than a **One Person Company** shall in each year hold in addition to any other meetings, a general meeting as its general meeting and shall specify the meeting as such in the notices calling it.

Time for holding GM	1. The 1st AGM can be held **within 9 months** from the closing of FY. 2. If a company holds its first AGM as aforesaid, it shall not be necessary

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	for the company to hold any AGM in the year of its incorporation. 3. For subsequent AGM's there are two requirements: i. Company must hold AGM **every year.** (Calendar year) ii. The gap between 2 AGM's cannot be **more than 15 months.** 4. AGM must not be held later than 6 months from the date of closing of FY.
Place* of *GM	The notice should state the place where the general meeting is scheduled to be held. In case of an AGM, the place of the meeting has to be either the i. **Registered Office** of the company or ii. Some other place **within the City**, **town or village** in which the registered office of the company is situated. Provided that AGM of an unlisted co. may be held at any place in India if consent is given in writing or by E-mode by all the members in advance:
Day* of *GM	The day and date of the meeting should be clearly stated in the notice. In case of an AGM, the day should be one that **is not a National Holiday.**
Time* of *GM	Exact time of holding the meeting should be given in the notice. An annual general meeting can be called during **business hours only**, that is, between 9 a.m. and 6 p.m.

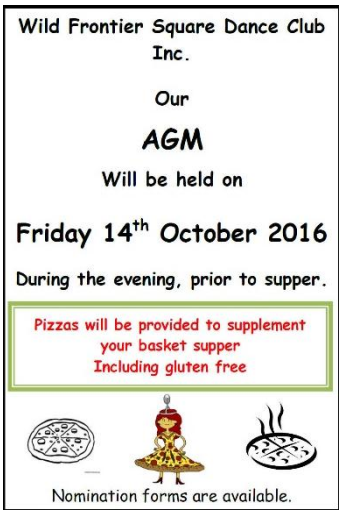
Extra Ordinary General Meeting sec 100

The BOD may, whenever it deems fit, call an EGM of the co. and such EGM shall be held at a place within India only.
Exception: WOS incorporated outside India.
Such EGM can also be called on requisition of members.

Notice of GM Sec 101

The term 'notice' is derived from the Latin word '**NOTITIA**' which means knowledge. A meeting cannot be validly held unless a proper notice of it has been given. Three things in connection with the notice have to be considered namely: -

i. Length of notice;
ii. Entitlement of notice and
iii. What should be its contents



Length of Notice (Sec101(1))

A general meeting of a company can be called by giving **not less than 21 days' notice in writing.** However, a company may, by its Articles, provide a period longer, then 21 days for convening a meeting. It must be noted that 21 days simply 21 clear days i.e. **21 days excluding the day of the service of notice and the day on which the meeting is to be held.**

A general meeting of a company may be called by giving not less than 21 clear days' notice either in

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writing or through electronic mode. Notice through electronic mode shall be given in such manner as may be prescribed.

Provided that a GM may be called after giving shorter notice, if consent, in writing or by E-mode, is accorded thereto—

i) in the case of an AGM, by not less than 95% of the members entitled to vote thereat; and
ii) in the case of any other GM, by members of the company—
   a) If the company has a share capital, holding majority in number of members entitled to vote and who represent not less than 95%. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or
   b) If the company has no share capital, having not less than 95% of the total voting power exercisable at that meeting:
   Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account in respect of the former resolutions and not in respect of the latter.

Entitlement of Notice [Section 101 (3)]

Notice of every general meeting of the company shall be given

i. To **every member** of the company;
ii. To the persons (**legal representative or receiver**) entitled to share in consequence of the death or insolvency of a member;
iii. To the **auditor or auditors** for the time being of the company;
iv. To **every director** of company

Preference shareholders are also entitled to notice. It is noted that unless the meeting is to be consider any matter, which **affects the rights** of the preference shareholders, they **cannot take part in the proceedings or vote** in any resolution, nevertheless, they have the right to attend the general meeting.

In the case of those members, who have no registered address in India and who have not supplied any address within India, the notice of the meeting can be given to them by advertising the same in the newspaper.

CASE LAW 86 Maharaja exports vs. apparels export promotion council

An accident omission to give notice to, or the non-receipt of notice by, any member or other person to whom it should be given, shall not invalidate the proceedings at the meeting. But where the **omission** to send the notice is **not accidental** the whole proceedings at the meeting become **invalid.**

Contents of the Notice [Section 101 (2)]

Every notice of the meeting of a company shall specify the

i. **Place**
ii. **Day**
iii. **Date and**
iv. **Hour** of the meeting.

It should also contain the **statement of business to be transacted** thereat. This is done by grouping the items of business under two heads namely **Ordinary Business & Special Business.**

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Special Business means all business to be transacted at a meeting except the following, which is called Ordinary Business.

- The consideration of the account, balance sheet and the reports of the board of directors and auditors.
- The declaration of dividend.
- The appointment of directors in the places of those retiring.
- The appointment of and the fixing of remuneration of the auditors.

Statement to be annexed to Notice [Section 102]

In case of special business items to be transacted at a general meeting, a statement setting out the following material facts, shall be annexed to the notice calling the meeting:

Material facts to be given in the explanatory statement

The nature of concern or interest, financial or otherwise, if any, in respect of each item of:

- Every director and the manager, if any;
- Every other key managerial personnel; and
- Relatives of the persons mentioned in sub-clauses (i) and (ii);

Disclosure of shareholding interest in the explanatory statement

Where any item of Special Business to be transacted at a meeting of the company relates to or affects any other company, the **extent of shareholding interest in that other company of every promoter, director, manager,** if any, and of every other key managerial personnel of the first mentioned company shall, **if the extent of such shareholding is not less than 2% of the paid up share capital of that company, also** be set out in the statement.

Consequences for non-disclosure or insufficient disclosure in the explanatory statement

If any benefits accrue due to non-disclosure, all the aforesaid persons shall hold such benefit in trust for the company and shall be liable to compensate the company to the extent of the benefit received by them.

Penalty **(02/11/18)**

If any default is made in complying with the provisions of this section, every promoter, director, manager or other key managerial personnel who is in default shall be punishable with ~~fine~~ **penalty** which may extend to **Rs. 50,000 or five times the amount of benefit accruing to the promoter,** director, manager or other key managerial personnel or any of his relatives, **whichever is more.**

Agenda

A statement of the business to be transacted at the general meeting should be given in the notice. In case, the meeting is to transact a special business, an explanatory statement should be attached about such item.

Proxy clause with reasonable prominence

Every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, should carry with reasonable prominence, a statement that a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

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Authority for Issuance of Notice for Meeting

A general meeting, whether an annual general meeting or an extraordinary general meeting, must be called under the authority of a resolution of the Board of directors subject to the provisions contained in the company's articles. If the managing director, manager, secretary or other officers call a meeting without such authority, it will not be effective unless the Board ratifies the same before the meeting is held. The notice should state that 'By the orders of the Board.

In case of a notice for the Board meeting, it should be issued on the instructions of the Chairman of the Board of directors of the company.

Advertisement of Notices in the Newspaper

It is not obligatory to advertise notice in the newspaper. However, as an abundant precaution, the company may advertise in the newspapers to avoid objection from such of the shareholders as reside outside India and who incidentally may not receive the notices served through the post.

Authority to Make Amendment in the Special Business

All the special businesses submitted to the meeting shall be subject to such modification(s) as may be considered appropriate and accepted by the members at the meeting. It is a good secretarial practice to start each business with the following style:

'To consider and, if thought fit, to pass **with or without modification(**s), if any, the following **Ordinary/Special Resolution.**

Quorum of General Meeting Sec 103

Quorum	Quorum is the **minimum number of members required to be present at a general meeting** of the company to validly transact any business. Quorum is the minimum number of members of a company where presence is necessary for the transaction of business. In reckoning, quorum, only those persons are taken into account who are qualified to take part and decide upon questions brought before the meeting.
Main Provisions	Following are the minimum numbers provided in section 103, for various categories of companies. **a) In the case of public company:** A. **5 members** personally present if the number of members as on the date of meeting is **not more than 1000;** B. **15 members** personally present if the number of members as on the date of meeting is **more than 1000 but up to 5000;** C. **30 members** personally present if the number of members as on the date of the meeting exceeds 5000. **b) In case of Private company:** **2 members** personally present, shall be the quorum for a meeting of the company.

Articles may provide for Larger Quorum

AOA of a company may provide for larger number of members personally present as quorum, rather than members stated in section 103 who shall be personally present in case of public and private company respectively but it cannot be less than the minimum number of quorum required for the meeting.

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Whether presence of preference shareholders would count for quorum?

If business proposed to be transacted at a general meeting does not include any item or resolution proposed to be passed, which directly affects the rights of the preference shareholders, their presence should not be taken into account for purposes of determining the quorum but where the subject-matter includes any resolution in which the rights of preference shareholders are directly affected, their presence should be taken into account for the purpose of the quorum.

Representative in the general meeting shall be considered for quorum

Corporate members of a company may by a resolution of its Board of directors authorize a person to attend a general meeting of the company in which it is a member. Such representative shall be deemed to be a member personally present and where necessary he can appoint a proxy to attend the meeting.

The representatives of the President and Governors of the State appointed under **section 112** shall be deemed to be a member personally present and will be counted for the quorum.

Joint shareholders will be regarded as one member for the purpose of quorum

Any joint shareholder present at the meeting will be entitled to exercise his/her voting power and will be counted for the quorum as one shareholder

Maintenance of Quorum

At one time it was considered essential that the required quorum should present throughout the proceedings. But **in Hartly Baird Ltd.** case it was held that where the company's articles were similar to Table A, a quorum need be present only when the meeting commenced, and it was immaterial that there was no quorum at the general meeting when the vote was taken.

Consequences of absence of quorum

If within half an hour from the time appointed or holding a meeting of the company, a quorum is not present, the meeting, if called up on the requisition of members, shall stand dissolved. In any other case, the meeting shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and at such other time and place, as the Board may determine.

Adjourned meeting

In case of an adjourned meeting or of a change of day, time or place of meeting, the company shall give **not less than 3 days' notice to the members either individually or by publishing an advertisement** in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated. If at the adjourned meeting also, a quorum is not present within half-an-hour from the time appointed for holding meeting**, the members present shall be the quorum *subject to the minimum* 2.**

Can a single member constitute quorum for a meeting?

The word 'meeting' prima facie means coming together of more than one person and thus a single shareholder cannot constitute quorum for a meeting.

Following are the exceptions to the general rule where one person can constitute quorum

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for a meeting:-

(i) Where default is made by a company in holding an annual general meeting, the NCLT may give direction that one member of the company present in person or by proxy shall be deemed to constitute the meeting. **[Section 97]**
Where for any reason, it is impracticable to hold or conduct extraordinary general meeting, the NCLT may give direction that one member of the company present in person or by proxy shall be deemed to constitute the meeting. **[Section 98]**

(ii) Where a person holds all the shares of a class, he alone may constitute a class meeting.

Chairman of Meeting [Sec 104]

Appointment of Chairman under Articles	**Regulation 45 of Table F:** It provides that the **Chairman**, if any, **of the Board** shall preside as Chairman at every general meeting of the company. **Regulation 46 of Table F:** If there is **no Chairman or he is not present within 15 minutes** after the appointed time of the meeting or is unwilling to act as Chairman of the meeting, the **directors present shall elect one among themselves** to be chairman of the meeting. **Regulation 47 of Table F** If in any meeting, no director is willing to act as chairman or if no director is present within 15 minutes after the appointed time of the meeting, the **members present should choose one among themselves to be chairman of the meeting.**
Appointment u/s 104	If the articles of association of a company do not contain any provision for the appointment of chairman, such appointments shall be made by the members personally present at the meeting who shall elect one of themselves to be the chairman thereof on a show of hands. **If a poll is demanded on the election of the Chairman, it shall be taken immediately**. If some other person is elected as a result of poll, he shall be the Chairman for the rest of the meeting
Appointment of Chairman by NCLT	Where the NCLT under **Section 97 or Section 98** directs the calling of general meeting of a company, it may give directions regarding it's calling holding and conducting. It may appoint any person as its Chairman.
Position and responsibility of Chairman	The chairman has the authority to conduct the business of the meeting in terms of the notice. Accordingly, he has to carry out the following duties: • With the permission of chairman, **each item of business will be moved** for the consideration of the members. • He will give **enough time to members to discuss** and express their opinion and views on each of the proposal under consideration. • He has powers to **close the discussion** if sufficient time has been spent. • He has the powers to **admit or reject an amendment** to a resolution. • Where there is a serious disorder, he has an inherent **power to adjourn the meeting.** However, he cannot arbitrarily close or adjourn a meeting.

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	•He shall arrange for **voting on every resolution and declare the result.** If the Articles give authority to the chairman to exercise a **casting vote,** he can cast a second vote in case of a tie as he consider appropriate.
Declaration of result by the Chairman	A declaration by the chairman that on a show of hands, a resolution has or has not been carried unanimously or by a particular majority and an entry to that effect set in the minutes book, shall be conclusive evidence of the fact without proof of the number or proportion of the votes cast in favour of or against the resolution.
Discretion of chairman for recording proceedings of the meeting	The chairman has the power to exclude from the minutes any matter, which, in his opinion ➢ Is regarded as defamatory of any person; ➢ Is irrelevant or immaterial to the proceeding or ➢ Is detrimental to the interest of the company.

Proxies [Sec 105]

Meaning

The word **"proxy"** has two different meanings.

i. Firstly it means the **agent appointed by the member** of a company to attend and vote on his behalf at a meeting of members, and
ii. Secondly, it means **the document by which such an agent is appointed.**

The relation between the member appointing proxy and the proxy so appointed is that of **principal and agent** and thus this relationship is governed by the relevant provisions of **Indian Contract Act, 1872.**

Who has right to appoint proxy

In the case of a company, having a share capital every members of the company who is entitled to attend and vote at the meeting can appoint a proxy. In the case of a company not having share capital, this right is available only if the articles make a specific provision for it. A proxy need not to be member of the company.

Generally, the preference shareholders are not entitled to appoint a proxy as they are not entitled to vote at the meeting.

Notice for GM should mention right to appoint proxy

In every notice calling a general meeting of the company, there should appear with reasonable prominence a statement that a member, entitled to attend and vote, is entitled to appoint a proxy to attend and vote instead of himself and a proxy need not be a member of the company.

In case of default, every officer in default, shall be liable to a **penalty of Rs. 5,000.**

The note may be given in the following manner:

"MEMBERS ENTITLED TO ATTEND AND VOTE MAY APPOINT ONE OR MORE PROXIES TO ATTEND AND VOTE INSTEAD OF THEMSELVES AND A PROXY NEED NOT BE A MEMBER.

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PROXIES TO BE VALID MUST BE RECEIVED AT THE REGISTERED OFFICE OF THE COMPANY NOT LESS THAN FORTY- EIGHT HOURS BEFORE THE APPOINTED TIME OF THE MEETING:'

Maximum Number of proxies to be held by an individual

The member of a public company can **appoint more than one proxy**. This will be possible only if he is entitled **to cast more than 1(one) vote.** A member of a private company cannot appoint more than one proxy to attend on the same occasion.

A person appointed as proxy shall **not act as proxy on behalf of more than 50 members** and members **holding in the aggregate more than 10% of the total share capital** of the company carrying voting rights.

Who can appoint proxy for the General Meeting?

1. **Members** of a company having a **share capital.**
2. Members of a company **not having a share capital, if AOA** provides so.
3. **Representatives of body corporate** appointed **u/s 113**.
4. **Representatives of the President and the Governors** of the State appointed **u/s112**.
5. **Power of Attorney holder of a member** may vote by proxy, if authorised by such power of attorney.

Note: A member of Sec 8 Company i.e. NPC shall not be entitled to appoint any other person as proxy unless such other person is also a member of such company.

Who cannot appoint proxy for a meeting?

The following persons cannot appoint proxy to attend a general meeting of the company:-

1. A **proxy cannot appoint** a proxy. However, this general rule has certain exceptions as mentioned above.
2. A member of a company **not having a share capital** cannot appoint a proxy if the AOA does not provide otherwise.
3. Members of an **independent private company unless the AOA** provide otherwise.

Section 105 does not apply to independent private company and consequently, this aspect will be regulated by the AOA of the concerned company.
A member of a company registered **u/s 8** shall not be entitled to appoint any other person as his proxy unless such other person is also a member of such company. [Rule 19(1)).

Only individual can be appointed as a proxy

i. Any person whether he is member or not, can be appointed as a proxy.
ii. He must be **individual capable of attending and voting**, at the meeting.
iii. There is no restriction in law about who can be appointed as proxy.
iv. Even **the existing or proposed chairman of the company, director, secretary or any employee can be appointed as proxy**.
v. Even minor is capable of to be appointed as proxy as such appointment does not incur or undertake any liability or burden.
vi. An **artificial or judicial person cannot be appointed as proxy.**

Signing of proxy.

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A proxy may be signed by the following persons:

i. In the case **of joint holders, all of them** have equal rights as members and, therefore, unless otherwise provided, proxy forms should be signed by all the joint holders;
ii. By the **individual sole member** of a company;
iii. **Power of attorney holder** of a member of a company;
iv. **Authorised representative** of a body corporate;
v. By receivers/liquidators and/ or executors of a member

Limitations of proxy

A proxy has **no right to speak** at the meeting. A proxy shall not be entitled to vote **except on poll.**As proxy has no right to speak at the meeting, he cannot take part in any discussion. A proxy is not counted for quorum. A proxy cannot inspect the proxies list with the company and the minute's book of the GM.

Period for deposit of proxy:

A **proxy instrument** should be deposited at registered office **at least 48 hours before the time fixed for a meeting**. Any provision contained in the AOA, requiring a longer period than48 hours shall have effect as if a period of 48 hours had been specified.
Note: Sunday shall form part of 48 hours.

Requirements of instrument of proxy

The instrument appointing a proxy must be in **Form no. MGT11** as per Rule 19(3).
It should be in **writing and be signed by the appointer** or his attorney duly authorized in writing. Where the appointer is a body corporate, it shall be under its seal or be signed by an officer or an attorney duly authorised by it.

If an instrument of proxy is furnished in the prescribed form, the same cannot be questioned on the ground that it fails to comply with the special requirements in the AOA.

A proxy must put revenue stamp of appropriate value and stamp should be cancelled either by signature or by some other means. Proxies, which are unstamped or on which stamps are not cancelled, are invalid.

Dating of Proxy

Proxy executed should contain the date of its execution.

Case Law 87	**Re- Iron & steel co. & steel Co. & Firestone tyre & rubber Co. Vs. synthetics & Tata Chemicals Ltd.**

However, an undated proxy lodged within the prescribed time is valid.

Canvassing for appointment of Proxy Sec 105(5):

A company shall not issue any invitation at its expense to a member who is entitled to have the notice of meeting to appoint numbers of persons specified therein as his proxy. In the case of default, every officer of the company who knowingly issued the invitation shall be punishable with fine, which **may extent to Rs.1, 00,000/-**.
However, an officer shall not be so punishable if the following two conditions are fulfilled:
(i) That officer issued a list of persons willing to act as proxies to a member at his written request; and
(ii) That the said list is available on request in writing to every member entitled to vote at the

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meeting by proxy.

Inspection of list of proxies [Section 105(8)]

Every member entitled to vote is entitled to inspect the proxies lodged with it. He may do so at any time during the **period beginning from 24 hours** before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting. However, such inspection can be done only during the **business hours** of the company; provided at **least 3 days' notice in writing of intention to do so has been given to the company.**

Revocation of proxies:

A proxy can be revoked in any of the following ways:-

i. By **deposit of a new proxy** within the time stipulated for deposit of proxies;
ii. ***Cousin's* v *International Bricks* Co. *Ltd.* By the member himself attending** and voting before the proxy has voted; and
iii. **By the death or insanity of the appointer or by revocation of proxy or transfer of shares** by the appointer

Provided that the company has received intimation in writing of such death, insanity, revocation or transfer before the commencement of the meeting.

Register of proxy:

- The company should maintain a register of proxy for future reference and record.
- All the proxy forms received within the stipulated time appointed for deposit of proxy should be entered in order of their receipt.
- The Register may contain two parts ***viz,* valid proxy register and rejected proxy register**.
- On receipt of a proxy, the details shown therein like name of the shareholder(s), ledger folio number, number of shares held and signature of members should be verified from the relevant register of members and specimen signature card.
- The Register for valid proxy form received should **be closed before 48 hours of the meeting** and it should be authenticated by the chairman of the meeting.

Practical aspects of proxies

The following practical aspects of the proxy should be noted carefully:-

1. **Multiple proxy:** If the shareholder has signs two proxy forms representing the same share and hand over them to two persons then proxy bearing the later date would be valid. Proxy form not bearing any date will be rejected by the company. If both the forms bear the same date then both shall be rejected by the company.

2. **Alternative proxies**: The alternative proxies may be appointed by a single instrument of proxy specifying the alternative proxies in case of absence of first mentioned proxy.

3. **General and special proxy**: A general proxy is in the nature of general power of attorney and is valid for attending all the general meetings of the company. A special proxy is drawn for attending meeting specified therein.

Methods of ascertaining the Sense of Meeting [Sec 106 to 109]

Voting denotes a method by which a person express his wish or opinion in an authorized formal way or a mechanism through which the wishes of persons are ascertained in relation to a particular

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matter.
It reflects the mood of the meeting on a particular matter.
If a motion gets support of the required members in a meeting, it becomes resolution.

Case Law 88 **Burlal V,s. Earle (1902)**
A shareholder can vote on any resolution in which he is interested.

Case law 89 **Nell Vs. Long Bottom (1894)**
In the case of equality of votes a chairman may give casting vote if permitted by Articles. The Companies Act, 2013 prescribes three methods of ascertaining the sense of a meeting, namely:-

i. Show of hands; and
ii. Poll
iii. Voting through electronic mode

Voting by Show of Hands [Section 107]
At any general meeting, a resolution put to the vote of the meeting shall in the **first instance** be decided on a show of hands. A declaration by the Chairman of the meeting of the passing of resolution or otherwise, by show of hands shall be conclusive evidence of the fact of passing of such resolution or otherwise, unless a poll is demanded before or immediately on declaration by Chairman.

Case Law 90 **Re- Hornby Bridge CO. (1879)**
Votes of members personally present will be counted on a show of hands.

Case Law 91 **Earnest Vs. Lama** Gold Mines Ltd.(1897)
One member one vote by show of hands.

Note: Directors cannot participate at meetings unless they are having voting rights as a member

Methods of Voting

VOTING THROUGH ELECTRONIC MEANS :(SECTION 108)
Companies (Management and Administration) Rules, 2014,

- Every **listed company or**
- **A company having 1,000 or more shareholders**

May provide to its members, facility to exercise their right to vote at general meetings by electronic means.

A member may exercise his right to vote at any GM by electronic means and company may pass any resolution by electronic voting system. [Rule 20(2)].

It may be noted that 'voting by electronic means' or 'electronic voting system' means a **'secured system' based process of display of electronic ballots,** recording of votes of the members and the number of votes polled in favour or against, such that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate 'cyber security:

'Secured System' means computer hardware, software, and procedure that -

- Are reasonably secure from unauthorized access and misuse;
- Provide a reasonable level of reliability and correct operation;
- Are reasonably suited to performing the intended functions;
- Adhere to generally accepted security procedures.

"Cyber security" means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosures, disruption, modification or destruction.

Procedure for E-Voting:

A company which opts to provide the facility to its members to exercise their votes at any GM by electronic voting system shall follow the following procedure:

i. The notices of the meeting shall be sent to all the members/auditors of a company or directors either,-
   a) By Registered Post or speed post, or
   b) Through electronic means like registered e-mail id., or
   c) Through courier service

ii. The notice shall also be placed on the web site of the company, if any and of the agency forthwith after it is sent to the members.

iii. The notice of the meeting shall clearly mention that the business may be transacted through electronic voting system and the company is providing facility for voting by electronic means.

iv. The notice shall clearly indicate the process and manner for voting by electronic means and time schedule including the time period during which the votes may be cast and shall also provide the login ID and create a facility for generating password and for keeping security and casting of vote in a secure manner;

v. The company shall cause an advertisement to be published, **not less than 5 days** before the date of beginning of the voting period, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having sent the notice of the meeting and specifying therein, ***inter alia***, the following matters, namely:
   - statement that the business may be transacted by electronic voting;
   - the date of completion of sending of notices;
   - the date and time of commencement of voting through electronic means;
   - the date and time of end of voting through electronic means;
   - the statement that voting shall not be allowed beyond the said date and time;
   - website address of the company and agency, if any, where notice of the meeting is displayed;
   - contact details of the person responsible to address the grievances connected with the electronic voting
   - E-voting shall remain open for not less than one day and not more than three days.

   Provided that in all such cases, such voting period shall be completed three days prior to the date of the general meeting;

vi. During the e-voting period, shareholders of the company, holding shares either in physical form or in dematerialized form, as on the record date, may cast their vote electronically. Provided that once the vote on a resolution is cast by the shareholder, he shall not be allowed to change it subsequently.

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vii. At the end of the voting period, the portal where votes are cast shall forthwith be blocked.
viii. The Board of directors shall appoint one scrutinizer, who may be chartered accountant in practice, cost accountant in practice or company secretary in practice or an advocate but not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinize the E voting process in a fair and transparent manner.
ix. The scrutinizer so appointed may take assistance of a person who is not in employment of the company and who is well-versed with the e-voting system.
x. The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.
xi. The scrutinizer shall, within a period of not exceeding three working days from the date of conclusion of e-voting period, unblock the votes in the presence of at least two witnesses not in the employment of the company and make a scrutinizer's report of the votes cast in favour or against, if any, forthwith to the Chairman.
xii. The scrutinizer shall maintain a register either manually or electronically to record the assent or dissent, received, mentioning the particulars of name, address, folio number or client ID of the shareholders, number of shares held by them, nominal value of such shares and whether the shares have differential voting rights.
xiii. The register and all other papers relating to electronic voting shall remain in the safe custody of the scrutinizer until the chairman considers, approves and signs the minutes. Thereafter, the scrutinizer shall return the register and other related papers to the company.
xiv. The results declared along with the scrutinizer's report shall be placed on the website of the company and on the website of the agency within two days of passing of the resolution at the relevant general meeting of members.

Subject to receipt of sufficient votes, the resolution shall be deemed to be passed on the date of the relevant general meeting of members.

Demand for Poll [Section 109]:

A poll can be ordered at any time before or after the declaration of the result on the voting of any resolution by show of hands.

A poll can be demanded by any of the following persons:

- Chairman himself;
- Members and proxies.

The Chairman shall order a poll to be taken, if any demand is made in this behalf:-

- in the case of a **company having a share capital,** by any member or members present in person or by proxy and holding shares in the company-
- Which confer a power to the vote on the resolution **not being less than 1/10thof the total voting power in** respect of the resolution; and
- On which an aggregate sum of **not less than** Rs.5, 00,000 has been paid up.
- in the case of **any other company,** by any member or members present in person or by proxy and having **not less than 1/10thof the total voting power** in respect of the resolution.

Withdrawal of demand for poll

The demand for a poll may be withdrawn at any time by the person or persons who made the demand.

Case Law **Campbel**

A member may vote at a poll, even though he was not present when the poll was demanded.

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Time of taking poll[Section 109(4)]:

A poll demanded on the question of adjournment of the meeting and on the election of **Chairman must be taken immediately.** A poll demanded on any other question shall be taken at any time **within 48 hours** of the time of making a demand.

Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinize the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed. The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

Procedure for conduct of poll:

As per **Rule 21(1)** of the **Companies (Management** and Administration) **Rules, 2014** *provides that the chairman of a meeting shall ensure that -*

- The Scrutinizers are provided with the Register of Members, specimen signatures of the members, Attendance Register and Register of Proxies.
- The Scrutinizers are provided with all the documents received by the Company.
- The Scrutinizers initial the Polling papers and distribute them to the members and proxies present at the meeting. **In** case of joint shareholders, the polling paper shall be given to the first named holder or in his absence to the joint holder attending the meeting as appearing in the chronological order in the folio. **The Polling paper shall be in Form No. MGT.12.**
- The Scrutinizers keep a record of the polling papers issued.
- The Scrutinizers lock and seal an empty polling box in the presence of the members and proxies.
- The Scrutinizers open the Polling box in the presence of two persons as witnesses after the voting process is over.
- Incase of ambiguity about the validity of a proxy, the Scrutinizers decide the validity in consultation with the Chairman.
- The Scrutinizers shall ensure that if a member who has appointed a proxy has voted in person, the proxy's vote shall be disregarded.
- The Scrutinizers count the votes cast on poll and prepare a report thereon addressed to the Chairman.
- Where voting is conducted by electronic means, the company shall provide all the necessary support, technical and otherwise, to the Scrutinizers in orderly conduct of the voting and counting the result thereof.
- The Scrutinizers' report state total votes cast, valid votes, votes in favour and against the resolution including the details of invalid polling papers and votes comprised therein.
- The Scrutinizers submit the Report to the Chairman who shall counter-sign the same.
- The Chairman declare the result of Voting on poll. The result may either be announced by him or a person authorized by him in writing.

The Scrutinizer/s Appointed for the poll, shall submit a report to the Chairman of the meeting in **Form No. MGT No. 13**. The report shall be signed by the **scrutinizer / all the scrutinizers**, in case there is more than one scrutinizer, and be submitted by them to the Chairman of the meeting **within 7 days** from the date the poll is taken.

Validity of votes:

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In construing whether a resolution is passed, what is to be taken into consideration in calculating majority is not number of persons present and voting, but number of valid votes polled in such meeting which includes only votes which are indicating mind of voter for or against resolution.

Restrictions on exercise of voting rights [Section 106]:

The AOA of a company may provide that no member shall exercise any voting right in respect of any shares on which any calls have not been paid, or in regard to which the company has exercised any right of lien.

A company shall not prohibit any member from exercising his voting right on the ground that he has not held its shares for any specified period preceding the date on which the vote is taken or any other ground, not being a ground set out.

Right of Member to use his votes differently: [Sec 106(3)]

When a poll is taken at a meeting, a member entitled to more than one vote, or his proxy can split his votes in favour or against the resolution.

Case study **Ralta India Ltd. Vs. Venire Industries Ltd.**

A pooling agreement may be utilised in connection with the election of Directors and shareholders' resolutions where shareholders have a right to vote

ADJOURNMENT OF MEETING:

Meaning

Adjournment means suspending a meeting after it has been duly commenced to be resumed at a later date and time fixed in that meeting itself at the time of adjournment or to be decided later on.

Methods

A meeting may be adjourned in anyone of the following ways:-

i. By passing a resolution at the meeting;
ii. By the act of chairman;
iii. By lack of quorum at the meeting.

By passing a resolution at the meeting:

According to common law, the power to adjourn a meeting lies in the hands of those constituting it. As such in the absence of provisions to the contrary in the articles of a company, the Chairman is authorized to adjourn the meeting only with the wishes of the majority present thereof.

By the act of Chairman: In case of disorder, etc. at the meeting, the Chairman is authorized to adjourn the meeting for a short period say **an hour** or so with a view to restore the order.

By lack of quorum at the meeting: If **within half an hour** from the time appointed for holding a meeting of the company, a quorum is not present, the meeting (other than called upon at the request of the members) shall adjourned to the same day in the next week, at the same time and place, or to such other day and at such other time and place as the Board may determine.

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Special Provisions:

Business to be transacted:

No business shall be transacted at an adjourned meeting other than the business **left uncompleted** of the meeting at which the adjournment took place.

Notice:

When a meeting is adjourned, notice of the adjourned meeting shall be **given not less than 3 days** to the members either **individually** or by publishing an **advertisement** in the newspapers (English & Vernacular) in the state of registered office of company.

Date:

When a resolution is passed at an adjourned meeting, the resolution shall, for all purposes, to be treated as having been passed on the date on which it was **in fact passed** and shall not be deemed to have been passed at an earlier date **[Sec.116]**

Postponement of a Meeting

Postponement of a meeting implies putting off commencement of the properly convened meeting. Such postponement takes place before the time fixed for the commencement of the meeting. On many occasions, it becomes necessary not to have the scheduled meeting for which a notice has already been issued. This may be for various reasons, which are beyond the control of management. However postponement of a general meeting must be exercised objectively on valid and cogent grounds and a decision to do so must be bona fide.

Where there is a change of day, time and place of meeting, the company is required to give not less than 3 days' notice to the members, either individually or by publishing an advertisement in the newspapers (English &Vernacular) in the state of registered office of company.

Cancellation of a meeting:

Cancellation of a meeting refers to the situation where meeting no longer exists as such. Its proceedings are not merely suspended but exhausted.

As per Section 103 (2) of the Companies Act, if within half an hour after the time appointed for holding a **GM**; the quorum is not present; the meeting shall stand dissolved if it was called on requisition of members.

Passing of Resolution by Postal Ballot [Section 110]

1) Notwithstanding anything contained in this act, a co. –
   a) Shall, in respect of such items of business as the CG may notify to be transacted only by means of postal ballot; and
   b) May, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot, in such manner as may be prescribed, instead of transacting such business at a GM.

Provided that any item of business required to be transacted by means of postal ballot may be transacted at GM by a co. which is required to provide the facility to members to vote by Electronic method.

***Rule* 22(16) of the Companies (Management and Administration), Rules, 2014**, provides as under with regard to conducting business through postal ballot.

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- Alteration in the Object Clause of MOA and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the MOA;
- Alteration of AOA in relation to insertion of provisions which, u/s 2(68), are required to be included in the AOA of a company in order to constitute it a private company;
- Buy-Back of own shares by the company u/s 68(5).
- Change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised u/s 13(8);
- Issue of shares with differential rights as to voting dividend or otherwise u/s 43(a) (ii).
- Change in place of Registered office outside local limits of any city, town or village as specified u/ s 12(5)
- Sale of whole or substantially the whole of undertaking of a company as specified.
- Giving loans or extending guarantee or providing securities in excess of the limit prescribed u/s *186(3).*
- Election of Director' u/s 151 of the act.
- Variation of rights attached to a class of shares or debentures or other securities as specified u/s 48.
- Section 110(1)(b) further provides that a company may pass any item of business, other than ordinary business and any business in respect of which director or auditors have a right to be heard

Proviso to Rule 22 of the Companies (Management and Administration) Rules, 2014 provides that **OPC** and other companies **having members up to 200 are not required** to transact any business through postal ballot.

Procedure

(1) Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons there for and requesting them to send their assent or dissent in writing on a postal ballot or by electronic means within a period of thirty days from the date of dispatch of the notice.

(2) The notice shall be sent either
   - by Registered Post or speed post, or
   - through electronic means like registered e-mail id or
   - Through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period of thirty days.

(3) An advertisement shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having dispatched the ballot papers and specifying therein, inter alia, the following matters:

(4) The notice of the postal ballot shall also be placed on the web site of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members.

(5) The Board of directors shall appoint one scrutinizer, who is not in employment of the company and who in the opinion of the Board can conduct the postal ballot voting process in a fair and transparent manner.

(6) The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.

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(7) If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot including voting by electronic means, it shall be deemed to have been duly passed at a general meeting convened in that behalf.
(8) Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer. After the receipt of assent or dissent of the shareholder in writing on a postal ballot, no person shall deface or destroy the ballot paper or declare the identity of the shareholder.
(9) The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof;
(10) The Scrutinizer's Report must be addressed to the Chairman and should contain details of the complete process of scrutiny.
The Report should specify:
- Number of valid postal ballot forms received;
- Votes cast in favour of the Resolution;
- Votes cast against the Resolution;
- Number of invalid postal ballot forms received;
- Number of postal ballot forms received in defaced or mutilated form.

(11) The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the minutes. Thereafter, the scrutinizer shall return the ballot papers and other related papers/register to the company who shall preserve such ballot papers and other related papers/register safely;
(12) The assent or dissent received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received;
(13) The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company;
(14) The resolution shall be deemed to be passed on the date of declaration of its result;
(15) The provisions regarding voting by electronic means shall apply, as far as applicable, mutatis mutandis in respect of the voting by Postal ballot.

If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf. In case of One Person Company and other companies having members up to 200 are not required to transact any business through postal ballot.

Issue of duplicate notice and postal ballot form

Where Notice and the accompanying postal ballot form sent by post are not received by a shareholder or are damaged in transit or are returned undelivered, the Managing or Whole- time Director responsible for the process or, where there is no such MD or WTD, any Director of the company so authorised and the CS may, in consultation with the Scrutinizer, if they are satisfied with the reasons given for such non - receipt, damage, or return, issue a duplicate postal ballot form to the shareholder on his applying for the same in writing. A record should be maintained of all the duplicate Notices and postal ballot forms issued.

If a shareholder inadvertently deals with his postal ballot form in such manner that it cannot be used as a ballot form, he may, on returning it to the company make a request for a duplicate and the company, in consultation with the Scrutinizer, if he is satisfied as to the genuineness of such request, may issue a duplicate postal ballot form to the shareholder.

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The postal ballot form returned by the shareholder should be marked **"Spoilt-Returned"** and kept separately, with a separate record thereof being maintained.

It should be made clear to any shareholder requesting for a duplicate postal ballot form that the time limit of thirty days for receiving the duly filled in postal ballot form would be counted from the cut-off date and not from the date of issue of the duplicate Notice and duplicate postal ballot form.

Form of ballot:

The postal ballot forms should be **serially numbered,** have distinguishing marks or bar coding or other security features unique to the company and should be in the format set out below or as near thereto as circumstances admit.

- A single postal ballot form may provide for multiple items of business to be transacted.
- A postal ballot form shall be valid only for the items of business of the Notice to which it relates.
- The postal ballot form should contain instructions as to the manner in which the form is to be completed and may also specify the instances in which the postal ballot form shall be treated as invalid.

The last date for receiving the duly completed postal ballot forms by the Scrutinizer should also be mentioned in the form along with a statement that forms received after this date will be treated as if the reply from the Member has not been received.

Invalid postal ballot forms

A postal ballot form should be considered invalid if:-

- A form other than the one issued by the company or a photocopy thereof has been used;
- It has not been signed by or on behalf of the shareholder;
- It is not possible to determine without any doubt the assent or dissent of the Member;
- Any competent authority has given directions in writing to the company to freeze the voting rights
- The postal ballot form, signed in a representative capacity, is not accompanied by a certified copy of the relevant specific authority;
- It is received from a shareholder who is in arrears of payment of calls;
- It is damaged or mutilated in such a way that its identity as a genuine form cannot be established;
- It is not filled in accordance with the instructions for filling and executing the form.
- Any amendment made by the Member to the Resolution or any condition imposed by the Member while exercising his vote, will render the postal ballot form invalid. When the Scrutinizer rejects a postal ballot form, he should state the reasons for rejection on the postal ballot form itself. No other remark should be made on the postal ballot form.

Rescinding the Resolution

A Resolution passed by Postal Ballot should not be rescinded otherwise than by a Resolution passed subsequently through Postal Ballot. No amendment or modification can be made to any Resolution set out in the Notice.

Preservation and custody of Postal Ballot

The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the

minutes. Thereafter, the scrutinizer shall return the ballot papers and other related papers/register to the company who shall preserve such ballot papers and other related papers/register safely. [Rule 22(11)]

Circulation of Member's Resolution [Sec 111]

Section 111 of the Companies Act, 2013 effective from 12th Sept., 2013, enables members to avail of the administrative machinery of the Company to put resolutions at their expense, in the annual general meeting and make other members aware of the purpose behind submission of such resolutions.

Requirement of specified number of members who shall send requisition in writing for circulation thereof by company.

Section 111 (1) provides that a Company shall be bound to circulate members' resolutions, if requisition is received from such number of members, as required in section 100.

Section 100 provides following strength for requisition:

In the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, **not less than 1/10th** of such paid-up share capital of the company as on that date carries the right of voting;

In the case of a company not having a share capital, such number of members who have, on the date of receipt of the requisition, not less than 1/10th of the total voting power of all the members having on the said date a right to vote.

AMENDMENT BY COMPANIES AMENDMENT ACT 2017

In section 100 of the principal Act, in sub-section (1), the following proviso shall be inserted, namely: -Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.

Manner of Circulation of Members' Resolution

i. Notice of any such resolution shall be given by the company and such statement shall be circulated to all the members of the company entitled to have notice of the meeting sent to them, by serving a copy of the resolution or statement on each member, in any manner permitted for service of notice of the meeting.
ii. Notice of any such resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in such a manner permitted for giving them notice of meetings of the company.

Obligation on company to circulate the Members' Resolution

Section 111(1) casts an obligation on the company as to Circulation of Members' Resolution.
Accordingly, a company shall, on requisition in writing of specified number of members and unless it resolves otherwise, at the expense of the requisition

a. on receipt of resolution for circulation shall give it to all the members of the company entitled to receive notice of the next annual general meeting, notice of any resolution which may properly be moved at that meeting;
b. Circulate to the members entitled to the notice of any general meeting sent to them, any

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statement with respect to the matter referred to in any proposed resolution, or any business to be dealt with at the meeting.

In other words, a proposed 'member's resolution' shall be circulated by the company, subject to the following conditions:

i. Provisions of section 111 have been complied with.
ii. Requisition shall be in writing.
iii. Circulation shall be at the expense of the requisitionists unless the company resolves otherwise.

Circumstances in which a company is not required to circulate Members' Resolution

A company shall not be bound **u/s 111**of the Act, to give notice of any resolution or to circulate any statement unless:

A. A copy of the requisition signed by the requisitionists is deposited at the registered office of the company -
   i. in the case of requisition requiring notice of resolution **not less than 6 weeks** before the meeting;
   ii. in the case of any other requisition, **not less than 2 weeks** before the meeting; and

B. This is deposited or tendered with the requisition a sum reasonably sufficient to meet the company's expenses in giving effect thereto:

Provided that if, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called for a date **6 weeks or less** after the copy has been deposited, the copy although not deposited within the time required by this sub-section, shall be deemed to have been properly deposited for the purposes thereof.

If on the application, either of the company or of any other person who claims to be aggrieved, the Central Government is satisfied that the rights conferred by **section 111** are being abused to secure needless publicity for defamatory matter, and the **CG** may order the company's costs on an application **u/s 188** to be paid in whole or in part by the requisitionists.

Penalty

The company and every officer of the company who is in default shall be liable to a penalty of **25,000.**

Representatives Representation of President and Governors in Meetings [Section 112]

President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit, to act as his representative at any meeting of the company. The person so appointed shall be deemed to be a members and have the same rights including the right vote by proxy or postal ballot, as the President or Governor could exercise as a member of the company

Representation of Corporations at Meeting of Companies and of Creditors [Section 113]

Debentures of the company and it authorises any person as its representative at any meeting of the in terms of Section 113, where a body corporate is a member or a creditor including a holder of representative shall be entitled to exercise the same rights and powers including right to vote by proxy Company or any class of members of the company or at any meeting of creditors of the company, such and by postal ballot on behalf of the body corporate which he represents.

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Resolutions [Sec 114 to 118]

The term 'resolution' has not been defined in the Companies Act, 2013. Taking the dictionary meaning, which should therefore hold good, resolution means **a formal decision** of the meeting. A motion when decided at a meeting becomes a resolution.

Motion Vs. Resolution:

"Motions" and "**Resolutions"** are the terms generally used interchangeably but are different. The submission of Proposal for discussion is Motion whereas adoption of decision is by the mean of resolution.

- A motion is a proposal and a resolution is the adoption of such motion duly made.
- A motion becomes a resolution only after the requisite majority decides on it.
- A motion should be in writing and signed by the mover and put to the vote at the meeting by the chairman.

In case of **GM**, only such motions are proposed which are covered by the agenda.

Types of Resolutions [Section 114]

The resolutions passed at a GM of a company can be of 2 types, namely:

- Ordinary Resolution and
- Special Resolution

Ordinary Resolution:

A resolution shall be ordinary one when the notice required under the Companies Act has been duly given and the votes cast in favour of the resolution exceed the votes cast against it. Casting vote of the Chairman of the meeting, if any; shall also be included while counting votes provided it has been exercised by him.

Special Resolution:

A resolution shall be special resolution if the following conditions are fulfilled:-

i. The **intention** to propose it as a special resolution has been duly specified in the notice calling the general meeting; or other intimation given to the members of the resolution
ii. The **notice** of the meeting has been duly given; and
iii. Votes cast in favour of the resolution are not less than 3 times the votes cast against the resolution.

Resolution requiring Special Notice [Section 115]

Section 115 provides that where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1 % of total voting power or holding shares on which such aggregate sum not exceeding Rs.5,00,000/ - as may be prescribed has been paid-up and the company shall give its members notice of the resolution in the following manner as prescribed in Rules.

Rule 23 Procedure for special notice

A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than
one percent of total voting power or holding shares on which an aggregate sum of not less than five

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lakh rupees has been paid up on the date of the notice.

Resolutions Passed at Adjourned Meeting [Sec 116]

Where a resolution is passed at an adjourned meeting of—

a. a company; or
b. the holders of any class of shares in a company; or
c. the Board of Directors of a company,

the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

Sec 117 (2)

If any company fails to file the resolution or the agreement before the expiry of the specified period, such company shall be liable to a penalty of Rs. 1,00,000 and in case of continuing failure, with a further penalty Rs. 500 for each day after the first during which such failure continues, subject to a maximum of Rs. 25,00,000 and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of Rs. 50,000 and in case of continuing failure, with a further penalty of Rs. 500 for each day after the first during which such failure continues, subject to a maximum of Rs. 5 Lakh.".

Minutes of Proceedings of General Meeting, Meeting of Board of Directors and Other Meeting and Resolutions Passed by Postal Ballot [Sec 118]

(1) Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every Board Meeting or of every committee of the Board, to be prepared and signed in such prescribed manner and kept within 30 days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.

(2) The minutes of each meeting **shall contain a fair and correct summary** of the proceedings thereat.

(3) All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(4) In the case of a Board Meeting or committee meeting, the minutes shall also contain—

a. the names of the directors present at the meeting; and

b. in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

(5) There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting,—

a. is or could reasonably be regarded as defamatory of any person; or
b. is irrelevant or immaterial to the proceedings; or
c. is detrimental to the interests of the company.

(6) The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes.

(7) such minutes shall be evidence of the proceedings recorded therein.

(8) Until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, KMP, auditors or PCS, shall be deemed to be valid.

(9) No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.

(10) Every company shall observe secretarial standards with respect to general and Board meetings.

(11) If any default is made, the company shall be liable to a penalty of Rs. 25,000 and every officer of the company who is in default shall be liable to a penalty of Rs. 5000.

(12) If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 1 Lakh.

Inspection of Minute-Books of General Meeting [Sec 119]

(1) The minute books, shall—

(*a*) be kept at the registered office of the company; and

(*b*) be open, during business hours, to the inspection by any member without charge, subject to reasonable restrictions, however, not less than 2 hours in each business day are allowed for inspection.

(2) Any member shall be entitled to be furnished, within 7 working days after he has made a request in that behalf to the company, and on payment of prescribed fees, with a copy of minute.

(3) If any inspection is refused, or if any copy required is not furnished within the specified time, the company shall be liable to a penalty of Rs. 25,000 and every officer of the company who is in default shall be liable to a penalty of Rs. 5000 for each such refusal or default, as the case may be.

(4) In the case of any such refusal or default, the Tribunal may, by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.

Maintenance and Inspection of Documents in Electronic Form [Sec 120]

Without prejudice to any other provisions of this Act, any document, record, register, minutes, etc.,—

a. required to be kept by a company; or
b. allowed to be inspected or copies to be given to any person by a company, may be kept or inspected or copies given, as the case may be, in electronic form in such form and prescribed manner.

Report on annual general meeting [Sec 121]

(*1*) Every listed public company shall prepare in the prescribed manner a report on each AGM including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of this Act and the rules made thereunder.

(*2*) The company shall file with the ROC a copy of the report **within 30 days** of the conclusion of the AGM with such fees as may be prescribed, or with such additional fees as may be prescribed.

(3)If the company fails to file the AGM report before the expiry of the specified period, such company shall be liable to a penalty of Rs. 1 Lakh and in case of continuing failure, with a further penalty of Rs. 500 for each day after the first during which such failure continues, subject to a maximum of Rs. 5 Lakh and every officer of the company who is in default shall be liable to a penalty which shall not be less than Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 500 for each day after the first during which such failure continues, subject to a maximum of Rs. 1 Lakh."

122. Applicability of this Chapter to One Person Company

(*1*) The provisions of section 98 & sections 100 to 111 shall not apply to a OPC.

(*2*) The ordinary businesses, which a company, other than a OPC, is required to transact at its AGM, shall be transacted, in case of OPC, as provided in sub-section (*3*).

(*3*) Any business which is required to be transacted at an AGM or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of OPC, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained u/s 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.

(*4*) Notwithstanding anything in this Act, where there is only one director on the BOD of a OPC, any business which is required to be transacted at the meeting of the BOD of a company, it shall be sufficient if, in case of such OPC, the resolution by such director is entered in the minutes-book required to be maintained u/s 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the BOD for all the purposes under this Act.

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VIRTUAL MEETINGS

Virtual Meeting — Definition

A meeting held totally by means of either Video conferencing or other audio-visual means is known as Virtual Meeting.

A virtual meeting is when people around the World, regardless of their location, use video, audio, and text to link up online. Virtual meetings allow people to share information and data in real-time without being physically located together.

In virtual meeting there is no physical presence of participants and there is no designated venue for the purpose of meetings.

Participants located at different places participate in the meeting either by teleconference or video conference or combination of them at predetermined time.

The Meetings are Mainly –

- audio-and/or video based, such as audio conferencing, video conferencing, and on-line meetings or webinars, often they are supported by other forms like chat, white boards, document sharing, etc
- Audio conferencing means conference calls with three or more participants, either by connecting the different participants by using a conference phone, or both.
- Video conferencing, a technology now a clay commonly used in board meetings.

Brief Requirements for Virtual Meeting

- Meeting rooms
- Software, which can be either purchased or can be provided by vendor for a fee on yearly rental basis.
- Hardware equipment like Monitor or LED screen, Webcams.
- High quality mike system.
- Projectors.
- Document scanners.
- Leased Lines.
- High speed wireless inter-net.
- Have trial run before the meeting to ensure all the systems are working properly.
- Ensure that the proper arrangements are made in the Meeting room.

Virtual Board Meetings

Present day Directors who are professional have busy schedules which makes it difficult for them to attend board meetings of the companies in which they are directors especially for those who are living and working in different cities and countries. Tele conferencing,

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videoconferencing, and meeting online benefit boards and directors to enable them to attend the meetings from any location.

Virtual meetings help the directors to participate in meetings where ever they are despite their busy schedule and make valuable contributions by their participation.

Virtual attendance can also make board participation more attractive and appealing especially for independent directors as they are not be expected attend every meeting in person and it is not practically possible as they sit on many boards of company which are located in different cities countries and due to statutory requirements most the board meetings of the companies especially listed entities are held around the same time making it more difficult for the Independent professional directors to be physically present and participate in the meetings.

By holding virtual meetings, Boards with members around the country and globe will benefit from wider participation and it would be very convenient for the directors to attend through virtual media from their respective location and also it helps from reduced travel and reimbursement of costs.

The use of technology can present its own challenge, including directors' reluctance, lack of technical proficiency, lack of access to data and material. However, modern tools like board portals and board management software and help in solving some of the concerns.

Procedures for Convening and Conducting Board's Meetings through video or Audio Visual Means (Rule 3 of Companies (Meetings of Board and its powers) _Rules_2014

1. Every Company shall make necessary arrangements to avoid failure of video or audio-visual connection.
2. The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care, the same has been discussed above.
3. The notices of the meeting shall be sent to all the directors.
   The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio-visual means and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio-visual means.
4. A director intending to participate through video conferencing mode or audio-visual means shall communicate his intention to the Chairman or the company secretary of the company.
5. If the director intends to participate through video conferencing or other audio-visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangement in this behalf
   In the absence of any such intimation from the director, it shall be assumed that the director will attend the meeting in person.
6. At the commencement of the meeting, a roll call shall be taken by the Chairperson when every director participating through video conferencing or other audio-visual means shall state, for the record, the following namely
   - Name

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- the location from Where he is participating;
- that he can completely and clearly see, hear and communicate with the other participants;
- that he has received the agenda and all the relevant material for the meeting; and

7. Alter the roll call, the Chairperson or the Secretary shall inform the Board about the names of persons other than the directors who are present for the said meeting at the request or with the permission of the Chairman and confirm that the required quorum is complete. The roll call shall also be made at the conclusion of the meeting and at the re- commencement of the meeting after every break to confirm the presence of a quorum throughout the meeting.
8. With respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.
9. The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting and Where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode if they have given their consent to this effect and it is so recorded in the minutes of the meeting.
10. Every participant shall identify himself for the record before speaking on any item of business on the agenda. If a statement of a director in the meeting through video conferencing or other audio-visual means is interrupted or garbled, the Chairperson or CS shall request for a repeat or reiteration by the director.
11. If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote
12. From the commencement of the meeting until the conclusion of such meeting, no person other than the Chairperson, directors, Secretary and any other person whose presence is required by the Board shall be allowed access to the place Where any director is attending the meeting either physically or through video conferencing without the permission of the Board.
13. At the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, dissented from the decision taken by majority. The minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio-visual means
14. The draft minutes of the meeting shall be circulated among all the directors **within 15 days** of the meeting either in writing or in electronic mode as may be decided by the Board. Every director who attended the meeting, Whether personally or through video conferencing or other audio visual means, shall confirm or give his comments, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, **within 7 days** or some reasonable time as decided by the Board, after receipt of the draft minutes tailing which his approval shall be presumed.
15. After completion of the meeting, the minutes shall be entered in the minute book and signed by the Chairperson.

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Virtual AGM/EGMs

- **Section-108** of the Companies Act, 2013 provides for Voting through electronic means. The Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means General meetings, particularly when large numbers of shareholders are involved, can be very expensive and are not considered to be a cost effective.
- Companies may find virtual meetings help to achieve wider shareholders participation. Virtual annual meetings offer benefits to both companies and shareholders.
- With companies and investors becoming increasingly global, virtual meetings can save travel time and costs for shareholders, avoid traffic and other logistical delays and be easier to schedule.
- It will also eliminate the costs of an in-person meeting, including travel for shareholders and a company's directors and management, thereby allowing shareholders more time to attend more meetings in which they hold shares, as well as minimizing the amount of time that directors and management must spend at meetings. This in turn will increase the participation of shareholders who would otherwise not attend the meetings.

Advantages of Virtual AGM/EGMs

- Increase shareholder participation in meetings,
- Save time on travel and cost because of remote voting.
- Encourages more participation by investors across the world.
- Provides greater accessibility to shareholders who cannot be physically present due to distance.
- Enables institutional investors to attend more than one meeting in a day and protect shareholders interest.
- Reduce the cost of holding and conducting shareholder meeting, including the costs of the venue, stationary, transport and refreshments.
- Saves time of the Company's personal.

Difficulties in holding Virtual Meetings of Members:

- Security of the systems used.
- Streaming With quality without interruption.
- Providing with secure login and shareholder authentication for attendance, with ease of access for shareholders, and remote voting.
- Combined registration, voting and reporting software.
- Customized instant results screen and detailed audit reporting.
- Data Security of Logins and Passwords.
- Allowing the shareholders, the choice of device.
- the technology used must give all shareholders a reasonable opportunity to participate.

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SECRETARIAL STANDARD

Secretarial Standards – Meaning

1. Secretarial Standards are the policy documents relating to various aspects of secretarial practices in the corporate sector.
2. These standards lay down a set of principles which companies are expected to adopt and adhere to, in discharging their responsibilities.

Formulator of the Secretarial Standards

ICSI constituted the Secretarial Standards Board (SSB) in the year 2000 for formulating Secretarial Standards. SSB formulates Secretarial Standards taking into consideration the applicable laws, business environment and the best secretarial practices prevalent.

Composition of Secretarial Standards Board (SSB)

SSB having members from following authorities.

1. ICSI members working in Companies as well as in practice
2. Representatives of MCA,
3. Representatives of SEBI
4. Representatives of ICAI
5. Representatives of ICWAI

Scope and Functions of the Secretarial Standards Board

The scope of SSB is to identify the areas in which Secretarial Standards need to be issued by the Council of ICSI and to formulate such Standards, taking into consideration the applicable laws, business environment and best secretarial practices. SSB will also clarify issues arising out of such Standards and issue guidance notes for the benefit of members of ICSI, Corporates and other users.

The main functions of SSB are

1. Formulating Secretarial Standards
2. Clarifying issues arising out of the Secretarial Standards
3. Issuing Guidance Notes
4. Reviewing and updating the Secretarial Standards

Scope of Secretarial Standards

1. The Secretarial Standards do not seek to substitute or supplant any existing laws or the rules and regulations framed there under but, in fact, seek to supplement such laws, rules and regulations.
2. Secretarial Standards that are issued will be in conformity with the provisions of the applicable laws.

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3. However, if, due to subsequent changes in the law, a particular Standard or any part thereof becomes inconsistent with such law, the provisions of the said law shall prevail.

Procedure for issuing Secretarial Standards

SSB, in consultation with the ICSI council, shall determine the areas in which Secretarial Standards need to be formulated.
↓
SSB may constitute Working Groups to formulate preliminary drafts of the proposed Standards
↓
The preliminary draft of the Secretarial Standard prepared by the Working Group shall be circulated amongst the members of SSB for discussion and shall be modified appropriately.
↓
The preliminary draft will then be circulated to the members of the Central Council as well as to Chairmen of Regional Councils/ Chapters of ICSI, various professional bodies, Chambers of Commerce, regulatory authorities for ascertaining their views.
↓
On the basis of the preliminary draft and the discussion with the bodies/organizations, an Exposure Draft will be prepared and published in the "Chartered Secretary", the journal of ICSI, and also put on the Website of ICSI to elicit comments from members and the public at large.
↓
After taking into consideration the comments received, the draft of the proposed Secretarial Standard will be finalized by SSB and submitted to the Council of ICSI.
↓
The Council will consider the final draft of the proposed Secretarial Standard and finalize the same in consultation with SSB. The Secretarial Standard on the relevant subject will then be issued under the authority of the Council.

SECRETARIAL STANDARDS UNDER THE COMPANIES ACT, 2013

Introduction and Need

The term 'Secretarial Standard' is defined as an explanation to section 205 of the Companies Act, 2013 to mean secretarial standards issued by ICSI constituted u/s 3 of the Company Secretaries Act, 1980 and approved by the Central Government. Thus, for the 1st time, Secretarial Standards have been accorded statutory recognition under the Companies Act, 2013.

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The formulation of Secretarial Standards by the SSB and its statutory recognition is a unique and pioneering step towards standardization of diverse Secretarial practices prevalent in the corporate sector. No similar Standards are in existence elsewhere in the world.

Generally, in addition to the Secretarial Standards, the requirements laid down under any other applicable laws and rules and regulations, need to be complied with. However, in case of variations in any provision of the applicable laws and the Secretarial Standards, the stricter provisions need to be complied with.

If, due to subsequent changes in the law, a particular Standard or any part thereof becomes inconsistent with such law, the provisions of the said law shall prevail.

Section 118 (10) of the Companies Act, 2013 requires every company to observe Secretarial standards with respect to Board meetings (SS-1) and General meetings (SS-2).
Also, as per section 205(1) (b), it is the duty of the company secretary to ensure that the company complies with the applicable secretarial standards.

Note: Earlier SS were approved by CG on 10th April 2015 and were published in Gazette on 23rd April 2015. They were supposed to be effective from 1st July 2015 but it was withdrawn on 30th Sept 2017 without effecting the enforceability of SS 1 and SS 2 during the period before such withdrawal.
Now Revised SS-1 and SS-2 are approved by CG on 14th June 2017 which shall be effective from 1st October 2017.

Even Section 121 of the Companies Act, 2013 requires confirmation with respect to compliance of Secretarial Standards in the Report on the AGM.

Section 205 (1) of the Companies Act, 2013 lays down the functions of the Company Secretary which inter-alia include ensuring that the company complies with the applicable Secretarial Standards.

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MEGA FIRMS

Introduction

In a rapidly changing economy, industrial environment and emergence of the need for corporate governance and ethical business practices of voluntary disclosures, role of a PCS has also changed substantially over last three decades. PCS has become a crucial player. The stakeholders are becoming vigilant towards the compliances. It is the prime duty of a professional to meet the expectations of the stakeholders at any given point of time.

The Company Secretaries profession has also obtained new dimensions from being conscience keeper to compliance officer, governance professionals, Advisor, strategist for the growth of corporate. Presently the Company Secretaries profession has achieved a significant position in corporate world to step in a leadership role in guiding the corporates for the success and sustainable growth. The Company Secretaries to assume the leadership position with new role, values and approach. It is now imperative for Company Secretaries to act as catalyst for change and, help decision makers in setting the direction of corporate to achieve excellence.

The Companies Act, 2013, & Insolvency and Bankruptcy Code 2016, has considerably enhanced the role and responsibilities of company secretaries both in employment and in practice. CS is a KMP in a company, responsible to ensure the effective and efficient administration of the company and certifying the company's compliance with the provision of the Act. This is challenging.

ADOPTION OF MODE OF PRACTICE

To meet the expectation and to survive competition, moulding, changing and upgrading oneself is a must. For stability as well as growth one needs to join hands with professional fraternity and have synergy. Synergy is possible by way of establishing big firms, putting minds, hands and intelligence together. Such flow of synergies would enable the Practicing community as a whole to grow big, achieve higher goals and maintain highest degree of quality which otherwise one would not be able to achieve as a sole proprietor.

Features (Limitations) of a single practicing professional are enumerated as under:

1. Irregular Cash flows;
2. Capital investment. (Fixed as well as Working);
3. No limit on working hours , clients expect PCS to be available 24*7;
4. No work no pay — is a rule;
5. Need to continuously update oneself;
6. No body to protect your mistakes, PCS is directly exposed to all kinds of acts of omission & commission;
7. Has to create his own infrastructure – right from acquiring office premises, PCs, Computer networking, Office furniture, hardware, software, its maintenance;
8. Has to have staff, their appointments, promotions, incentives, salaries, HR management;
9. Cannot directly or indirectly solicit clients.
10. No pension, no provident fund, no gratuity, no perquisites, no fringe benefits;

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11. May not afford air travel or even train travel in first class, on the first day;
12. No paid leave, no leave travel concession, No casual leave, No sick leave;
13. Encroachment on family time.

Of course there are lots of positive aspects of being in practice the most important being, ***Quid Pro Co*** i.e. more you work more you get. PCS is his own master, he generates employment, has flexibility of working hours, has reasonable assurance of sustained earnings in long run, no fear of losing employment at advanced age.

Let's now discuss certain features of the two forms of enterprise a practicing professional may choose i.e. Partnership Firm (including LLP) & Sole Proprietor:

Firm with several partners	**Proprietor**
Various avenues of practice, un-trodden areas can be explored.	Likely to get restricted to the "Routine" procedural matters.
Knowledge management becomes easier as partners can help each other in their respective areas of expertise.	Knowledge management becomes difficult being the only person. No other person is available to support /guide. Keeping track of latest developments, case law, notifications, circulars becomes a daunting task.
Inherent risks associated with the practice are shared with others.	Risk bearing has to be shouldered by one person. No one available to share the risks.
Several partners can render multi-dimensional services.	Difficult for a single individual to provide multiple services say under GST, Income Taxes, FEMA along with Company Law.
Partners inter-se should have full faith & trust.	Not relevant since it is 'one man show'
Frequencies of the partners should match. It is desirable that their family background, culture, political thinking should be more or less similar.	Not relevant since it is 'one man show'.
Freedom of decision making gets restricted.	Not required Proprietor is his own master. No need to consult others
All partners should be mentally prepared to share revenues.	Not required Proprietor is his own master. No need to share revenues.
One is responsible to the wrongs & liabilities of his partners.	Not relevant since it is 'one man show'
There should not be communication gap.	Not relevant since it is 'one man show' inter-se
One of the partners can afford to become Resolution professional (RP) / valuer .	It is very difficult for a proprietor to act as RP / Valuer while simultaneously handing is routine Practice as PCS.

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Applicable Rules, Regulations and Guidelines for PCS or Firm of PCS
Whether a PCS or a Firm of CS they are subject to Rules, Regulations and Guidelines enumerated as under:

1. Company Secretaries Regulations, 1982
2. Schedule I & III of CS Act, 1980 in relation to Professional misconduct.
3. Guidelines for requirement of maintenance of a register of attestation certification services rendered by PCS/firm of PCS.
4. Guidelines for issuing compliance certificate and signing of annual return.
5. Guidelines framed by the council relating to approval of proprietorship concern/firm's name under regulation 169 of the CS Regulations, 1982
6. Guidelines for advertisement by PCS.
7. Guidelines for compulsory attendance of Professional development programmes by the members
8. Mechanism for maintenance of attendance records of members at professional development programmes and issuance of Certificates for programme credit hours (PCH)
9. Guidelines for peer review of attestation services by PCS.
10. Guidelines for professional dress of CS.
11. Guidelines for setting up and Conversion of Firms of PCS into LLP.

WHAT IS MULTIDISCIPLINARY/MEGA FIRM?
Mega Firm can be described as a Partnership firm with more than 25 partners. A firm which provides core professional service of a particular profession along with the allied and ancillary service with equal competence under one roof is a multidisciplinary firm. **For example,** company and corporate law is core knowledge for CS, however, they can acquire expertise in any other area like direct- indirect taxation, labour laws, economic laws, finance, accounting, insurance, international business and IPRs and they may be in position to provide single window business solutions.

Multidisciplinary Firm – A PCS may form multi- disciplinary firm with the member of other professional bodies as prescribed under regulations 168A and 168B of The Company Secretaries Regulations, 1982, in accordance with the regulating guidelines of the Council for functioning and regulation of such multidisciplinary firm.

Regulation 168 A. Other Professional bodies
(1) A person has to be member of any of the following, namely :-
(a) The ICAI established under the Chartered Accountants Act, 1949;
(b) The ICWAI established under the Cost and Works Accountants Act, 1959;
(c) Bar Council of India established under the Advocates Act, 1961;
(d) The Indian Institute of Architects established under the Architects Act, 1972;
(e) The Institute of Actuaries of India established under the Actuaries Act, 2006;
(f) The membership of the professional bodies or institutions whose qualifications relating to Company Secretary ship are recognized by the Council.

(2) The following shall be the persons qualified in India, namely :-

1. CA within the meaning of the Chartered Accountants Act, 1949;

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2. Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959;
3. Actuary within the meaning of the Actuaries Act, 2006;
4. Bachelor in Engineering from a University established by law or an institution recognized by law;
5. Bachelor in Technology from a University established by law or an institution recognized by law;
6. Bachelor in Architecture from a University established by law or an institution recognized by law;
7. Bachelor of Law from a University established by law or an institution recognized by law;
8. MBA from Universities established by Law or Technical Institutions recognized by All India Council for Technical Education.

Regulation 168B: of Company Secretaries Regulations, 1982 determines the membership of professional body for partnership, accordingly For the purposes of entering into partnership under clauses (4) and (5) of Part I of the First Schedule to the Act, a person shall be a member of any of the following professional bodies, namely:-

- The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;
- The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959;
- Bar Council of India established under the Advocates Act, 1961;
- The Institute of Engineers or Engineering from a University established by law or an institution recognized by law;
- The Indian Institute of Architects established under the Architects Act, 1972;
- The Institute of Actuaries of India established, under the Actuaries Act, 2006;
- Professional bodies or institutions outside India whose qualifications relating to CS recognized by the Council.

This actually introduces the concept of multi-disciplinary firms or mega firms.

Why such firms?
Keeping in view of the present needs of the corporate and multi-dimensional growth of CS profession especially in the areas of practicing in the areas of Corporate Laws, Labour laws, RBI/ FEMA, acting as Secretarial Audit, Resolution Professional Insolvency Bankruptcy Code, GST Practitioner there is a need to structure and build the Multidisciplinary(MDF)/mega firms. There is a huge demand and scope for a multifunctional firm, where several services are provided under one roof. Clients always have a comfort level in dealing with such firms. They are assured of timely and quality service since even if one of the Partners is not available for consultancy they can bank on the others.
MDF is a joint or collaborative venture amongst independent individuals. **Therefore, every one wishing to join hands should understand that:**

1. All minds should work together and in unison;
2. Say go to ego;
3. Mutual faith and respect lays strong foundation;
4. Unanimity shall be the rule on important policy decisions;
5. Financial discipline is a must;

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6. Founder partners shall be given equal status;
7. Income of the firm shall be distributed at short regular intervals;
8. One shall not put undue influence on the others or show that he is king pin of the association.

The nature of a multidisciplinary firm fosters collaboration. The common office space, with professionals working in close proximity to one another, provides each professional with a strong set of resources in the firm. In addition, this spirit of working together creates greater opportunity for collaboration so the total needs of the client are best met.

- **Working in a team environment**: The concept of MDF will have an opportunity to work with team members who share interests, expertise, ideas, and work ethically.
- **Exposure to various and different works**: Every client has different expectations, needs, audience, products and services, so consultants get to oversee projects of all kinds. In MDF being more than 2 partners having different experience in different fields the apprentice and employee will have an exposure to various and different works. With each partners specialized knowledge the MDF may venture into new areas of practice.
- **Cost effective:** the With large investment budgets, the MDF have not only create state-of-the-art training facilities, they also may have much more developed infrastructure, processes and tools which can make your life less stressful when trying to sell or deliver a project. The overheads and the risks get distributed amongst the partners.
- **Exceptional training and on-boarding**: MDF provides an opportunity to have a good training facilities whether on job training or off job training to get things started off on the right foot. The goal of on job training or off job training is to set you up for success, so during this training you can expect to receive the resources, knowledge, and tools to do so.
- **Continuous learning:** The partners of MDF having multi-dimensional experience they can impart continuous training by adapting to new trends in the Profession. The great thing about staying on your toes is that clients appreciate it because you'll be able to develop relevant and successful ideas. Though it might sound overwhelming to always be on top of news and trends, it will eventually become habit – and the results are worth it!
- **Big growth opportunities**: With the right work ethic and dedication, MDF can experience professional growth early compared to the other small firms. MDF may attract big multinationals. They get comfort about availability of at least one of the partners, if they are dealing with a firm rather than an individual. Senior partners can concentrate on critical assignments which obviously are more lucrative.
- The MDF have an international or global scope and reach, offer diversified services and can draw from a large pool of consultants, skills and expertise, and hence become a Mega Firm.
- **Revenue sharing**: By appropriate revenue sharing model a PCS who himself may not have subject expertise can get a share from the assignments of that subject being executed by others.
- **Structure & Processes**: The structure for execution of works or assignments will be more systematic and the process will be cost effective due to the standard processes and procedure. The hiring and training of people will be more systematic there by productivity of the company will be improved

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- **Corporate or Industry perception**: When considering different professional firms, the corporate client may be preferring to one of the familiar, renowned MDF having brand image. The MDF may appear like a known quantity and can draw from a large pool of partners and associates.
- **Reputation & risk-adjusted value**: Many of the bigger client's organizations may prefer that "you never go wrong when hiring one of the MDF", since the renowned brands of the MDF are perceived as proxy for high levels of professionalism, quality and reputation. Credibility of the firm and brand gets established in long term.

RISKS

Lack of understanding and multiplicity of directions to the staff could be disastrous.

1. More cost on infrastructure and technology.
2. Dominance of senior partners over the younger partners.
3. Defining exit route is difficult.
4. Lack of transparency may lead to disputes.
5. If crack develops in mutual faith & trust, very difficult to cure.
6. Communication gap between partners

PROCESS OF CONSTITUTION

The process of formation of MDF shall be an outcome of conscious and sincere decision and it is essential that the like-minded professional should deliberate and take this decision. It shall be ensured that the proposed constituents have expertise in different disciplines. There could be series of meetings before MOU is reached. It

is advisable to work under MOU for one year. This works as a cooling period and for better understanding each other such trial period help in getting acclimatised. Mutual faith and understanding is *sine qua non*. Time has to be given to understand the compatibility of the individuals to each other. Once the initial bridge is successfully crossed then formal partnership may be constituted on the agreed terms. It will be in the long term interest of the MDF to have all the founder partners on equal footing. Their intellectual level shall be at par. During the reasonable period individual practice existing if any, shall be introduced in the firm. When it is proposed to add new partner, apart from settling commercial terms, it is suggested that the MDF shall enter into MOU effective at least for one year with the proposed partner and after understanding each other's compatibility he or she may be admitted to the MDF.

Agreement between partners

Partners must enter into a partnership agreement defining *inter alia* the process of decision making, allocation of duties, responsibilities, delegation of authorities, revenue sharing and exit route.

Management of Firms

The mega firm requires effective management skills including skills for handling finance, dealing with human resources and day to day administration of the office. The management of a MDF is in itself a major challenge.

(a) Operational functions

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Operational functions are for providing services by the firms, the operational functions requires expertise in the domain areas by each of the partners

(b) Administrative functions

Partners should allocate different administrative functions required for day to day functionality of the firm. For example infrastructure availability- right from acquiring office premises, handling reception, attending to calls, inward-outward, record keeping, PCs, library, computer networking, office furniture, hardware, software, its maintenance, brand building, etc.

(c) Human resources

The Mega firms over a period of time creates a large pool of talented people. They need to be offered extremely competitive salaries and benefits, career and learning opportunities. Right from appointment of staff, promotions, incentives, salaries, HR management, require proper knowledge of human resources skills

(d) Client relationship

Michael R. Caplan, chief operating officer of Goodwin Procter, argues the benefits of a multi-disciplinary, full- service model in the New York Law Journal: "When law firms treat client relationships as strategic partnerships, flexibility, transparency, and communication are paramount, investment in risk and reward is shared, and all firm resources are leveraged for the client's benefit. Only then does the relationship grow and prosper."

(e) Public Relationship and Brand building:

Admittedly a PCS firm cannot advertise or solicit clients . The only way to grow is rendering excellent timely and quality service to the client who certainly recommend the name of a good consultants to their peers. There cannot be a marketing department in MDF but there has to be PR department which ensures cordial relations with the existing and probable clients.

Revenue Sharing Models

In the long term success of the MDF the revenue sharing model has to be designed to suit the given situation. Partners may adopt simple revenue sharing model to share profits and losses equally. In this model it is assumed that each one is bringing equal business and generating equal revenue. However, in reality if it doesn't happen it may give rise to sense of discomfort against the person who is continuously showing less contribution but at the same time getting equal share of profits.

Therefore, it is essential to device "performance, contribution and efficiency based" revenue sharing model. Assume a situation where A,B,C,D and E are the partners expert in different disciplines. The revenue sharing model could be the following:

1. Partner bringing new client shall be given referral or induction share, say, @ 15% of the fees settled and received; it can be for the first year or for given number of years;
2. Certain percentage of fees, say 15% shall be retained in business in common pool for meeting expenses;
3. 70% of the fees shall be given to the partner or partners who actually work on the assignment (assignment share). When more than one partners are involved in an assignment their share can be determined based on respective role;
4. At the year-end after meeting expenses resultant profit shall be shared in proportion of contribution of individual in the gross earnings/ net profit of the firm.

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5. Internally, different verticals can be created and surplus generated by each one can be assessed as an independent cost centre.

This model motivates each partner to bring more and more business into the firm and also to work for maximization of his share and wealth of the firm.
There could be more tailor made revenue sharing models, however, the model based on performance, contribution and efficiency is likely to work better.

Conclusion

One stop or single window solutions or services always attract clients or customers. We can witness that conventional shops are being replaced by big shopping malls. In the same manner there is need for corporate and business sector to have "service malls". It always works better for a business enterprise to have handy team of consultants, both from cost and management point of view. It is most likely that MDF giving professional advice considers all angles and dimensions rather than an advice only from one point of view. Well considered advice by MDF can add value to their clients. Off late, business enterprises have become professionally shroud and they always like to have a professional firm who is willing to invest in improving their knowledge of the industries they serve. MDF is the right platform that caters to the requirement of the business enterprises. With specialized partner, "knowledge management" becomes easier and less costlier.

MDF is a step towards mega firm. It is paradigm shift from traditional approach of 10X10 offices to a global office. MDF will put the professionals in general and company secretaries in particular on fast track. Large firms will still become larger and one day the global business enterprise will call them a "Mega Firm".

1. Can there be a Partnership firm in between CA, CS, CWA, Advocate?

CA/CWA may become partners of PCS only for non-attestation services i.e. only for the purposes as contemplated by clause nos. 2, 3, 4 & 5 of the 1st Schedule and CA / CWA cannot become full-fledged partners as contemplated by Clause 1 of Part I of the 1st Schedule. That is to say a PCS even if he is allowed to be a partner of a CA, will not be able to sign the Auditors report on behalf of the multidisciplinary firm.

2. Can there be a PCS LLP in between CA, CS, CWA, Advocate?

Yes, there can be a PCS LLP in between CA, CS, CWA, Advocate.

3. How many Partners LLP of Practicing professional can have ?

The minimum number of members of LLP under LLP Act, 2008 is 2, there is no restriction on a maximum number of members.

4. Are there any restrictions on sharing fees with members/ non-members of ICSI ?

A PCS can partake of his profits with other members of the Institute and with members of any other professional bodies specified in this regard or with such other persons having such qualifications as may be prescribed. A PCS as recipient can enter into profit sharing arrangement with a member of the Institute and/or with a member of such other professional body or other person having qualifications.

5. Can MEGA firm charge fees to the clients based on the result of the matter/ success of the litigation?

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Fees shall be charged for the professional work done

6. Can a Mega Firm have branches within / outside India? What regulations guide operations of such Branch office?

Sec 37(1) of CS Act, 1980 where a PCS or a firm of such CS has more than one office in India, each one of such offices must be in the separate charge of a member of the Institute.

Applications for opening of Branch Office without a member in the separate charge at places where there are few or no PCS are decided by the Council on the merits of each case subject to the following general conditions.

The branch office shall be an independent office and not in the office of some other professional.

One of the partners of the firm shall attend the branch office **at-least 100 days** in a financial year. However, if a candidate who has passed Intermediate examination of the Institute and also completed Management/ Apprenticeship Training or has passed the Final Examination of the Institute is posted at the said branch office, one of the partners of the firm shall attend the branch office at-least 60 days in the financial year.

The approval shall be valid for a period of 2 years within which a member must be appointed in the separate charge of the branch office.

Section 37(2) requires every PCS or firm of such CS maintaining more than one office to send to the Council a list of offices and the persons in charge thereof and also to intimate any change therein. Regulation 163 of the CS Regulations, 1982, requires the changes to be intimated to the Council within 1 month of such change(s).

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DRAFTING UNDER COMPANIES ACT, 2013

Practical Aspects of Drafting Resolutions

The following points should be kept in mind while **drafting resolutions**, both for Board and general meetings -

a) All essential facts are included in the resolution - e.g., the resolution for re-appointment of managing director should indicate that the re-appointment is subject to the approval of the Central Government if approval of the CG is required and should also cover the period of appointment, terms and conditions of such appointment
b) Surplus and meaningless words or phrases should not be included in resolutions
c) Resolutions must indicate the relevant provisions or sections of the Act and the Rules pursuant in which they are being passed
d) If a resolution is one which requires the approval of the Central Government or confirmation the NCLT/Court, this must be stated in the resolution.
e) A resolution must indicate when it will become effective.
f) A resolution must confirm itself to one subject matter and 2 distinct matters should not be covered in one resolution.
g) A resolution should be crisp, concise and precise and should be flexible enough to take care eventualities.
h) Where lengthy resolutions have to be approved, they should be divided into paragraphs and should be arranged in their logical order having regard to the subject matter of the resolution.
i) A resolution must be so drafted that anybody not present at the meeting or anybody referring to at a later date will know clearly what the decision was at that meeting without referring to any other document

Specimen of the Special Resolution for altering AOA of a Private Company converting it into a Public Company

TYPE OF REOLUTION: SPECIAL RESOLUTION
TYPE OF MEETING: GENERAL MEETING

"RESOLVED THAT

A. Pursuant to the applicable provisions of the Companies Act, 2013, the company be and is hereby converted into a public company.
B. The name of the company be and is hereby changed from _____Private Limited to _____ Limited.
C. The regulations contained in the document submitted for consideration and approval of this meeting and initialized by the chairman of the meeting for the purpose of identification, be

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and are hereby approved and adopted as the articles of association of the company in substitution for, and to the exclusion of, the present articles of association of the company."

Explanatory Statement

The Board of directors of the company, at its meeting held on ...., discussed the pros and cons of a public limited company and a private limited company, and decided to convert the company into a public limited company and also decided that the present articles of association of the company.

Which were adopted by the company when it was incorporated as a private limited company, be also instituted by a new set of articles.

Since the proposed alterations, deletions, insertions etc. to the present articles of association were the Board decided that it would be convenient to adopt an altogether new set of articles of incorporating all the proposed alterations your director commend the proposed special resolution for your consideration and adoption of the articles of association of the company in place of the existing articles of association of the company .

Name of the directors is concerned or interested in the proposed resolution –

1.

2.

Specimen of the Special Resolution for Change of Name of the Company

TYPE OF REOLUTION: SPECIAL RESOLUTION

TYPE OF MEETING: GENERAL MEETING

"RESOLVED THAT

A. Subject to the approval of the Central Government, pursuant to the proviso to Section 13 of the Companies Act, 2013, as a consequence of the conversion of the company from a private limited company into a public limited company, the name of the company be and is hereby changed from ' …….. Private Limited" to……. Limited"; and

B. Clause I (name clause) in the memorandum of association of the company be and is hereby altered substituting the same with the following:
'The name of the company is ....Limited."

EXPLANATORY STATEMENT

The Board of directors of the company had, at its meeting held on ...., resolved that consequent upon conversion of the company from private limited company to public limited company, the name of the company be changed from "..... .. Private Limited" to ……. Limited" and according clause I (name clause) in the memorandum of association of the

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company is to be altered by substituting the same with a clause as set out in the notice for approval of the shareholders of the company.

No director is concerned or interested in the proposed resolution.

Specimen of The Resolution for Consolidation of shares

TYPE OF REOLUTION: ORDINARY RESOLUTION
TYPE OF MEETING: GENERAL MEETING

"RESOLVED THAT-

A. Pursuant to Section 6l(l)(b) and other applicable provisions, if any, of t e companies Act.2013 and Article... of Articles of Association of the company, all the 5,00,00,000 (Rs. five crore) enquiry shares of 5 (Rupees five) each of the company be and are hereby consolidated into two crore and fifty lakh (Rs. 2,50,00,000) equity shares of '10/- (Rupees ten) each
B. all the present shareholders holding in all 2,00,00,000 (Rs. two crore) issued, subscribed and 5.1. paid equity shares of 5 (Rs. Rupees five) each he issued, in lieu of their present shareholding the number of fully paid consolidated equity shares of 10 (Rupees ten) each.
C. the Board of directors of the company be and is hereby authorized to take all the necessary steps for giving effect the foregoing resolution, including recall of the existing share certificates issue of new share certificates in lieu of the existing issued share certificates in terms of the foregoing resolutions and in accordance with the applicable provisions of the Companies Act, 2013 read with Companies (Share Capital and Debentures) Rules, 2014."

Specimen Resolution of the Board for Appointment of Additional Director

TYPE OF REOLUTION: BOARD RESOLUTION
TYPE OF MEETING: BOARD MEETING

"**RESOLVED THAT** pursuant to the provisions of article .... of the Articles of Association of I company, Shri "Y" who has signified his consent to act as a director, be and is hereby appoint: - an additional director of the company to hold office till the next annual general meeting."
RESOLVED FURTHER THAT Shri .... Secretary/Director be and is hereby authorized to submit form **DIR 12** with the register of Companies and to do all such acts and deeds as may be required.

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Specimen of Notice Of Board Meeting

Mr. ……

Director,
New Delhi

Dear Sir,

A meeting of the Board of Directors of the Company Will be held on (day of the week), the…….. (date)…….. (month)……. (year) at (a.m./p.m.) at the registered office of the Company.

The Agenda of the business to be transacted at the meeting is enclosed.

You are requested to make it convenient to attend the Meeting.
Yours faithfully,
For……

(Signature)

(Name)
(Designation)

AGENDA OF FIRST BOARD MEETING

1. To elect the Chairman of the Meeting.
2. To take note of the certificate of Incorporation of the company, issued by the Registrar of Companies.
3. To take note of the Memorandum and Articles of association of the company, as registered.
4. To take note of the situation of the Registered Office of the company.
5. To confirm note the appointment of the first Directors of the company.
6. To read and record the notices of disclosure of interest given by the Directors.
7. To adopt the Common Seal (if any) of the company.
8. To fix the financial year of the company.
9. To authorize printing of share certificates
10. To authorize the issue of share certificates to the subscribers to the Memorandum of Association of the company.
11. To consider the appointment of the first Auditors
12. To approve preliminary expenses and preliminary contracts.
13. To consider the appointment of the Managing Director/ whole-time Director/Manager and Secretary, if applicable and other senior officers.

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Minutes of The Meeting of The Board

MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF (NAME OF THE COMPANY) HELD ON_____(DAY)_____(DATE MONTH & YEAR) AT_____ (TIME) AT (VENUE)

PRESENT

MR. A	- CHAIRMAN
MR. B	- MANAGING DIRECTOR
MR. C	- DIRECTOR

SPECIAL INVITEE

MR. CA - REPRESENTING (NAME OF THE STATUTORY AUDITORS)

IN ATTENDANCE - **MR. _____**, Company Secretary

CHAIRMAN- -Mr. A Presided.

LEAVE OF ABSENCE

Mr. D and Mr. E, who had expressed their inability to attend the meeting, were granted leave of absence.

1. **CONFIRMATION OF THE MINUTES OF THE LAST BOARD MEETING**
   The minutes of the previous Board Meeting held on _____ as circulated to the Directors were confirmed and signed.

2. **TO CONSIDER. APPROVE AND AUTHENTICATE THE BALANCE SHEET AND PROFIT & LOSS ACCOUNT FOR THE YEAR ENDED 31st MARCH 20__**
   The Draft Balance Sheet and Profit & Loss Account for the year ended 31st March 20__ along with Schedules and Notes to Accounts were placed before the Board for consideration and approval. After some discussion, the Board passed the following resolutions:

   "RESOLVED THAT The drat Balance Sheet and profit & Loss Account as at 31st March 20__ be and are hereby approved and that Mr. B, Managing Director, Mr. C, Director and Mr. CS, Company Secretary of the Company be and are hereby authorized to sign the same and the said accounts be submitted to the Auditors for their report thereon."
   (The aforesaid accounts duly signed by the said Directors were then submitted to the Auditors for their signatures and report. For this, the Chairman decided to adjourn the meeting for a short while and after receiving the Auditors Report on the Accounts, the Directors reassembled to transact the further business of Agenda).

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3. **TO RECEIVE AN1) CONSIDER AUIDITORS; REPORT ON THE ACCOUNTS FOR THE YEAR ENDED 31st MARCH 2016**

   The Auditors 'Report on Accounts for the year ended 31st March 20__ was place on the table for perusal. The Board noted the Same.

4. **TO DECIDE ABOUT THE DIRECTORS WHO WILL RETIRE BY ROTATION AT THE ANNUAL GENERAL MEETING OF THE COMPANY**

   The Board was informed that as per the provisions of the Companies Act, 2013 at least 2/3rd of the total number of Directors should be the persons whose period of office shall be liable for retirement by rotation and l/ 3rd of such Directors should retire by rotation at every Annual General Meeting.

   In order to comply with the aforesaid provisions, the Board passed the following resolution

   "RESOLVED THAT pursuant to the provisions of Section 152 of the Companies Act, 2013 Mr. C. Director of the Company shall retire by rotation at the Annual General Meeting of the Company.

5. **TO RECOMMEND APPOINMENT OF AUDITORS FOR THE NEXT FINANCIAL YEAR**

   The letter dated August 5, 20__ received from M/s. (Name of the Auditors), Chartered Accounts informing that their appointment, if approved, will be within requirement as per Companies Act, 2013, was placed before the Board for information. The Board recommended the appointment of Auditors to the Shareholders of the Company by passing the following resolution:

   "RESOLVED THAT M/s. (Name of the Auditors), Chartered Accountants, be recommended for appointment as Auditors of the Company for the Financial Year 20__-20__."

6. **TO CONSIDER AND APPROVE THE DIRECTORS REPORT TO THE SHAREHOLDERS**

   A Draft of Directors' Report to the members of the Company was placed before the Boar; I will approval. The Board considered the report and approved the same by passing the resolution:

   "RESOLVED THAT the Directors' Report for the year ended 31st March, 20__ as per the Sai submitted to this meeting be and is hereby approved and the Chairman of the Company be hereby authorized to sign the same for and on behalf of the Board.

   RESOLVED FURTHER THAT the Chairman be and is hereby also authorized to make such changes / amendments in the report as may be deemed necessary before issuing the same to the members"

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7. **TO DECIDE DATE. TIME AND VENUE OF THE ANNUAL GENERAL MEETING OF THE COMPANY**
   The Board noted that Annual General Meeting of the Company is statutorily required to be held on 30th September 20__. In view of the above, the Board passed the following resolution:

   "RESOLVED THAT the Annual General Meeting-of the Company be held at (Address of Registered office) on Thursday, the 31th day of September, 20__ at l 1.00 am."

8. **TO CONSIDER AND APPROVE THE NOTICE TO THE SHAREHOLDERS FOR THE ANNUAL GENERAL MEETING OF THE COMPANY**
   A draft of the Notice for Annual General Meeting of the Company is statutorily required to be held on or before 30" September 20__. In view of the above, the Board passed the following resolution:
   "RESOLVED THAT the draft Notice with agenda be and is hereby approved and Mr. CS, Company Secretary of the Company be and is hereby authorized to issue the same under his signature to be persons specified under Section 101 of the Companies Act, 2013."

Sd/-

CHAIRMAN

Notice Of Annual General Meeting

NAME OF THE COMPANY

Notice is hereby given that the Sixth Annual General Meeting of the Shareholders of the Company will be held on Thursday the 30th day of September, 2016 at (Address of Registered Office) at 10AM to transact the following business:

ORDINARY BUSINESS

1. To receive, consider and adopt the audited Profit and loss Account for the year ended 31st March, 20__, the Balance sheet as at that date and the Reports of Directors and auditors thereon.
2. To appoint a Director in place of Mr. D, who retires by rotation and being eligible, offers himself for reappointment.
3. To appoint Auditors of the Company and fix their remuneration.

SPECIAL BUSINESS

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4. To consider and, if thought fit, to pass, with or without medication(s), the following resolution as Ordinary Resolution:

"RESOLVED THAT pursuant to Section 6 (1)(a) and other applicable provisions, if any, of the Companies Act, 2013 and Article of the Articles of Association of the company, the Authorized Share capital of the company be and is hereby increased from Rs. 50,00,000 (Rupees fifty lakh) divided into 5,00,000 (five lakh) equity shares of 'Rs. 10 each to' Rs. 5,00,00,000/- (Rupees five crore) divided into Rs. 50,00,000 (fifty lakh) equity shares of ' 10 (Rupees ten) each by creation of 45,00,000 equity shares of ' Rs. I0 each ranking pari passed in all respect with the existing equity shares."

RESOLVED FURTHER THAT the existing clause V of the Memorandum of Association of the Company be and is hereby substituted by the following:

Clause V. The authorized share capital of the company is Rs. _____ (Rupees……..only) divided into..... equity shares of Rs..... each."

By Order of the Board
Place: New Delhi.
Date: 1th September, 2016.

Sd/-
COMPANY

SECRETARY

NOTES:

1. **A MEMBER ENTITLED TO ATTEND AND VOTE AT THE MEETING IS ENTITLED** TO **APPOINT A PROXY TO ATTEND AND VOTE INSTEAD OF HIMSELF AND SUCH** A **PROXY NEED NOT BE A MEMBER.**
2. Proxies in order to be effective must be received by the Company not less than 48 hours before the time for holding the Meeting.
3. Explanatory Statement pursuant to Section 102 of the Companies Act, 2013 is annexed hereto.

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