VG STUDY HUB

CS-EXECUTIVE

MODULE-1

COMPANY LAW

(VOLUME -1)

FOR JUNE/DEC 2023 EXAMS

SOURCE: ICSI MODULE

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PREFACE OF THIS BOOK

This Book adopts a fresh and new approach to understand and gain in depth knowledge of the Provision of the Companies Law in an illustrative Manner for the Students of CS EXECUTIVE and other Law Students. The Law Stated in the Book is as per the Amended Provisions and the problems are solved keeping in Mind the amended provisions of The Companies Act, 2013.

This Book helps you to understand the provision in an easy and better way. This is designed to ease your Study of the company Law. Moreover, the objective of the book is to present the Law in Simple and easy language so as make topics student friendly by illustrating provisions in graphical and tabular manner.

The Book has been written keeping in view of the new syllabus as Notified by ICSI.

Key Features of the Book:

- **Suitable for Detailed Discussion and in depth understanding of the topic**: The book covers entire syllabus at a place along with suitable illustration for Concepts for better Understanding.
- **Includes most important solved problems**: The book contains practical questions that will help with help in the application of law.
- **All Concepts in Simple and Easy Language:** All the Provisions have been explained in easy language and also in graphical and tabular manner to make study easy and simple.

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I would like to thank my Lord for his constant courage, blessing and everything that has been provided by Almighty to each one of us.

I would like to thank my parents for their constant love, support, encouragement, and blessing and for being a big source of inspiration.

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Chapter 1 : Preliminary

1. INTRODUCTION

The Companies Act, 2013 is an Act to consolidate and amend the law relating to companies. The legislation was necessitated to meet changes in the national and international economic environment and for expansion and growth of economy of our country. The Companies Act, 2013 received the assent of the Hon'ble President of India on 29th August 2013 and was notified in the Official Gazette on 30th August 2013 for public information stating that different dates may be appointed for enforcement of different provisions of the Companies Act, 2013, through notifications.

Section 1 came into force on 30th August 2013; 98 sections came into force on 12th September 2013; 143 sections were enforced from 1st April 2014 and so on.

The Companies Act, 2013 is rule based legislation with 470 sections and seven schedules. The entire Act has been divided into 29 chapters. Each chapter has at least one set of Rules. The Companies Act, 2013 aims to improve corporate governance, simplify regulations and strengthen the interests of investors. Thus, this enactment makes our corporate regulations more contemporary.

2. SHORT TITLE, EXTENT, COMMENCEMENT AND APPLICATION

Section 1 of the Companies Act, 2013 deals with the title of the Act according to which this Act may be called as the Companies Act, 2013.

Further, section deals with the extent to the applicability of the Act. It says that the Act shall extend to the whole of India.

This section also specifies the date of commencement of this Act. Accordingly, this section shall come into force at once and the remaining provisions of this Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

This Section furthermore states of the applicability of the Act. The provisions of this Act shall apply to-

(a) companies incorporated under this Act or under any previous company law;

Example 1: ABC Ltd. was incorporated on 1.1.1972 under the Companies Act, 1956. So, the Companies Act, 2013 shall also be applicable on ABC Ltd.

(b) insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act,

1938 or the Insurance Regulatory and Development Authority Act, 1999;

(c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949;

(d) companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003;

(e) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act, and

(f) such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification.

Example 2: Food Corporation of India (FCI), National Highway Authority of India (NHAI) etc.

Note: The term "except in so far as" shall mean excluding to the extent of i.e. if any provision of the Companies Act is inconsistent with any of the provisions of other Act (Insurance Act, Banking Regulation Act, Electricity Act, etc.) to which the company is regulated than that company shall comply with the provisions of respective Act/Acts to which it is governed and regulated by.

3. DEFINITIONS

Section 2 of the Companies Act, 2013 is a definition section. It provides various terminologies used in the Act. Definitional Sections or Clauses, are known as 'internal aids to construction' and can be of immense help in interpreting or construing the enactment or any of its parts.

Also, according to clause 95 of section 2, words and expressions used and not defined in this Act but defined in the Securities Contracts (Regulation) Act, 1956 or the Securities and Exchange Board of India Act, 1992 or the Depositories Act, 1996 shall have the meanings respectively assigned to them in those Acts.

When a word or phrase is defined as having a particular meaning in the enactment, it is that meaning alone which must be given to it while interpreting a Section of the Act unless there be anything repugnant in the context.

Section 2 states that- In this Act, unless the context otherwise requires, —

(1) **Abridged prospectus** means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf;

(2) **Accounting standards** means the standards of accounting or any addendum thereto for companies or class of companies referred to in section 133;

Section 133 of the Act deals with the Central Government to Prescribe Accounting Standards. As per the section, the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.

Section 133 is to be read with Rule 7 of the Companies (Accounts) Rules, 2014. Accordingly,

(i) The standards of accounting as specified under the Companies Act, 1956 shall be deemed to be the accounting standards until accounting standards are specified by the Central Government under section 133.

(ii) Till the National Financial Reporting Authority* is constituted under section 132 of the Act, the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India in consultation with and after examination of the recommendations made by the National Advisory Committee on Accounting Standards constituted under section 210A of the Companies Act, 1956.

Further, in exercise of the powers conferred by section 133, the Central Government in consultation with the National Advisory Committee on Accounting Standards prescribed

that Companies (Accounting Standards) Rules, 2006 and the Companies (Indian Accounting Standards) Rules, 2015 may be followed.

*The Central Government hereby appoints the 1st October 2018 as the date of constitution of National Financial Reporting Authority.

(3) Alter or Alteration includes the making of additions, omissions and substitutions;

(5) Articles means-

- the articles of association of a company as originally framed, or
- as altered from time to time, or
- applied in pursuance of any previous company law, or
- applied in pursuance of this Act;

(6) Associate company, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation. — For the purpose of this clause, —

(a) the expression "significant influence" means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

Vide Circular dated 25/06/2014 it has been clarified that the shares held by a company in another company in a fiduciary capacity (a fiduciary is a person who holds a legal or ethical relationship of trust with one of more parties (persons or group of persons. Typically, a fiduciary prudently takes care of money or other assets for another person) shall not be counted for the purpose of determining the relationship of associate company.

(7) **Auditing standards** means the standards of auditing or any addendum thereto for companies or class of companies referred to in sub-section (10) of section 143.

****Section 143 of the Companies Act, 2013 deals with the Powers and Duties of Auditors and Auditing Standards.**

(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;

(10) **Board of Directors or Board,** in relation to a company, means the collective body of the directors of the company;

(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;

(12) Book and Paper and Book or Paper include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;

(13) "Books of account" includes records maintained in respect of—

(i) all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;

(ii) all sales and purchases of goods and services by the company;

(iii) the assets and liabilities of the company; and

(iv) the items of cost as may be prescribed under section 1482 in the case of a company which belongs to any class of companies specified under that section;

(14) Branch office, in relation to a company, means any establishment described as such by the company;

(15) Called-up capital means such part of the capital, which has been called for payment;

(16) **Charge** means 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;

(17) **Chartered Accountant** means a chartered accountant as defined in section 2(1)(b) of the Chartered Accountants Act, 1949 who holds a valid certificate of practice under section 6(1) of that Act;

(18) **Chief Executive Officer (CEO)** means an officer of a company, who has been designated as such by it;

(19) **Chief Financial Officer (CFO)** means a person appointed as the Chief Financial Officer of a company;

These definitions of CEO & CFO should be read with section 2(51) and 203 which deals with the definition and appointment of Key Managerial Personnel (KMP) of the Companies Act, 2013.

(20) **Company** means a company incorporated under this Act or under any previous company law;

Example 3: Reliance Industries Limited incorporated in year 1973, Tata Steel Limited incorporated in year 1907, Infosys Limited incorporated in year 1981.

Such companies are incorporated under Companies Act, 1956 (previous company law) are also included in the above definition for being treated as a Company.

(21) **Company limited by guarantee** means a company having the liability of its members limited by the memorandum to such

amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up;

(22) **Company limited by shares** means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them;

Example 4: A shareholder who has paid rupees 75 on a share of face value rupees 100 can be called upon to pay the balance of rupees 25 only.

(26) **Contributory** means a person liable to contribute towards the assets of the company in the event of its being wound up

Explanation: For the purpose of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory.

(27) **Control** shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

It is an inclusive definition and relevant for the provisions relating to subsidiary and holding companies.

(30) Debenture includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;

Provided that—

(a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and

(b) such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company, shall not be treated as debenture;

(34) Director means a director appointed to the Board of a company;

(35) Dividend includes any interim dividend;

(36) Document includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form;

(37) Employees' stock option means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price;

(38) Expert includes an engineer, a valuer, a Chartered Accountant, a Company Secretary, a Cost Accountant and

any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force;

(40) Financial statement in relation to a company, includes—

(i) a balance sheet as at the end of the financial year;

(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

(iii) cash flow statement for the financial year;

(iv) a statement of changes in equity, if applicable; and

(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub-clause (iv):

Provided that the financial statement, with respect to One Person Company, small company and dormant company, may not include the cash flow statement;

Exemption: For private companies, the proviso to section 2(40) shall be read as follows:

"Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement;

Explanation. - For the purposes of this Act, the term "start-up" or "start-up company" means a private company incorporated under the Companies Act, 2013 or the

Companies Act, 1956 and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry."

The exceptions, modifications and adaptations shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.

Note: Students may note that 'Profit and Loss Account' may also be referred as 'Statement of Profit and Loss' under the Act at some places.

(41) Financial year, in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

Note: The term "company incorporated outside India" refers to Foreign Company incorporated under any applicable laws for the constitution of company outside India.

(43) Free reserves means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend:

Provided that—

(i) any amount representing unrealised gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or

(ii) any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, shall not be treated as free reserves;

(45) Government company means any company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company;

Explanation. - For the purposes of this clause, the "paid-up share capital" shall be construed as "total voting power", where shares with differential voting rights have been issued.

Example 5: X Industries Ltd. is a company in which 25% of shareholding is held by Central Government; 10% shareholding is held by Government of Maharashtra and 15% shareholding is held by Central Government and Government of Rajasthan. Here, X Industries Ltd. is not a government company as there is no compliance of minimum holding of paid-up share capital i.e., at least 51 % by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Government.

(46) Holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies

Explanation — For the purposes of this clause, the expression "company" includes any body corporate.

For meaning of "subsidiary company" refer the definition given in section 2(87) of the Companies Act, 2013.

(50) Issued capital means such capital as the company issues from time to time for subscription;

(51) Key Managerial Personnel, in relation to a company, means —

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer;

(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and

(vi) such other officer as may be prescribed;

Note: However, till now no other officer has been prescribed.

(52) Listed company means a company which has any of its securities listed on any recognised stock exchange;

Provided that such class of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with the Securities and Exchange Board, shall not be considered as listed companies.

According to Rule 2A of the Companies (Specification of definitions details) Rules, 2014, the following classes of companies shall not be considered as listed companies, namely: -

(a) Public companies which have not listed their equity shares on a recognized stock exchange but have listed their –

(i) non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008; or

(ii) non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing

of Non-Convertible Redeemable Preference Shares) Regulations, 2013; or

(iii) both categories of (i) and (ii) above.

(b) Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;

(c) Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a jurisdiction as specified in section 23(3) of the Act.

(53) Manager means 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 company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not;

(54) Managing Director means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

Explanation — For the purposes of this clause, the power to do administrative acts of a routine nature when so authorised by the Board such as:

- the power to affix the common seal of the company to any document or
- to draw and endorse any cheque on the account of the company in any bank or
- to draw and endorse any negotiable instrument or
- to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of management;

Explanation - For any individual to be called as managing director, an individual shall first be a director duly appointed by the Company under the provisions of the Companies Act, 2013. This also implies that an individual who is not a director in the company cannot be appointed as Managing Director of that company.

(55) Member, in relation to a company, means—

(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;

(ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;

(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

(56) **Memorandum** means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act;

(57) **Net worth** means the aggregate value of the paid-up share capital and all reserves created out of the profits, securities premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;

(58) **Notification** means a notification published in the Official Gazette and the expression "notify" shall be construed accordingly;

(59) **Officer** includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act;

(60) **Officer who is in default,** for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by

way of imprisonment, fine or otherwise, means any of the following officers of a company, namely: —

(i) whole-time director (WTD);

(ii) key managerial personnel (KMP);

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

(vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

Example 6: In a company, a default was committed with respect to the allotment of shares by the officers. In company there were no managing director, whole time director, a manager, secretary, a person charged by the Board with the responsibility of complying with the provisions of the Act, and neither any director/directors specified by the board. Therefore, in such situation, all the directors of the company may be treated as officers in default.

(62) One Person Company means a company which has only one person as a member;

(63) Ordinary or special resolution means an ordinary resolution, or as the case may be, special resolution referred to in section 114 (Ordinary and Special Resolution);

(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;

(65) Postal ballot means voting by post or through any electronic mode;

This definition is related to section 110 to be read with Rule 22 of the Companies (Management and Administration) Rules, 2014 specifying the procedure to be followed for conducting of business through postal ballot and provides the list of items of business which should be transacted only by means of voting through a postal ballot.

(66) Prescribed means prescribed by rules made under this Act;

(68) Private company means a company having a minimum paid-up share capital as may be prescribed, and which by its articles —

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

A. persons who are in the employment of the company; and

B. persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the

employment ceased, shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;

The requirement of having a minimum paid up share capital shall not apply to a section 8 company (Formation of companies with charitable objects, etc.) vide notification dated 5th June 2015.

The above-mentioned exemption shall be applicable to a section 8 company which has not committed a default in filing its financial statements under section 137 of the Companies Act, 2013, or annual return under section 92 of the said Act with Registrar.

(69) Promoter means a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92, or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;

(70) Prospectus means any document described or issued as a prospectus and includes a red herring prospectus or 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;

(71) Public company means a company which—

(a) is not a private company; and

(b) has a minimum paid-up share capital as may be prescribed8:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles;

Example 7: A Pvt. Ltd. is wholly owned subsidiary of AB Ltd., a public company incorporated under the Companies Act, 2013. A Pvt. Ltd. wanted to avail exemptions as provided to private companies. In this case, since A Pvt. Ltd. is subsidiary of AB Ltd., which is a public company, therefore A Pvt. Ltd. will be deemed to be a public company and will be not allowed to avail exemptions provided to a private company.

(74) Register of companies means the register of companies maintained by the Registrar on paper or in any electronic mode under this Act;

(75) Registrar means a Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, having the duty of registering companies and discharging various functions under this Act;

(76) 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 and manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital;

(vi) any body 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-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any body corporate which is-

A. a holding, subsidiary or an associate company of such company;

B. a subsidiary of a holding company to which it is also a subsidiary; or

C. an investing company or the venturer of the company;

Explanation - For the purpose of this clause, "the investing company or the venturer of a company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

Exemption - This Clause (viii) shall not apply with respect to section 188 (Related Party transactions) to a private company.

(ix) such other person as may be prescribed;

As per Rule 3 given in the Companies (Specification of Definitions Details) Rules, 2014, for the purposes of section 2(76)(ix) of the Act, a director (other than an independent director) or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party.

Example 8: XYZ Pvt. Ltd. has two subsidiary companies, Y Pvt. Ltd. and Z Pvt. Ltd. Here as per the section 2(76)(viii)(B), Y Pvt. Ltd and Z Pvt. Ltd. are related parties. However, as per the Notification No. G.S.R. 464(E) dated 5th June, 2015, clause (viii) shall not apply with respect to

section 188 to a private company. Therefore Y Pvt. Ltd and Z Pvt. Ltd are not related parties for the purpose of section 188. However, if Y Pvt. Ltd and Z Pvt. Ltd. have common directors, then they will be deemed to be related parties because of section 2(76)(iv).

(77) Relative, with reference to any person, means anyone who is related to another, if—

(i) they are members of a Hindu Undivided Family;

(ii) they are husband and wife; or

(iii) one person is related to the other in such manner as may be prescribed;

Rule 4 given in the Companies (Specification of Definitions Details) Rules, 2014 provides of the List of Relatives in terms of Clause (77) of section 2. Accordingly, a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely: -

1. Father: Provided that the term "Father" includes step-father.
2. Mother: Provided that the term "Mother" includes the step-mother.
3. Son: Provided that the term "Son" includes the step-son.
4. Son's wife.
5. Daughter.
6. Daughter's husband.

7. Brother: Provided that the term "Brother" includes the step-brother;

8. Sister: Provided that the term "Sister" includes the step-sister.

(78) 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

(84) Share means a share in the share capital of a company and includes stock;

(85) Small company means a company, other than a public company —

(i) paid-up share capital of which does not exceed Rs. 50,00,000 or such higher amount as may be prescribed which shall not be more than Rs. 10 crores; and

(ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed Rs. 2 crores or such higher amount as may be prescribed which shall not be more than Rs. 100 crores:

Provided that nothing in this clause shall apply to—

A. a Public Company;

B. a holding company or a subsidiary company;

C. a company registered under section 8; or

D. a company or body corporate governed by any special Act.

As per the Companies (Specification of Definitions Details) Rules, 2014, for the purposes of sub-clause (i) and sub-clause (ii) of clause (85) of section 2 of the Act, paid up capital and turnover of the small company shall not exceed Rs. 2 crores and Rs. 20 crores respectively.

Example 10: H Ltd. is the holding company of S Pvt. Ltd. As per the last profit and loss account for the year ending 31st March, 2019 of S Pvt. Ltd., its turnover was to the extent of Rs. 1.50 crores; and paid-up share capital was Rs. 40 lacs. Since S Pvt. Ltd., as per the turnover and paid-up share capital norms, qualifies for the status of a 'small company' it wants to be categorized as 'small company'. S Pvt. Ltd. cannot be categorized as a 'small company' because it is the subsidiary of another company (H Ltd.). [Proviso to section 2(85)].

(86) Subscribed capital means such part of the capital which is for the time being subscribed by the members of a company;

Example 11: ABC Ltd. was registered with Registrar with an Authorised capital of Rs. 2,00,00,000 where each share is of Rs. 10.

In response to the advertisements made by the company to buy shares in the company, applications have been received for 10,00,000 shares but company actually issued 700,000 shares where company has called for Rs. 8 per share.

All the calls have been met in full except three shareholders who still owe for their 6000 shares in total.

Amount of various share capital

Authorized share capital = Rs. 2,00,00,000 (2 crores)

Subscribed capital = 10,00,000 x 10 = Rs. 1,00,00,000 (1 Crore)

Issued capital = 7,00,000 x 10 = Rs. 70,00,000

Called-up capital = 7,00,000 x 8 = Rs. 56,00,000

Paid-up capital = Rs. 56,00,000 – (6000 x Rs. 8) = Rs. 55,52,000

(87) Subsidiary company or Subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company —

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation—For the purposes of this clause —

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause

(i) or sub-clause(ii)is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression "company" includes any body corporate;

(d) "layer" in relation to a holding company means its subsidiary or subsidiaries;

As per the notification dated 27th December 2013, Ministry clarified that the shares held by a company or power exercisable by it in another company in a fiduciary capacity shall not be counted for the purpose of determining the holding –subsidiary relationship in terms of the provision of section 2(87) of the Companies Act, 2013.

(88) Sweat equity shares means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;

(89) Total voting power, in relation to any matter, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of a company if all the

members thereof or their proxies having a right to vote on that matter are present at the meeting and cast their votes;

(90) Tribunal means the National Company Law Tribunal constituted under section 408;

(91) Turnover means the gross amount of revenue recognised in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year;

(92) Unlimited company means a company not having any limit on the liability of its members;

(93) Voting right means the right of a member of a company to vote in any meeting of the company or by means of postal ballot.

Chapter 2 : Prospectus & Allotment of Securities

This Chapter is based on the Chapter III of the Companies Act, 2013 (in short 'the Act') consisting of sections 23 to 42 dealing with the prospectus and allotment of securities. The Act provides the manner in which securities can be issued by both public and private companies. Chapter III of the Act covers the issue of securities under two headings as under:

Part I - It contains provisions for the issue of securities through public offer;

Part II - It contains provisions for the issue of securities through private placement.

Various sections under this chapter:

- Prospectus and Allotment of securities [Sec. 23-42]
- Issue of Prospectus and related matters [Sec. 23, 26, 29, 31, 32, 25, 28, 27 & 40]
- Allotment of securities [Sec. 39]
- Penalties [Sec. 34, 35, 36, 37 & 447*]
- Private Placement [Sec. 42]

* Section 447 contains provisions relating to 'punishment for fraud'.

1. INTRODUCTION

One of the advantages of floating a company is raising of capital from the public at large or from a defined group or inner circle (pre-known select group of persons).

- When the capital is raised from public at large, it is undertaken through the medium of 'Public Offer' and
- when it is raised from a defined group of persons it is carried out through 'Private Placement of securities'.

Acquisition of capital is inflow of funds for the issuer and needs advertisement which should be in accordance with the relevant legal provisions so that no investor is defrauded or cheated. On successful closure of the application process, securities are allotted to the investors which could then be listed on an appropriate segment of a recognised stock exchange after fulfilling due formalities.

As already mentioned, the provisions relating to raising of capital such as issue of prospectus, allotment of securities etc., and other matters incidental thereto are contained in Chapter III of the Act. This Chapter is divided into two parts:

Part I relates to 'Public Offer' (sections 23 to 41); and

Part II relates to 'Private Placement' (section 42).

The provisions contained in Part I and part II are supplemented by the Companies (Prospectus and Allotment of Securities) Rules, 2014.

2. PUBLIC OFFER AND PRIVATE PLACEMENT

Various modes of issue of securities by a public company or a private company are depicted below:

Issue of securities:

- Public Company
  - Prospectus/Public Offer
  - IPO
  - FPO
  - OFS
  - Private Placement
  - Right Issue
  - Bonus Issue
- Private Company
  - Private Placement
  - Right Issue
  - Bonus Issue

As per Section 23 (1), a public company may issue securities —

(a) to public through prospectus (herein referred to as "public offer") by complying with the provisions of Part I; or
(b) through private placement by complying with the provisions of Part II; or
(c) through a rights issue or a bonus issue in accordance with the provisions of the Act and in case of a listed company or a company which intends to get its securities listed also with the provisions of the Securities and Exchange Board of India Act, 1992 (SEBI) and the rules and regulations made thereunder.

As per Section 23(2), a private company may issue securities—

(a) by way of rights issue or bonus issue in accordance with the provisions of the Act; or
(b) through private placement by complying with the provisions of Part II.

By way of Explanation it is provided that, "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 (OFS) to the public by an existing shareholder, through issue of a prospectus.

Meaning of Securities:

As per section 2 (81), the term 'securities' means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 [SCRA].

The definition given by section 2 (h) of SCRA is as under:

"Securities" include—

i. Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

(id) units or any other such instrument issued to the investors under any mutual fund scheme.

Explanation: For the removal of doubts, it is hereby declared that "Securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938.

(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;

ii. Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

iii. rights or interests in securities.

The provisions of Section 23 are tabulated below:

	Public Company	Private Company
Public Offer (including IPO, FPO or OFS)	Yes	No
Private Placement	Yes	Yes
Rights issue / Bonus Issue	Yes	Yes
Compliance with SEBI rules and regulations	Yes (for a listed company or a company proposed to be listed)	No

3. PROSPECTUS

I. Meaning of Prospectus

As per the definition given in section 2 (70), prospectus means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 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.

According to the above definition, following points emerge in relation to prospectus:

i. Prospectus is any document described or issued as a prospectus. Thus, any document which is described as a prospectus or issued as a prospectus is to called prospectus.
ii. A prospectus shall include a red herring prospectus or shelf prospectus.
iii. A prospectus shall also include any notice, circular, advertisement or other document which intends to invite offers from the public for the subscription of any securities or purchase of any securities of a body corporate.

II. Matters to be stated in prospectus

Section 26 mentions the various matters which are to be stated in a prospectus. They are as under:

(1) Prospectus to be dated and signed and to state specified information, etc.: Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or 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 Securities and Exchange Board in consultation with the Central Government.

However, until the Securities and Exchange Board specifies the information and reports on financial information under this subsection, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

*(c) prospectus shall make a declaration about the compliance of the provisions of the Companies Act, 2013 and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder. [Sub-section 1 and Proviso]

*clauses (a), (b) and (d) to sub-section (1) omitted by the Companies (Amendment) Act, 2017, w.e.f. 07-05-2018.

(2) Exceptions: Nothing in sub-section (1) shall apply—

(a) to the issue to existing members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or

(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange. [Sub-section (2)]

(3) Application of sub-section (1) to prospectus or to a form of application: Subject to sub-section (2), the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

As per the Explanation, the date indicated in the prospectus shall be deemed to be the date of its publication. [Sub-section (3)]

(4) Prospectus to be issued after delivery to Registrar for filing: No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for filing, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorized attorney. [Sub- section (4)]

(5) Prospectus not to include Experts' statement under certain circumstances: A prospectus issued under sub-section (1) 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 management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for filing and a statement to that effect shall be included in the prospectus. [Sub- section (5)]

Note: As per Section 2(38) 'expert' includes an engineer, a valuer, a Chartered Accountant, a Company Secretary, a Cost Accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force.

(6) Prospectus to mention compliances of certain formalities on its face: Every prospectus issued under sub-section (1) shall, on the face of it—

(a) state that a copy has been delivered for filing to the Registrar as required under sub-section (4); and

(b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents.

(7) Prospectus to be issued within specified time: No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar under sub-section (4). [Subsection (8)]

(8) Punishment if 'issued prospectus' contravenes applicable provisions: The company and every person who is knowingly a party to the issue of a prospectus issued in contravention of Section 26, shall be liable to: -

a. Minimum fine of Rs. 50,000

b. Maximum fine of Rs. 3,00,000 [Sub- section (9)]

Example 1: The Board of Directors of Dr. Sunny Pharmaceutical Limited has allotted shares to the investors at large without issuing a prospectus with the Registrar of Companies, Mumbai. In this regard, it is to be noted that a public company can issue securities to the public only by issuing a prospectus (Section 23).

Section 26 (1) lays down the matters required to be disclosed and included in a prospectus and requires the filing of the prospectus with the Registrar before it is issued.

In the given case, the company has violated the above provisions of the Companies Act, 2013 and hence the allotment made by it is void. The company will have to refund the entire moneys received and will also be punishable under section 26 (9) of the Act.

III. Public Offer of Securities to be in Dematerialised Form

Section 29 along with Companies (Prospectus and Allotment of Securities) Rules, 2014 [PAS Rules] contain provisions which require public offer of securities to be in dematerialised form. Further, prescribed class or classes of companies shall issue the securities only in the dematerialised form.

(1) Every company making public offer and such other class or classes of companies as may be prescribed shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

Dematerialisation of Securities: As per Rule 9 of PAS Rules, the promoters of every public company making a public offer of any convertible securities may hold such securities only in dematerialised form.

It is provided that the entire holding of convertible securities of the company by the promoters held in physical form up to the date of the initial public offer shall be converted into dematerialised form before such offer is made and thereafter such promoter shareholding shall be held in dematerialised form only.

(1A) In case of such class or classes of unlisted companies as may be prescribed, the securities shall be held or transferred only in dematerialised form in the manner laid down in the Depositories Act, 1996 and the regulations made thereunder.

Rule 9A of PAS Rules mentions about issue of securities in dematerialised form by unlisted public companies. The provisions are as under:

Issue of securities in dematerialised form by unlisted public companies: According to Rule 9A (1), every unlisted public company (excluding a Nidhi, a Government company and a wholly owned subsidiary4) shall issue the securities only in dematerialised form and also facilitate dematerialisation of all its existing securities in accordance with provisions of the Depositories Act, 1996 and regulations made there under.

Conversion of securities in dematerialised form: Rule 9A (2) states that every unlisted public company making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer shall ensure that before making such offer, entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised in accordance with provisions of the Depositories Act, 1996 and regulations made there under.

Responsibility of every holder of securities of an unlisted public company:

According to Rule 9A (3), every holder of securities of an unlisted public company:

(a) who intends to transfer such securities on or after 2nd October, 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 private placement or bonus shares or rights offer) on or after 2nd October, 2018

shall ensure that all his existing securities are held in dematerialized form before such subscription.

Application to the depository: As per Rule 9A (4), every unlisted public company shall facilitate dematerialisation of all its existing securities by making necessary application to a depository as defined in section 2 (1) (e) of the Depositories Act, 1996 and shall secure International Security Identification Number (ISIN) for each type of security and shall inform all its existing security holders about such facility.

Obligations of every unlisted public company: According to Rule 9A (5), every unlisted public company shall ensure that -

(a) it makes timely payment of fees (admission as well as annual) to the depository and registrar to an issue and share transfer agent in accordance with the agreement executed between the parties;
(b) it maintains security deposit, at all times, of not less than two years' fees with the depository and registrar to an issue and share transfer agent, in such form as may be agreed between the parties; and
(c) it complies with the regulations or directions or guidelines or circulars, if any, issued by the Securities and Exchange Board or Depository from time to time with respect to dematerialisation of shares of unlisted public companies and matters incidental or related thereto.

Prohibition on defaulting unlisted public company: Rule 9A (6) states that no unlisted public company which has defaulted in sub-rule (5) shall make offer of any securities or buyback its securities or issue any bonus or right shares till the payments to depositories or registrar to an issue and share transfer agent are made.

Application of certain provisions: According to Rule 9A (7), except as provided in sub-rule (8), the provisions of the Depositories Act, 1996, the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018 and the Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 shall apply mutatis mutandis to dematerialisation of securities of unlisted public companies.

Filing with the Registrar: Rules 9A (8) prescribes that every unlisted public company governed by Rule 9A shall submit Form PAS-6 to the Registrar with such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within 60 days from the conclusion of each half year duly certified by a company secretary in practice or chartered accountant in practice.

Reporting of difference: As per Rule 9A (8A), the company shall immediately bring to the notice of the depositories any difference observed in its issued capital and the capital held in dematerialised form.

Grievances redressal mechanism: According to Rule 9A (9), the grievances, if any, of security holders of unlisted public companies under Rule 9A shall be filed before the Investor Education and Protection Fund Authority (IEPF).

Initiation of action by IEPF Authority: Rule 9A (10) states that the Investor Education and Protection Fund Authority shall initiate any action against a depository or participant or registrar to an issue and share transfer agent after prior consultation with the Securities and Exchange Board of India.

(2) Any company, other than a company mentioned in sub-section (1), may convert its securities into dematerialised form or issue its securities in physical form in accordance with the provisions of this Act or in dematerialised form in accordance with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

IV. Advertisement of Prospectus

According to Section 30, where an advertisement of any prospectus of a company is published in any manner, it shall be necessary to specify therein the contents of its memorandum as regards the following:

i. the objects,
ii. the liability of members and the amount of share capital of the company,
iii. the names of the signatories to the memorandum,
iv. the number of shares subscribed for by the signatories, and
v. the capital structure of the company.

V. Shelf Prospectus, Red Herring Prospectus and Abridged Prospectus

These are described as under:

A. <u>Shelf Prospectus</u>

Section 31 contains provisions relating to Shelf Prospectus. These provisions play a significant role in facilitating commercial and logistical consideration involved in the funds raising cycle.

We may consider a situation where the issuer company issues debentures frequently and has to file a prospectus every time it issues a new series of debentures. Here, the concept of shelf prospectus comes into play. Literally, it means a prospectus with a given shelf life. Any number of issues could be made during the tenure of the shelf prospectus. The only caveat is to supplement the shelf prospectus by an "information memorandum" containing key updates or changes.

The provisions of Section 31 are stated below:

Meaning of Shelf Prospectus: The expression "shelf prospectus" means 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. [Explanation to Section 31]

(1) Filing of shelf prospectus with the Registrar: Any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage-

i. of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and

ii. in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required. [Sub-section (1)]

(2) Filing of 'Information Memorandum' with the Shelf Prospectus: A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities and such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

It is provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof. [Sub-section (2) and Proviso]

According to Rule 10 of the Companies (Prospectus and Allotment of securities) Rules, 2014, the information memorandum shall be prepared in Form PAS-2 and filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

(3) Information Memorandum together with Shelf Prospectus is deemed Prospectus: Where an information memorandum is filed, every time an offer of securities is made under sub-section (2), such memorandum together with the shelf prospectus shall be deemed to be a prospectus. [Sub-section (3)]

B. <u>Red Herring Prospectus</u>

Section 32 contains provisions relating to Red-herring Prospectus.

Developments taking place in the financial markets from time to time allow innovative methods of raising funds so as to avail the most of favourable market conditions. Timing the issue and book building of issue are facilitated by the concept of red herring prospectus whereby the price per security and number of securities are left open to be decided post closure of the issue.

The provisions of Section 32 are sated as below:

Meaning of Red Herring 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. [Explanation to Section 32]

(1) Red Herring Prospectus is issued prior to issue of Prospectus: A company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus.

(2) Filing with the registrar: A company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

(3) Obligations under Red Herring Prospectus vis-à-vis Prospectus: A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

(4) Filing of Red Herring Prospectus with Registrar and SEBI upon closing of Offer: Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

C. Abridged Prospectus

The term 'Abridged Prospectus' has been defined by Section 2 (1). According to it, 'Abridged Prospectus' means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. In fact, 'Abridged Prospectus' is a summarised form of actual prospectus.

VI. Document containing Offer of Securities for Sale to be Deemed Prospectus

Section 25 provides that a document by which offer of securities for sale to the public is made, shall be a deemed prospectus. The provisions of Section 25 are mentioned as under:

(1) Documents which are deemed to be a Prospectus: Where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in sub-sections (3) and (4) and shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) Securities offered for sale to the public: For the purposes of the Companies Act, 2013, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown:

(a) that an offer of the securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(3) that 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.

Effect of section 26: Section 26 as applied by section 25 shall have effect as if:

i. it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—

(a) the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and

(b) the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;

ii. the persons making the offer were persons named in a prospectus as directors of a company.

(4) Signing of Document in case of a company or a firm: Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document referred to in sub-section (1) is signed on behalf of the company or firm by two directors of the company or by not less than one-half of the partners in the firm, as the case may be.

It is to be noted that all applicable provisions relating to prospectus viz., mis-statements, contents, civil and criminal liability etc., are applicable to the deemed prospectus. There is no dilution of liability for the persons making the offer which is in addition to liability of the company whose securities are offered for sale.

Additionally, below mentioned information needs to be disclosed as well in the deemed prospectus:

- the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and
- the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;

The purpose of deeming provision is to protect gullible investors from various fraudulent practices.

VII. Offer of Sale of Shares by Certain Members of Company

Sections 28 contains the provisions which regulate the offer for sale of securities by certain members of company. These provisions are stated as under:

(1) Offering of shares to public by certain members permitted: Where certain members of a company propose, in consultation with the Board of Directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed.

(2) Document offering sale to public is deemed to be a prospectus: Any document by which the offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company and all laws and rules made thereunder as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company.

(3) Collective Authorisation and reimbursement of expenses to company: The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorise the company, whose shares are offered

for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse the company all expenses incurred by it on this matter.

As regards offer of sale of shares by certain members of the company Rule 8 of the Companies (Prospectus and Allotment of Securities) Rules, 2014, contains guiding provisions which are stated as under:

Exceptions to certain Matters: According to Rule 8 (1), the provisions of Part I of Chapter III namely "Prospectus and Allotment of Securities" and rules made thereunder shall be applicable to an offer of sale referred to in section 28 except for the following, namely: -

(a) the provisions relating to minimum subscription;
(b) the provisions for minimum application value;
(c) the provisions requiring any statement to be made by the Board of directors in respect of the utilization of money; and
(d) any other provision or information which cannot be compiled or gathered by the offeror, with detailed justifications for not being able to comply with such provisions.

Disclosure: As per Rules 8 (2), the prospectus issued under section 28 shall disclose the name of the person or persons or entity bearing the cost of making the offer of sale along with reasons.

VIII. Variation in terms of contract or objects in prospectus

Section 27 contains provisions relating to variation in terms of contract or objects in prospectus. Once funds are raised through a given prospectus, the principle of "doctrine of ultra vires" (mutatis mutandis) comes into play i.e., the company has to use the funds strictly in accordance with the prospectus. Deviations are required to be pre-approved by the investors and 'recall option' needs to be given to the dissenting investors. Deviation regarding use of proceeds of issue for buying, trading or otherwise dealing in equity shares of any other listed company is not permitted.

The provisions of Section 27 are stated as under:

(1) Variation on approval in general meeting by passing of SR: A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution (SR).

It is provided that the details, as may be prescribed, of the notice in respect of such resolution to shareholders, shall also be published in the newspapers (one in English and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation.

It is further provided that such company shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company. [Sub-section (1) and Provisos]

In respect of variation in terms of contracts referred to in the prospectus or objects for which prospectus was issued, Rule 7 of the Companies (Prospectus and allotment of Securities) Rules, 2014, states as under:

Special Resolution to be passed through Postal Ballot and Contents of Notice: According to Sub-rule (1), where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot and the notice of the proposed special resolution shall contain the following particulars, namely:—

(a) the original purpose or object of the Issue;
(b) the total money raised;
(c) the money utilised for the objects of the company stated in the prospectus;
(d) the extent of achievement of proposed objects (that is fifty percent, sixty percent, etc.);
(e) the unutilised amount out of the money so raised through prospectus,
(f) the particulars of the proposed variation in the terms of contracts referred to in the prospectus or objects for which prospectus was issued;
(g) the reason and justification for seeking variation;
(h) the proposed time limit within which the proposed varied objects would be achieved;
(i) the clause-wise details as specified in sub-rule (3) of rule 3 as was required with respect to the originally proposed objects of the issue;
(j) the risk factors pertaining to the new objects; and
(k) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution.

Advertisement to be in Specified Form: According to Sub-rule (2), the advertisement of the notice for getting the resolution passed for varying the terms of any contract referred to in the prospectus or altering the objects for which the prospectus was issued, shall be in Form PAS-1 and such advertisement shall be published simultaneously with dispatch of Postal Ballot Notices to Shareholders.

Placing of Notice on Web-site: According to Sub-rule (3), the notice shall also be placed on the web-site of the company, if any.

(2) Exit offer to dissenting shareholders: The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf. [Sub-section (2)]

4. SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES

Section 40 contains following provisions in respect of securities which are to be dealt with in the recognised stock exchanges.

(1) **Filing of an application with recognised stock exchange:** Every company making public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

(2) **Prospectus to state name of stock exchange:** Where a prospectus states that an application has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.

(3) **Maintaining of separate bank account:** All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or

(b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.

(4) **Condition purporting to waive compliance shall be void:** Any condition purporting to require or bind any applicant for securities to waive compliance with any of the requirements of this section shall be void.

(5) **Default in complying with provisions:**

Fine on the company:

i. Minimum fine of Rs. 5 Lakh
ii. Maximum fine of Rs. 50 Lakh

Fine on every officer of the company who is in default:

i. Minimum fine of Rs. 50,000
ii. Maximum fine of Rs. 3,00,000

(6) **Payment of commission:** A company may pay commission to any person in connection with the subscription to its securities subject to the prescribed conditions.

Rule 13 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 prescribes the following conditions for the payment of commission:

(a) the payment of such commission shall be authorized in the company's articles of association;

(b) the commission may be paid out of proceeds of the issue or the profit of the company or both;

(c) Rate of commission: Following are the rates of commission -

- in case of shares
  - shall not exceed 5% of the price at which the sharesare issued, or
  - a rate authorised by the articles, whichever is less
- in case of debentures
  - shall not exceed 2.5% of the price at which the debentures are issued, or
  - as specified in the company's articles, whichever is less

(d) Disclosure of the particulars in prospectus: The prospectus of the company shall disclose the following particulars -

i. the name of the underwriters;

ii. the rate and amount of the commission payable to the underwriter; and

iii. the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.

(e) When no commission is to be paid: There shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;

(f) Copy of payment of commission to be delivered to Registrar: A copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

Example 2: A public limited company which wanted to raise funds through public issue of shares had applied for listing of its shares in three recognised Stock Exchanges. However, only two exchanges had given permission for listing. Can the company proceed with the public offer?

Answer: According to Section 40 (1) of the Companies Act, 2013, every company making a public offer of shares shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges. As per Section 40 (2), where a prospectus states that an application has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with. From the above it is clear that not only the company has to apply for listing of the securities at a recognized stock exchange but also obtain permission thereof before making the public offer. In view of the above provisions, the company cannot proceed with the public offer of shares before obtaining the necessary approval from the stock exchanges.

Example 3: The Board of Directors of a company decide to pay 5% of the issue price of shares as underwriting commission to the underwriters. However, the Articles of Association of the company permit only 3% commission. The Board of Directors further decide to pay the commission out of the proceeds of the share capital. Are the decisions taken by the Board of Directors valid under the Companies Act, 2013?

Answer: Under Rule 13 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less. The same rule allows the commission to be paid out of proceeds of the issue or the profit of the company or both.

Therefore, the decision of the Board of Directors to pay 5% commission to the underwriters is invalid since the same cannot exceed the rate which is permitted by the Articles. However, the decision to pay commission out of the proceeds of the share issue is valid provided it is paid at the rate authorised by the Articles.

5. ALLOTMENT OF SECURITIES BY COMPANY

Meaning of Allotment

"Allotment" means the appropriation out of previously un-appropriated capital of a company, of a certain number of shares to a person. Till the allotment, as such the shares do not exist. It is on allotment that the shares come into existence. In fact, with the sending of allotment letters, the company starts the process of allotment and it is nothing but acceptance of offer made by the applicants of securities.

Legal Provisions governing Allotment

Section 39 contains provisions in respect of allotment of securities when there is a public offer. Further, the Companies (Prospectus and Allotment of Securities) Rules, 2014 [PAS Rules] have also been issued.

(1) **Receipt of Minimum Amount is a must:** No allotment of any securities of a company offered to the public for subscription shall be made unless the amount stated in the prospectus as the minimum amount has been subscribed and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument.

The prospectus must state the minimum amount to be subscribed. Such minimum amount must be received from the subscribers or investors at the time of making application.

(2) **Quantum of Amount Payable on Application:** The amount payable on application on every security shall not be less than five per cent of the nominal amount of the security or such other percentage or amount, as may be specified by the Securities and Exchange Board by making regulations in this behalf.

(3) **Consequences if minimum amount is not subscribed:** If the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, or such other period as may be specified by the Securities and Exchange Board, the amount received under sub-section (1) shall be returned within such time and manner as may be prescribed.

Refund of Application Money: Rule 11 (1) of the PAS Rules mentions that if the stated minimum amount has not been subscribed and the sum payable on application is not received within the period specified therein, then the application money shall be repaid within a period of fifteen days from the closure of the issue and if any such money is not so repaid within such period, the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at the rate of fifteen percent per annum.

Which Account to be used for Refund: According to Rule 11 (2), the application money to be refunded shall be credited only to the bank account from which the subscription was remitted.

(4) **Return of Allotment:** Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed.

Time Limit for filing Return of Allotment: According to Rule 12 (1) of PAS Rules, whenever a company having a share capital makes any allotment of its securities, the company shall, within thirty days thereafter, file with the Registrar a return of allotment in Form PAS-3, along with the fee as specified in the Companies (Registration Offices and Fees) Rules, 2014.

Details to be attached with PAS-3: Rule 12 (2) states that there shall be attached to the Form PAS-3 a list of allottees stating their names, address, occupation, if any, and number of securities allotted to each of the allottees and the list shall be certified by the signatory of the Form PAS-3 as being complete and correct as per the records of the company.

Attachments with PAS-3 when Securities are issued for consideration other than cash: According to Rule 12 (3), in the case of securities (not being bonus shares) allotted as fully or partly paid up for consideration other than cash, there shall be attached to the Form PAS-3 a copy of the contract, duly stamped, pursuant to which the securities have been allotted together with any contract of sale if relating to a property or an asset, or a contract for services or other consideration.

Attachments with PAS-3 when Contract is not Reduced to Writing: Rule 12 (4) states that where a contract referred to in sub-rule (3) is not reduced to writing, the company shall furnish along with the Form PAS-3 complete particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing and those particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the Registrar may, as a condition of filing the particulars, require that the stamp duty payable thereon be adjudicated under section 31 of the Indian Stamp Act, 1899.

Attachment of Report of a Registered Valuer: According to Rule 12 (5), a report of a registered valuer in respect of valuation of the consideration shall also be attached along with the contract as mentioned in sub-rule (3) and sub-rule (4).

Attachment of Resolution in case of Bonus Shares: Rule 12 (6) states that in the case of issue of bonus shares, a copy of the resolution passed in the general meeting authorizing the issue of such shares shall be attached to the Form PAS-3.

Attachment of Valuation Report of the Registered Valuer when shares have been issued in pursuance of Section 62 (1) (c): Rule 12 (7) states that in case the shares have been issued in pursuance of clause (c) of sub-section (1) of section 62 by a company other than a listed company whose equity shares or convertible preference shares are listed on any recognised stock exchange, there shall be attached to Form PAS-3, the valuation report of the registered valuer.

(5) Punishment for Default: In case of any default under sub-section (3) or sub-section (4), the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less. In case of default Company shall pay penalty of Rs. 1000 for each day during which such default continues, or Rs. 1 lac whichever is less

Once securities are issued and subscribed for, these needs to be allotted according to the conditions given below:

- Minimum subscription to be received within 30 days of issue of prospectus. In case minimum subscription is not received, the issue is considered as failed. To take care of such an eventuality, the merchant bankers in case of public offer resort to underwriting, suitable pricing, bringing in anchor investors etc., among other things. In case of a failed issue, the entire issue proceeds need to be refunded along with applicable interest.
- Application money need to be minimum 5% of the nominal amount and such amount must be sufficient to cover the minimum amount stated in the prospectus.
- Return of allotment needs to be filed with the ROC within the specified time after the allotment of securities.

Example 4: After having received 80% of the minimum subscription as stated in the prospectus, Raksha Detective Instruments Limited, before finalisation of the allotment, withdrew 50% of the said amount from the bank for the purchase of certain assets. Thereafter, it started allotting the shares to the subscribers. Rashmi, one of the subscribers, was allotted 1000 equity shares. She, however, refused to accept the allotment on the ground that such allotment was violative of the provisions of the Companies Act, 2013.

Answer: According to the above example, Raksha Detective Instruments Limited has received only 80% of the minimum subscription as stated in the prospectus. Since minimum amount has not been received in full, the allotment is in contravention of section 39 (1) of the Companies Act, 2013 which prohibits a company from making any allotment of securities until it has received the amount of minimum subscription stated in the prospectus. Further, under section 39 (3), such company is required to refund the application money received (i.e. 80% of the minimum subscription) to the applicants. Therefore, in the present case, Rashmi is within her rights to refuse the allotment of shares which has been illegally made by the company.

6. MIS-STATEMENTS IN PROSPECTUS

In common parlance, mis-statement is the act of stating something that is false or not accurate. It could either be due to commission or omission or both.

Mis-statement of prospectus is a serious offence which attracts the provisions of section 34 and / or section 35.

Liabilities can be classified under two headings:

- Civil Liability:
  - Loss or damage is an essential condition
  - Civil Procedure Code, 1908 applicable
  - Offence against the counter party
- Criminal Liability:
  - Mensrea (guilty mind) is anessential condition
  - Criminal Procedure Code, 1973 applicable

- Offence is regarded as being committed against the state

CRIMINAL LIABILITY FOR MIS-STATEMENTS IN PROSPECTUS

The provision of Section 34 which mentions criminal liability for mis-statements in a prospectus are stated as under:

Where a prospectus, issued, circulated or distributed under Chapter III, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorises the issue of such prospectus shall be liable under section 447.

Exception: It is provided that nothing in this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

Note: The provisions of section 447 are given later in the chapter.

CIVIL LIABILITY FOR MIS-STATEMENTS IN PROSPECTUS

Section 35 contains the provisions relating to civil liability for mis-statements in a prospectus. They are stated as under:

(1) Liabilities of Persons involved: Where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who:

(a) is a director of the company at the time of the issue of the prospectus;

(b) has authorised himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately or after an interval of time;

(c) is a promoter of the company;

(d) has authorised the issue of the prospectus; and

(e) is an expert referred to in sub-section (5) of section 26,

shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage. [Sub-section (1)]

(2) Exceptions: No person shall be liable under Sub-section (1) if he proves—

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

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

(c) 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 required by sub-section (5) of section 26 to the issue of the prospectus and had not withdrawn that consent before filing of a copy of the prospectus with the Registrar or, to the defendant's knowledge, before allotment thereunder. [Sub-section (2)]

(3) Unlimited Liability when prospectus issued with intent to defraud: Where it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in subsection (1) shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus. [Sub-section (3)]

Example 5: An allottee of shares in a company brought action against a director in respect of false statements made in the prospectus. The director contended that the statements were prepared by the promoters and he simply relied on them. Is the director liable under the circumstances?

Answer: Yes, the Director shall be held liable for the false statements made in the prospectus under sections 34 and 35 of the Companies Act, 2013. Whereas section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, section 35 more particularly includes a director of the company in the imposition of liability for such mis-statements. Certain situations when a director will not incur any liability for mis-statements in a prospectus are covered under exceptions provided by Section 35 (2) but no such exception specifies that relying on the statements prepared the promoters of the company is a valid ground for a director to escape liability for mis-statement.

Example 6: All the statements contained in a prospectus issued by a company were literally true. It was also stated in the prospectus that the company had paid dividends for a number of years but there was no disclosure regarding the fact that the dividends were paid out of realised capital profits and not out of trading profits. An allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars.

Answer: The non-disclosure of the fact that dividends were paid out of capital profits is a concealment of material fact as a company is normally required to distribute dividend only from trading or revenue profits and under exceptional circumstances it can pay dividend out of capital profits. Hence, a material misrepresentation has been made.

Accordingly, in the given case the allottee can avoid the contract of allotment of shares.

Example 7: A prospectus issued by a company contained certain mis-statements. On becoming aware of the fact regarding mis-statements in the prospectus, one of the experts Anilesh who had earlier given his consent, forthwith gave a reasonable

public notice stating that the prospectus was issued without his knowledge and consent. Is it possible for Anilesh to escape liability for misstatement in the prospectus?

Answer: Section 35 (2) of the Companies Act, 2013 states that no person shall be liable under Sub-section (1) if he proves that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

The case of Anilesh is covered under the above exception provided by Sub-section (2) and therefore, he will escape liability for mis-statement in the prospectus.

7. PUNISHMENT FOR FRAUDULENTLY INDUCING PERSONS TO INVEST MONEY

Section 36 prescribes punishment for fraudulently inducing persons to invest money. The provision is stated as under: Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into:

(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or
(b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or
(c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution,

shall be liable for action under section 447.

Note: The provisions of section 447 are given later in the chapter.

8. ACTION BY AFFECTED PERSONS

According to Section 37, a suit may be filed or any other action may be taken under section 34 or section 35 or section 36 by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Section 37 has paved way for class action.

Class Actions – Gift of the Companies Act, 2013

Class action suit is for a group of people filing a suit against a defendant who has caused common harm to the entire group or class. This is not like a common litigation method where one defendant files a case against another defendant while both the parties are available in court. In the case of class action suit, the class or the group of people filing the case need not be present in the court and can be represented by one petitioner. The benefit of these type of suits is that if several people have been injured by one

defendant, each of the injured person need not file a case separately but all of the people can file one single case together against the defendant.

The need for these types of suits was first felt in the context of securities market during the time of Satyam Scam, where a large group of persons was cheated and all such persons had to lose their hard-earned money invested in the stock market. During that time, it was felt that it was not at all viable and cost effective for a small stakeholder to file a case independently against the defendants. Millions of cheated investors during that time formed a large group and filed the case against the company, but since there was no available legal remedy or law which could actually support this type of litigation initiated by a group, it became tough for those investors to take a recourse or gain advantage from the Indian Judicial System.

Class action suits in India were so far filed under the guise of public interest litigations. Courts were free to dismiss them. These shareholders ran pillar to post right from the National Consumer Disputes Redressal Commission up to the extent of Supreme Court and ultimately had their claims rejected.

Example 8: M applies for equity shares of a company on the basis of a prospectus which contains mis-statement. The shares are allotted to him, who afterwards transfers them to N. Whether N can bring an action for a rescission on the ground of mis-statement under section 37 of the Companies Act, 2013?

Answer: No. N cannot bring an action for rescission of the contract for buying shares from M on the ground of mis-statement made in the prospectus. Section 37 of the Companies Act, 2013 does not become applicable in such a situation. It is noteworthy that according to Section 37, a suit may be filed or any other action may be taken under section 34 or section 35 or section 36 only by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus. Therefore, only M is eligible to file a suit. 9.

9. PUNISHMENT FOR FRAUD [SECTION 447]

Section 447 describes punishment for fraud. According to it,

: any person who is found to be guilty of fraud involving an amount of at least Rs. 10 lakh or 1% of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

It is provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

It is provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

Meaning of Certain Terms

Fraud: The term 'fraud' in relation to affairs of a company or any body corporate, includes-

- ♦ any act,
- ♦ omission,
- ♦ concealment of any fact, or
- ♦ abuse of position

committed by any person, or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

Wrongful Gain: The term 'wrongful gain' means the gain by unlawful means of property to which the person gaining is not legally entitled;

Wrongful Loss: The term 'wrongful loss' means the loss by unlawful means of property to which the person losing is legally entitled.

	Fine		Imprisonment
(i) Fraud involving less than 10 lakh rupees or 1% of turnover, whichever is lower (public interest not involved)	Up to Rs. 50 lakhs	or/and	Up to 5 years
(ii) Fraud involving at least 10 lakh rupees or 1% of turnover, whichever is lower (public interest not involved)	Minimum fine equal to amount of fraud; and Maximum fine three times of amount of fraud	and	Minimum 6 months; and Maximum 10 Years
(iii) Fraud at (ii) involves public interest	Minimum fine equal to amount of fraud; and Maximum fine three times of amount of fraud	and	Minimum 3 years; and Maximum 10 Years

10. PRIVATE PLACEMENT

Provisions relating to the 'private placement' are contained in Part II of Chapter III of the Act.

A private placement is a way of raising capital that involves the issue of securities to a relatively small number of select investors.

A private placement is different from a public issue in which securities are made available for issue or sale on the open market to any type of investor.

Issue of Shares on Private Placement Basis

According to Section 42, following provisions are applicable when shares are issued on private placement basis. They are also supplemented by Rule 14 the Companies (Prospectus and Allotment of Securities) Rules, 2014 [PAS Rules].

(1) Applicability: A company may, subject to the provisions of section 42, make a private placement of securities.

(2) Offer to be made only to a Select Group of Persons: 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 fifty or such higher number as may be prescribed [excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option in terms of provisions of section 62(1)(b)], in a financial year subject to such conditions as may be prescribed.

According to Rule 14 (2) of the PAS Rules, an offer or invitation to subscribe securities under private placement shall not be made to persons more than 200 in aggregate in a financial year.

It is provided that any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees' stock option as per provisions of section 62(1)(b) shall not be considered while calculating the limit of 200 persons.

As per Explanation given in this Rule, it is clarified that the restrictions aforesaid would be reckoned individually for each kind of security that is equity share, preference share or debenture.

Non-applicability of sub-rule (2): The provisions of sub-rule (2) shall not be applicable to -

(a) non-banking financial companies (NBFCs) which are registered with the Reserve Bank of India; and

(b) housing finance companies (HFCs) which are registered with the National Housing Bank;

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.

It is provided that such companies shall comply with sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations.

(3) Manner of Issuing Private Placement Offer and Application: A company making private placement shall issue private placement offer and application in such form and manner as may be prescribed to identified persons, whose names and addresses are recorded by the company in such manner as may be prescribed.

It is provided that the private placement offer and application shall not carry any right of renunciation.

Meaning of 'Private Placement': As per Explanation I, the term "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 section 42.

Meaning of 'Qualified Institutional Buyer': As per Explanation II, the term "qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time, made under the Securities and Exchange Board of India Act, 1992.

When a Private Placement shall be deemed to be an Offer to the Public: As per 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 recognised 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 Chapter III.

Requirement of Special resolution: According to Rule 14 (1) of the PAS Rules, for the purposes of sub-section (2) and sub-section (3) of section 42, 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.

In the explanatory statement annexed to the notice for shareholders' approval, the following disclosure shall be made: -

(a) particulars of the offer including date of passing of Board resolution;
(b) kinds of securities offered and the price at which security is being offered;
(c) basis or justification for the price (including premium, if any) at which the offer or invitation is being made;
(d) name and address of valuer who performed valuation;
(e) amount which the company intends to raise by way 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.

As per the second Proviso to Rule 14 (1), sub-rule (1) shall not apply in case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation does not exceed the limit as specified in clause (c) of sub section (1) of section 180 and in such cases relevant Board resolution under clause (c) of sub-section (3) of section 179 would be adequate.

As per the third Proviso to Rule 14 (1), in case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation exceeds the limit as specified in clause (c) of sub-section (1) of section 180, 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.

As per the fourth proviso to Rule 14(1), in case of offer or invitation of any securities to qualified institutional buyers, it shall be sufficient if the company passes a previous special resolution only in a year for all the allotments to such buyers during the year.

Applicable Application Form: According to Rule 14 (3) of the PAS Rules, a private placement offer cum application letter shall be in the form of an 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 thirty days of recording the name of such person pursuant to section 42 (3).

It is provided that no person other than the person so addressed in the private placement offer cum application letter shall be allowed to apply through such application form and any application not conforming to this condition shall be treated as invalid.

Maintaining of Complete Record: According to Rule 14 (4) of the PAS Rules, the company shall maintain a complete record of private placement offers in Form PAS-5.

Timing of issue of private placement offer cum application letter: According to Rule 14 (8) of the PAS Rules, a company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed in the Registry.

It is provided that private companies shall file with the Registry copy of the Board resolution or special resolution with respect to approval under clause (c) of sub-section (3) of section 179.

(4) Manner of Subscribing to the Private Placement Issue: 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.

It is provided that a company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar in accordance with sub-section (8) of Section 42.

Utilisation of Bank account: Supplementing the above sub-section (4), Rule 14 (5) of the PAS Rules provides that 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.

In case of joint holders, it is 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.

It is further provided that the provisions of sub-rule (5) shall not apply in case of issue of shares for consideration other than cash.

Example 9: Ruhi and her younger brother Sohit were offered jointly 1000 equity shares of Rs. 100 each by Soumya Software Private Limited under the issue of shares on private placement basis. From whose account the company is required to take subscription money for 1000 equity shares?

Answer: According to the first Proviso of Rule 14 (5) of the PAS Rules, 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. It is presumed that Ruhi's name appears first in the application and therefore, the subscription of Rs. 1,00,000 shall be payable by her from her account. It is obligatory for the company to ensure that the money is paid from her bank account and not from the bank account of her younger brother Sohit.

(5) Limit on Fresh Offer: 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.

It is provided that subject to the maximum number of identified persons under sub-section (2) of section 42, a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

(6) Time Limit for Allotment of Securities: A company making an offer or invitation under this section shall allot its securities within sixty 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 fifteen days from the expiry of sixty 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 twelve per cent per annum from the expiry of the sixtieth day.

It is provided that the monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised 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.

(7) Prohibition on Public Advertisement: No company issuing securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue.

(8) Filing of Return of Allotment: A company making any allotment of securities under this section, shall file with the Registrar a return of allotment within fifteen days from the date of the allotment in such manner as may be prescribed, 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.

As regards Return of Allotment, Rule 14 (6) of the PAS Rules states that a return of allotment of securities under section 42 shall be filed with the Registrar within fifteen days of allotment in Form PAS-3 and with the fee as provided in the Companies

(Registration Offices and Fees) Rules, 2014 along with a complete list of all the allottees containing -

i. the full name, address, Permanent Account Number and E-mail ID of such security holder;
ii. the class of security held;
iii. the date of allotment of security;
iv. the number of securities held, nominal value and amount paid on such securities, and particulars of consideration received if the securities were issued for consideration other than cash.

(9) Default in Filing the Return of Allotment: If a company defaults in filing the return of allotment within the period prescribed under sub-section (8), the company, its promoters and directors shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.

(10) Punishment for Contravening the Private Placement Provisions: Subject to sub-section (11), if a company makes an offer or accepts monies in contravention of section 42, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty.

(11) Deemed Public Offer: 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.

Chapter 3 : Share Capital & Debentures

1.INTRODUCTION

Finance, the lifeblood for running the affairs of a company, can be raised, inter alia, by issuing shares and debentures. In fact, shares and debentures are financial instruments which help in arranging funds for the company. Under the Companies Act, 2013, they are jointly referred to as "securities".

Shares represent ownership interest in a company with entrepreneurial risks and rewards whereas debentures depict lenders' interest in the company with limited risks and returns.

Sometimes, after the issue of capital, a company may either alter or reduce the share capital depending upon the exigencies of the situation. The company has to follow the requisite provisions for alteration or reduction of share capital.

Both the shares and debentures are presented in the Balance Sheet on the liabilities side of the issuer company and on the assets side of the investor and lender respectively.

Legal provisions relating to these instruments are covered under Chapter IV of the Companies Act, 2013 (comprising sections 43 to 72) and the Companies (Share Capital & Debentures) Rules, 2014 as amended from time to time along with endorsement in the company formation documents or approved at the suitable company forum, wherever necessary.

2.SHARE CAPITAL-TYPES [SECTION 43]

(1) **Definition of Share and Stock:** Section 2(84) defines share as a share in the share capital of a company and includes stock.

The share capital of a company is divided into small units having a certain face value. Each such unit is termed as share.

Example 1: Sun Bakers Limited has authorised share capital of Rs. 50.00 lacs. The face value of each unit of capital or 'share' is Rs. 10. In this case, it can be said that the company has 5.00 lacs shares of Rs. 10 each. When these shares (either in part or whole) are allotted to various persons, they, on the date of allotment, become shareholders of the company.

The definition of 'share' states that the term 'share' includes 'stock'. If a company undertakes to aggregate the fully paid-up shares of various members as per their requests and merge those shares into one fund, then such fund is called 'stock'. In simple words we can say that 'stock' is a collection or bundle of fully paid-up shares. According to Section 61 (1) (c), a limited company having a share capital, after completing certain formalities, can convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination. Stock is stated in lump sum whereas a 'share' being the smallest unit is having face value. Originally shares are issued

to the shareholders while in case of stock, the fully paid-up shares of the members are converted into 'stock' afterwards. Thus 'stock' is not issued originally but is obtained by conversion of fully paid-up shares.

(2) Two Kinds of Share Capital: Broadly, there are two kinds of share capital of a company limited by shares:

- Equity share capital
- Preference share capital.

The Act defines preference share capital as instruments which have preferential right to dividend payment (absolute/fixed or ad-valorem/%) and preferential repayment during winding up of the company. These shareholders can also participate in equity pool post the preferential entitlements.

Shares which are not preference shares are termed as equity shares.

Equity shares are further classified as plain vanilla (same voting rights) or differential equity shares (differential with respect to dividend or voting rights or otherwise).

According to Section 43, the share capital of a company limited by shares shall be of two kinds, namely: -

(a) equity share capital—

i. with voting rights; or

ii. with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

(b) preference share capital

Note: Nothing contained in this Act shall affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

Explanation—For the purposes Section 43:

i. "equity share capital", with reference to any company limited by shares, means all share capital which is not preference share capital;

ii. "preference share capital", with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to:

(a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

(b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;

iii. capital shall be deemed to be preference capital, notwithstanding that it is entitled to either or both of the following rights, namely:

(a) that in respect of dividends, in addition to the preferential rights to the amounts specified in sub-clause (a) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;

(b) that in respect of capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in sub-clause (b) of clause (ii), 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.

(3) Equity Shares with Differential Rights

Rule 4 of the Companies (Share capital and Debenture) Rules, 2014 contains provisions which need to be followed while issuing equity shares with differential rights. These are stated as under:

i. Conditions for the issue of equity shares with differential rights: According to Rule 4 (1), a company limited by shares may issue equity shares with differential rights as to dividend, voting or otherwise, if it complies with the following conditions, namely:

(a) the articles of association of the company authorizes the issue of shares with differential rights;

(b) the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders.

Where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot;

(c) the voting power in respect of shares with differential rights of the company shall not exceed seventy-four per cent of total voting power including voting power in respect of equity shares with differential rights issued at any point of time;

(d) Omitted;

(e) the company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares;

(f) the company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend;

(g) the company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government;

Provided that a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good.

(h) the company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934 (RBI), the Securities and Exchange Board of India Act, 1992 (SEBI), the Securities Contracts Regulation Act, 1956 (SCRA), the Foreign Exchange Management Act, 1999 (FEMA) or any other special Act, under which such companies being regulated by sectoral regulators.

ii. Contents of Explanatory statement: Rule 4 (2) states that the explanatory statement to the annexed to the notice of the general meeting or of a postal ballot shall contain various matters like particulars of the issue including its size, details of differential rights, etc.

iii. Restriction on conversion of equity share capital with voting rights into equity share capital carrying differential voting rights: Rule 4 (3) specifies 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.

iv. Disclosure in the Board's Report: According to Rule 4 (4), the Board of Directors shall, inter-alia, disclose the specified particulars in the Board's Report for the financial year in which the issue of equity shares with differential rights was completed.

v. Rights to the holders of the equity shares with differential rights: Rule 4 (5) states that the holders of the equity shares with differential rights shall enjoy all other rights such as bonus shares, rights shares, etc., which the holders of equity shares are entitled to, subject to the differential rights with which such shares have been issued.

vi. Particulars of shares to be maintained in the register of members:

Rule 4 (6) provides that where a company issues equity shares with differential rights, the Register of Members maintained under section 88 shall contain all the relevant particulars of the shares so issued along with details of the shareholders.

3.CERTIFICATE OF SHARES [SECTION 46]

A certificate of shares is required when shares are issued in physical form. Section 46 contains provisions which regulate certificate of shares. They are stated as under:

(1) Share Certificate is prima facie evidence of title: According to section 46(1), a certificate, issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary, specifying the shares held by any person, shall be prima facie evidence of the title of the person to such shares.

(2) Issue of Duplicate Certificate: Section 46 (2) states that a duplicate certificate of shares may be issued, if such certificate —

(a) is proved to have been lost or destroyed; or

(b) has been defaced, mutilated or torn and is surrendered to the company.

(3) Manner of Issue of Certificates/Duplicate certificates: According to section 46 (3), notwithstanding anything contained in the articles of a company, the manner of issue of a certificate of shares or the duplicate thereof, the form of such certificate, the particulars to be entered in the register of members and other matters shall be such as may be prescribed.

(4) Shares held in Depository Form: According to Section 46 (4), where a share is held in depository form, the record of the depository is the prima facie evidence of the interest of the beneficial owner.

(5) Punishment for issuing Duplicate Certificate of Shares with intent to Defraud: As per Section 46 (5), if a company with intent to defraud issues a duplicate certificate of shares, the punishment shall be as under:

- the company shall be punishable with fine which shall not be less than five times the face value of the shares involved in the issue of the duplicate certificate but which may extend to ten times the face value of such shares or rupees ten crores whichever is higher; and
- every officer of the company who is in default shall be liable for action under section 44.

Physical entitlement to a particular portion of share capital is prima facie evidenced by way of a share certificate which has to be:

- distinctively numbered; and
- issued under common seal6 of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.

In case the company is required to issue duplicate certificates, it can do so after following the procedure prescribed in Rule 6 of the Companies (Shares and Debentures) Rules, 2014.

The aforesaid requirements are not applicable in case of dematerialised shares or shares held in electronic form with any depository. In such a case, records of the depository will be treated as prima facie evidence of the interest of the beneficial owner.

Dematerialisation (in short 'Demat') of Securities: After the depositories started functioning in India, the listed shares are required to be held in electronic form. Even banks and financial institutions insist for demat of securities for creation of charge. Now, Rule 9A (inserted w.e.f. 2-10-20187) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, requires every unlisted public company to issue the securities only in dematerialised form and also facilitate dematerialisation of all its existing securities.

According to Rule 9A (3), every holder of securities of an unlisted public company -

(a) who intends to transfer such securities on or after 2nd October, 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 private placement or bonus shares or rights offer) on or after 2nd October, 2018 shall ensure that all his existing securities are held in dematerialized form before such subscription.

Rule 9A (11) states that Rule 9A shall not apply to an unlisted public company which is:

(a) a Nidhi;

(b) a Government company; or

(c) a wholly owned subsidiary.

It is to be noted that only unlisted public companies (subject to exceptions) are covered by Rule 9A and therefore, it is not necessary for a private limited company to get its securities dematerialised. At present, there are two depositories available in India i.e. NSDL and CDSL.

Various depository participants (DPs) are linked to them. Dematerialised securities are held by the investors in their respective accounts with the DP which keeps a track of transfer, transmission, charge creation etc. There are necessary enabling legal enactments to facilitate all such procedures.

It is noteworthy to observe that the share certificates issued by a company are comparable with the currency notes issued by the Central Bank i.e. Reserve Bank of India. Therefore, strict penal provisions are in existence against fraudulent activities. In such cases, the wrong-doer company and every officer who is in default are punishable under Section 447.

4. VOTING RIGHTS AND VARIATION OF SHAREHOLDERS' RIGHTS [SECTION 47 & 48]

Voting Rights [Section 47]

Section 47 governs the voting rights of the members of a company. The provisions of Section 47 are stated as under:

i. **Voting Rights of Members holding Equity Share Capital:**

Section 47 (1) states that subject to the provisions of section 43, section 50 (2) and section 188 (1)-

(a) every 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

(b) his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

ii. **Voting Rights of Members holding Preference Share Capital:** According to Section 47 (2), every member of a company limited by shares who is holding any preference share capital shall, in respect of such capital, have—

- a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares, and
- a right to vote on any resolution for the winding up of the company, or for the repayment or reduction of its equity or preference share capital.

and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company.

iii. **Proportion of Voting Rights:** According to First Proviso to Section 47 (2), 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.

iv. **Consequences when Dividends are not paid to Preference Shareholders:** According to Second Proviso to Section 47 (2), where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, then such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

From the above provisions, it is clear that in case of equity shares other than equity shares with differential voting rights, each shareholder is entitled to vote on any resolution placed before the company i.e., in the Annual General Meeting (AGM) or Extra-ordinary General Meeting (EGM) of the members of the company. The voting right shall be proportionate to the paid-up capital of the class of shares involved.

Though the preference shareholders have limited voting rights but they shall have a right to vote on all the resolutions placed before the company if the dividend has not been paid to them for a period of two years or more. Similarly, they have a right to vote on any resolution for the winding up of the company or for the repayment or reduction of company's equity or preference share capital.

Exemption to a Private Company - Section 47 shall not apply to a private company, where memorandum or articles of association of the private company so provides. However, the exemption shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar.

Thus, Private company could be more innovative in terms of voting rights if permitted by their Articles of Association.

Variations of Shareholders' Rights [Section 48]

In case share capital of a company is divided into different classes of shares, it may sometimes be necessary for it to amend the rights attached to one or more classes of shares. Section 48 deals with such a situation and regulates the variations of shareholders' rights as under:

(1) **Variation in Rights of Shareholders with Consent:** According to Section 48 (1), where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class: -

(a) if provision with respect to such variation is contained in the memorandum or articles of the company; or

(b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class.

It is provided that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of

shareholders shall also be obtained and the provisions of this section shall apply to such variation.

(2) **No Consent given for Variation:** According to Section 48 (2), where the holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal.

(3) **Application to Tribunal:** Proviso to Section 48 (2) states that an application under this section shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(4) **Decision of Tribunal:** According to Section 48 (3), the decision of the Tribunal on any application under sub-section (2) shall be binding on the shareholders.

(5) **Filing of copy of order with Registrar:** Section 48 (4) states that the company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.

5. CALLS, CALLS-IN-ADVANCE AND INCIDENTAL MATTERS [SECTION 49 TO SECTION 51]

When the shares are partly paid-up, the company issuing them can make calls, asking the shareholders to pay the amount 'called up' in respect of such partly paid-up shares.

As per Section 49, these calls have to be uniformly made and there should be no differentiation for a given class of shareholders. As per Explanation to Section 49, shares of the same nominal value on which different amounts have been paid-up shall not be deemed to fall under the same class (i.e. the provision is not applicable in case where different amounts are paid for a same class of shares).

Calls-in-Advance

As per Section 50, a company may, if so authorised by its articles, accept from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up (i.e. if authorised by the articles, a company is permitted to keep advance subscription or call money received in advance).

However, a member of a company limited by shares shall have no voting right in respect of the 'advance amount' paid by him on 'calls' till the amount is duly called up.

According to Section 51, the company is permitted to pay dividends in proportion to the amount paid-up on each share, if so authorised by the articles.

In other words, advance payment will not lead to increased voting rights but delayed payment of call money could be the reason of decreased voting rights.

Example 2: Moon Star Machineries Limited is authorised by its articles to accept the whole or any part of the amount of remaining unpaid calls from any member even if no part of that amount has been called up by it. 'Anand', a shareholder, deposits in advance

the remaining amount due on his partly paid-up shares without any calls being made by the company.

In view of the authorisation given by the Articles, Moon Star Machineries Limited is permitted to accept the advance amount received on unpaid calls from Anand. In other words, this is a valid transaction.

Example 3: Coriander Masale Limited has issued 10,00,000 equity shares of Rs. 10 each on which Rs. 6 per share has been called till allotment and the first and final call of Rs. 4 is yet to be made. Reena holds 10,000 shares on which she has paid whole of Rs. 10 per share. In the upcoming extra-ordinary general meeting of the company she wants to exercise her voting rights as the owner of fully paid-up shares. However, the company cannot permit her as she does not have voting right in respect of the 'advance amount' paid by her in respect of first and final call. The restriction will continue till the amount is duly called up by the company.

6. ISSUE OF SHARES AT A PREMIUM OR DISCOUNT [SECTION 52 TO SECTION 55]

Under the concepts of financial management, fair value of a share may be equal to, less than or more than its face value. If a share is issued to the new investors at a price lower than the fair value then the existing shareholders are likely to make an objection. Also, issuing a share at a value more than or less than the fair value may have adverse consequences under the Income Tax Act or under the Foreign Exchange Management Act (FEMA).

When a company issues shares at a price higher than their face value, the shares are said to be issued at premium and the differential amount is termed as premium.

Example 4: A share having face value of Rs. 10 is issued at a price of Rs. 14. The amount over and above the face value of ` 10 is called premium. Where the issue price is lower than the face value of the shares, such issue of shares is regarded as being issued at discount and the differential amount is known as discount.

Example 5: A share having face value of Rs. 5 is issued at a lower price of Rs. 4. The differential amount of Rs. 1 is known as discount which is being allowed by the company. There are precautionary provisions covered in Sections 52 and 53 for both these scenarios (i.e. premium or discount) to safeguard the issuer company and its stakeholders.

Application of Premiums received on Issue of Shares [Section 52]

Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a "securities premium account". Further, the provisions of the Companies Act, 2013 relating to reduction of share capital (which are very stringent) of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

Application of Securities Premium Account: The securities premium account may be applied by the company:

(a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;
(b) in writing off the preliminary expenses of the company;
(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or
(e) for the purchase of its own shares or other securities under section 68.

Prescribed Class of Companies are permitted to apply Securities Premium Account: The securities premium account may be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under Section 133:

(a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or
(b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or
(c) for the purchase of its own shares or other securities under section 68.

Prohibition on Issue of Shares at Discount [Section 53]

A company is prohibited from issuing shares at a discount if it does not follow the provisions of Section 53.

1. According to Section 53 (1), a company shall not issue shares at a discount, except as provided in Section 54.

   Note: Section 54 contains provisions for the issue of 'Sweat Equity Shares'.

2. Section 53 (2) states that any share issued by a company at a discount shall be void.
3. Exception: Section 53 (2A) states that notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.
4. According to Section 53 (3), where any company fails to comply with the provisions of Section 53, such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent per annum from the date of issue of such shares to the persons to whom such shares have been issued.

It is to be noted that the restrictions mentioned in Sections 52 and 53 apply only in respect of issue of shares (either equity or preference shares) but not to the issue of any debt related products like bonds or debentures whose pricing is mostly governed by YTM (yield to maturity) considerations.

Issue of Sweat Equity Shares [Section 54]

Sweat equity shares are issued to keep the employees of a company motivated by making them partner in the growth of the company.

Meaning of 'sweat equity shares': As per Section 2 (88), the term 'sweat equity shares' means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

Issue of 'sweat equity shares': Section 54 mentions the provisions which need to be adhered to by a company if it desires to issue sweat equity shares.

Conditions: According to Section 54 (1), a company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely:

(a) the issue is authorised by a special resolution passed by the company;
(b) the resolution specifies the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;
(c) omitted;
(d) where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with Rule 8 of the Companies (Share and Debentures) Rules, 2014.

Some of the important provisions contained in Rule 8 of the Companies (Share and Debentures) Rules, 2014, are stated as under:

Meaning of Employee: "Employee" means-

(a) a permanent employee of the company who has been working in India or outside India; or
(b) a director of the company, whether a whole- time director or not; or
(c) 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;

Meaning of 'Value additions': The expression 'Value additions' means actual or anticipated economic benefits derived or to be derived by the company from an expert or a professional for providing know-how or making available rights in the nature of intellectual property rights, by such person to whom sweat equity is being issued for which the consideration is not paid or included in the normal remuneration payable under the contract of employment, in the case of an employee.

Validity of Special Resolution: According to Rule 8 (3), the special resolution authorising the issue of sweat equity shares shall be valid for making the allotment within a period of not more than twelve months from the date of passing of the special resolution.

Limit on issue of Sweat Equity Shares: According to Rule 8 (4), a company shall not issue sweat equity shares for more than fifteen per cent of the existing paid up equity share capital in a year or shares of the issue value of rupees five crores, whichever is higher.

Provided that the issuance of sweat equity shares in the Company shall not exceed twenty five percent, of the paid up equity capital of the Company at any time.

Provided further that a startup company, as defined in notification number G.S.R. 127(E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, may issue sweat equity shares not exceeding fifty percent of its paid up capital upto ten years from the date of its incorporation or registration.

Lock-in Period: Rule 8 (5) states that the sweat equity shares issued to directors or employees shall be locked in/non-transferable for a period of three years from the date of allotment.

Valuation of Sweat Equity Shares: Rule 8 (6) mentions that the sweat equity shares to be issued shall be valued at a price determined by a registered valuer as the fair price giving justification for such valuation.

Valuation of IPR/know-how/value additions to be done by a Registered Valuer: According to Rule 8 (7), the valuation of intellectual property rights or of know how or value additions for which sweat equity shares are to be issued, shall be carried out by a registered valuer, who shall provide a proper report addressed to the Board of directors with justification for such valuation.

Treatment of non-cash consideration: According to Rule 8 (9), where the sweat equity shares are issued for a non-cash consideration on the basis of a valuation report in respect thereof obtained from the registered valuer, such non-cash consideration shall be treated in the following manner in the books of account of the company:

(a) where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or

(b) where clause (a) is not applicable, it shall be expensed as provided in the accounting standards.

Disclosure in the Directors' Report: Rule 8 (13) states that the Board of Directors shall, inter alia, disclose in the Directors' Report for the year in which such shares are issued, the specified details of issue of sweat equity shares.

Maintenance of Register: According to Rule 8 (14), the company shall maintain a Register of Sweat Equity Shares in Form No. SH. 3. It shall be maintained at the registered office of the company or such other place as the Board may decide.

Sweat equity shareholders to rank pari passu with other equity shareholders: According to Section 54 (2), the rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under Section 54 and the holders of such shares shall rank pari passu with other equity shareholders.

Preference Shares - Issue and Redemption [Section 55]

Section 55 contains provisions for regulation of issue and redemption of preference shares. These are stated as under:

i. **Company to issue only Redeemable Preference Shares:** A company limited by shares shall not issue any preference shares which are irredeemable.

ii. **Time Period within which Preference Shares are to be redeemed:** A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to such conditions as are prescribed in Types of Preference Shares

Rule 9 of the Companies (Share Capital and Debentures) Rules, 2014. These conditions are mentioned as under:

Requirement of Special Resolution and Condition of no Default: According to Rule 9 (1), the issue of preference shares has to be authorized by passing a special resolution in the general meeting of the company. Further, at the time of such issue of preference shares, the company should not have 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.

Maintenance of Register: Rule 9 (4) requires that if a company issues preference shares, the Register of Members maintained under Section 88 shall contain the particulars in respect of such preference shareholder(s).

iii. **Exceptional case where period may exceed twenty years:** A company may issue preference shares for a period exceeding twenty years (but not exceeding thirty years16) for infrastructure projects17, subject to the 18redemption of 10% of such preference shares beginning 21st year onwards or earlier, on proportionate basis, at the option of such preferential shareholders.

iv. **Preference Shares to be redeemed out of the Profits only:** No such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption.

v. **Only fully paid Preference Shares are to be redeemed:** No such shares shall be redeemed unless they are fully paid.

vi. Transfer to CRR Account21: Where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve (CRR) Account, and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the Capital Redemption Reserve Account were paid-up share capital of the company.

Example 6: During the current financial year, the Board of Directors of Vintee Lifestyles Garments Limited is to undertake redemption of 20,000 preference shares of Rs. 100 each at a premium of Rs. 20 per share. It is made out by the Accounts Department that the profits are sufficient to meet the ensuing liability arising out of redemption of preference shares at premium.

In this case, the amount that needs to be transferred to Capital Redemption Reserve (CRR) account, if preference shares are redeemed at a premium out of profits which are otherwise available for dividend, is Rs. 20,00,000 being the sum equal to the nominal amount of the preference shares to be redeemed. There is no need to transfer to CRR account any amount paid towards premium.

vii. **Payment of Premium in case of prescribed Class of Companies:** In case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed.

The premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

In a case not meeting above criteria, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

viii. **Issue of further Redeemable Preference Shares if a Company is unable to redeem existing preference shares or pay dividend:** According to Section 55 (3), where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may—

- with the consent of the holders of three-fourths in value of such preference shares, and
- with the approval of the Tribunal on a petition made by it in this behalf,

issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed.

It is provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.

Note: According to the Explanation given, the issue of further redeemable preference shares or the redemption of preference shares under this section shall not be deemed to be an increase or, as the case may be, a reduction, in the share capital of the company.

Utilisation of CRR Account: According to Section 55 (4), 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.

7. TRANSFER AND TRANSMISSION OF SECURITIES AND THE ALLIED PROVISIONS [SECTION 56 TO SECTION 59]

Section 56 deals with the transfer and transmission of securities or interest of a member in the company.

Requirement for Registering the Transfer of Securities: According to Section 56(1), a company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, unless a proper instrument of transfer in the prescribed form, duly stamped, dated and executed by or on behalf of the transferor and the transferee (except where the transfer is between persons both of whose names are entered as holders of beneficial interest in the records of a depository), specifying the name, address and occupation, if any, of the transferee, has been delivered to the company by the transferor or the transferee within a period of 60 days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities.

Where Instrument of Transfer lost/not delivered: First proviso to section 56(1) states that where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.

Instrument of Transfer not required in case of Bonds issued by a Government Company – It is provided that the provisions of this sub-section [i.e. section 56(1)], in so far as it requires a proper instrument of transfer, to be duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee, shall not apply with respect to bonds issued by a Government company, provided that an intimation by the transferee specifying his name, address and occupation, if any, has been delivered to the company along with the certificate relating to the bond; and if no such certificate is in existence, along with the letter of allotment of the bond.

Further, the provisions of section 56 (1) shall not apply to a Government Company in respect of securities held by nominees of the Government.

Note: The above exceptions are applicable to a Government Company, which has not committed a default in filing its financial statements under section 137 or Annual Return under section 92 with the Registrar.]

Power of Company to Register Transmission of Shares not affected by section 56 (1): According to section 56 (2), the power of company to register shall not be affected by the provision contained in Section 56 (1). Accordingly, the company is empowered to register, if it receives an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted. In other words, there is no need for submission of instrument of transfer in case of transmission of shares.

Procedure for Transfer of partly paid Shares on an application of transferor alone: According to Section 56 (3), where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice of the application, in such manner as may be prescribed, to the transferee and the transferee gives no objection to the transfer within two weeks from the receipt of notice.

Subscribing the above position, Rule 11 (3) of the Companies (Share Capital and Debentures) Rules, 2014, states that a company shall not register a transfer of partly paid shares, unless the company has given a notice in Form No. SH-5 to the transferee and the transferee has given no objection to the transfer within two weeks from the date of receipt of notice.

Example 7: Himanshu has received a notice from Chaitanya Progressive Books Private Limited on 7th August, 2019 intimating that Shefali has submitted a transfer deed duly signed by her for transfer of 500 partly paid shares (Rs. 6 paid-up out of Face Value of Rs. 10 per share) in his name. Himanshu as transferee must raise his objection to the proposed transfer of partly paid shares latest by 21st August, 2019.

Time Period for Delivery of certificates: Section 56 (4) states the time period for delivery of certificates. Accordingly, 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, transferred or transmitted—

Particulars	Time Period for delivering the Certificates of all Securities allotted, transferred or transmitted
In the case of subscribers to the memorandum.	Within 2 months from the date of incorporation.
In the case of any allotment of any of its shares by a company.	Within a period of two months from the date of allotment.
In the case of a transfer or transmission of securities.	Within a period of one month from the date of receipt by the company of the instrument of transfer or the intimation of transmission.
In the case of any allotment of debenture.	Within a period of six months from the date of allotment.

Securities dealt with in a Depository: According to the Proviso to Section 56 (4), 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.25

Transfer of Security of the Deceased Person by his Legal Representative: According to Section 56 (5), 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.

Example 8: Richa Daniel, after having obtained succession certificate, succeeded to 7,000 shares of Rs. 100 each allotted to her late father Alexender Daniel by Speed Software Limited. To pay off the debt of her cousin Stesley, she wants to transfer whole of the 7,000 shares to her on the basis of a duly stamped instrument of transfer which has been signed by her as well as Stesley. Accordingly, she has delivered the required documents to the company for transfer of shares.

In terms of Section 56 (5), the company, on receipt of duly stamped instrument of transfer along with requisite share certificates and succession certificate, shall transfer the shares in favour of Stesley. Thus, even though Richa Daniel, the legal representative of Alexender Daniel, is not a holder of 7,000 shares as per the Register of Members of the company, the transfer effected by her in favour of her cousin Stesley is a valid transfer as if she had been the holder of securities at the time of executing the transfer deed.

Note: As an alternative, Richa Daniel may choose to get herself registered as holder of the 7,000 shares in which case, she will make an application to Speed Software Limited. Such application shall be accompanied with share certificates and succession certificate. There is no need to submit instrument of transfer or transfer deed in such a case of

transmission. This is so because transfer deed cannot be signed by the deceased person as transferor.

On receipt of these documents, the company will scrutinize them and if found in order, it shall proceed to enter the name of Richa Daniel in the Register of Members. Consequently, the name of the deceased person i.e., Alexender Daniel shall be deleted. Further, new share certificates will be issued in the name of Richa Daniel, the legal representative of Alexender Daniel.

Cases of Transmission: In the following cases, transmission of shares shall take place:

(a) **Death:** When a shareholder expires, his shares need to be transmitted to his legal representative.

(b) **Insolvency:** When a shareholder becomes insolvent, his shares are to be transmitted to his Official Receiver.

(c) **Lunacy:** When a shareholder becomes lunatic, his shares are to be transmitted to his administrator appointed by the Court.

(d) **Punishment for Default in compliance with the provisions:** As per Section 56 (6), where any default is made in complying with the provisions of sub-sections (1) to (5), the company and every officer of the company who is in default shall be liable to a penalty of Rs. 50,000.

Liability of Depository: Section 56 (7) states that where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable under Section 447 along with the liability mentioned under the Depositories Act, 1996.

Forged Transfer: A forged transfer is a 'nullity' and is not legally binding. Forged transfer takes place when a company effects transfer of shares on the basis of an instrument of transfer containing forged signatures of transferor. Is it possible for a transferee of 'forged transfer' to acquire ownership of shares contained in the instrument of transfer? The answer is 'NO'. At the same time, the transferor who is the real owner continues to be the shareholder and accordingly, the company can be forced by him to delete the name of the transferee and to restore his name as owner of shares in the Register of Members.

What will happen if the transferee of 'forged transfer' transfers the shares to another buyer who does not know about the forgery and the company also registers the transfer in the name of new buyer and endorses the share certificates. In fact, the company cannot deny the ownership rights of new genuine buyer but it can also not deny the ownership rights of original shareholder because 'forged transfer' is void ab-initio and therefore, the company has to restore his name. While restoring the name of the original shareholder, the company may be asked to compensate the new genuine buyer who exercised good faith in purchasing the shares. As a remedy, the company may get itself indemnified by the first transferee who used the forged instrument of transfer to get the shares transferred in his name.

Note: With the dematerialisation process becoming a necessity in case of unlisted public companies i.e. they are required to dematerialise all of their securities as per Rule 9A of the Companies (Prospectus and Allotment of Securities) Rules, 2014, the chances of forgery are very thin or almost negligible. Though private companies are not required to dematerialise their securities but due to the limited number of shareholders, the company can exercise caution and easily detect the forgery, if at all it is going to happen.

Punishment for Personation of Shareholder [Section 57]

Section 57 contains provisions relating to punishment for personation of a shareholder.

If any person deceitfully personates: -

- as an owner of any security or interest in a company, or
- as an owner of any share warrant or coupon issued in pursuance of the Companies Act, 2013, and

thereby obtains or attempts to obtain any such security or interest or any such share warrant or coupon, or receives or attempts to receive any money due to any such owner, such person shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Refusal of Registration and Appeal against Refusal [Section 58]

It is possible that a company may refuse registration of transfer or transmission. According to Section 2 (68) (i), a private company is required to restrict the right to transfer its shares by providing so in its Articles. However, this right to prohibit transfer is not absolute but it should be reasonable so that it is in the interest of the company.

Section 58 contains the procedure which needs to be followed by a company while refusing to register the transfer of securities. It also contains process of filing appeal against such refusal. The provisions of Section 58 are stated as under:

i. **Notice of Refusal to be sent:** According to Section 58 (1), if a private company limited by shares refuses to register the transfer of, or the transmission by operation of law of the right to any securities or interest of a member in the company, then the company shall send notice of refusal to the transferor and the transferee or to the person giving intimation of such transmission, within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, was delivered to the company.

ii. **Securities/other interest a Public Company:** As per Section 58 (2), the securities or other interest of any member in a public company are freely transferable.

It is provided that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

iii. **Appeal to Tribunal against Refusal:** According to Section 58 (3), the transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period

of sixty days from the date on which the instrument of transfer or the intimation of transmission, was delivered to the company.

iv. **Appeal to Tribunal against Refusal by a Public Company without sufficient cause:** Section 58 (4) states that if a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, is delivered to the company, the transferee may, within a period of sixty 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.

v. **Order of Tribunal:** According to Section 58 (5), the Tribunal, 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.

vi. **Contravention of the Order of the Tribunal:** As per Section 58 (6), if a person contravenes the order of the Tribunal, he shall be punishable with imprisonment for a term not less than one year but may extend to three years and with fine not less than one lakh rupees which may extend to five lakh rupees.

Rectification of Register of Members [Section 59]

Section 59 provides the procedure for the rectification of register of members. These provisions are stated as under:

i. **Appeal by Aggrieved Person:** According to Section 59 (1), if the name of any person is, without sufficient cause,

- entered in the register of members of a company, or
- after having been entered in the register, is, omitted therefrom, or
- if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member,

then the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

ii. **Order of the Tribunal:** Section 59 (2) states that the Tribunal may, after hearing the parties to the appeal by order,

- either dismiss the appeal, or
- direct that the transfer or transmission shall be registered by the company within a period of ten days of the receipt of the order, or
- direct rectification of the records of the depository or the register and in the latter case, direct the company to pay damages, if any, sustained by the party aggrieved.

iii. **Entitlement to Voting Rights:** Section 59 (3) states that the provisions of Section 59 shall not restrict the right of a holder of securities, to transfer such securities. Further, any person acquiring such securities shall be entitled to voting rights unless the voting rights have been suspended by an order of the Tribunal.

iv. **Transfer of Securities contravenes certain Acts and Direction of Tribunal:** According to Section 59 (4), where the transfer of securities is in contravention of any of the provisions of the Securities Contracts (Regulation) Act, 1956 (SCRA), the Securities and Exchange Board of India Act, 1992 (SEBI) or the Companies Act, 2013 or any other law for the time being in force, the Tribunal may, on an application made by the depository, company, depository participant, the holder of the securities or the Securities and Exchange Board, direct any company or a depository to set right the contravention and rectify its register or records concerned.

8. ALTERATION OF SHARE CAPITAL [SECTIONS 61-67]

Before proceeding further, we may look at the following definitions:

Definition of Authorised Capital or Nominal Capital: Section 2(8) defines the term authorised capital or nominal capital to mean such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.

Definition of Called-up Capital: Section 2(15) states that the term called-up capital means such part of the capital, which has been called for payment.

Power of Limited Company to Alter its Share Capital [Section 61]

According to Section 61, a limited company having a share capital is empowered to alter its capital clause of the Memorandum of Association. The provisions are as under:

(1) Section 61 (1) states that a limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to—

(a) increase its authorised share capital by such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares,

However, no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;

(c) convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived.

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) Section 61 (2) provides that the cancellation of shares shall not be deemed to be a reduction of share capital.

Note: Section 64 states that a company shall, within 30 days of its share capital having been altered in the manner provided in Section 61 (1), give notice to the Registrar in the prescribed form27 along with an altered memorandum.

Further issue of share capital – Rights Issue; Preferential Allotment [Section 62]

A rights issue involves pre-emptive subscription rights to buy additional securities in a company offered to the company's existing security holders. It is a non-dilutive pro rata way to raise capital.

Example 9: If a company announces '1:10 rights issue', it means an existing shareholder can buy one extra share for every ten shares held by him/her. Usually the price at which the new shares are issued by way of rights issue is less than the prevailing market price of the stock to encourage subscription.

A public company may issue securities through a rights issue or a bonus issue in accordance with the provisions of this Act and in case of a listed company or a company which intends to get its securities listed also with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder as per section 23(1)(c) of the Companies Act, 2013.

A private company may issue securities by way of rights issue or bonus issue in accordance with the provisions of this Act as per the section 23(2)(a).

Section 62 deals with further issue of share capital. The provisions ensure equitable distribution of such shares to the existing shareholders. These are mentioned in the following paragraphs:

(1) **Offering of issue of further Shares:** According to Section 62 (1), where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered: -

(a) to persons who, at the date of the offer, are holders of equity shares of the company in proportion, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely: -

i. the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days or such lesser number of days as may be prescribed and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

ii. unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;

iii. after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the

shares offered, the Board of Directors may dispose of them in such manner which is not dis-advantageous to the shareholders and the company.

(b) to employees under a scheme of employees' stock option, subject to special resolution passed by company and subject to the conditions as may be prescribed; or

(c) 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 for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.

This clause authorises company to issue shares to persons other than its existing shareholders and to employees under ESOP. However, the process to issue those shares is provided under section 42 of the Act (Private Placement).

Note: As per Section 2(37), the term 'employees' stock option' means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

In case an unlisted company34 desires to issue shares under ESOP Scheme to its directors, officers or employees, Rule 12 of the Companies (Shares and Debentures) Rules, 2014 requires certain conditions to be fulfilled. Some of the important provisions are as under:

i. According to Rule 12 (1), the issue of Employees' Stock Option Scheme has been approved by the shareholders of the company by passing a special resolution.

The term 'Employee' means:

(a) a permanent employee of the company who has been working in India or outside India; or

(b) a director of the company, whether a whole-time director or not but excluding an independent director; or

(c) an employee as defined in clause (a) or (b) of a subsidiary, in India or outside India, or of a holding company of the company

but does not include-

i. an employee who is a promoter or a person belonging to the promoter group; or

ii. a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten per cent of the outstanding equity shares of the company:

Provided that in case of a startup company35, the conditions mentioned in sub-clauses (i) and (ii) shall not apply up to ten years from the date of its incorporation or registration.

ii. According to Rule 12 (2), the company shall make the specified disclosures in the explanatory statement annexed to the notice for passing of the resolution.

iii. According to Rule 12 (3), the companies granting option to its employees pursuant to Employees Stock Option Scheme will have the freedom to determine the exercise price in conformity with the applicable accounting policies, if any.

iv. According to Rule 12 (6):

(a) There shall be a minimum period of one year between the grant of options and vesting of option:

It is provided that in a case where options are granted by a company under its Employees Stock Option Scheme in lieu of options held by the same person under an Employees Stock Option Scheme in another company, which has merged or amalgamated with the first mentioned company, the period during which the options granted by the merging or amalgamating company were held by him shall be adjusted against the minimum vesting period required under this clause;

(b) The company shall have the freedom to specify the lock-in period for the shares issued pursuant to exercise of option.

(c) The Employees shall not have right to receive any dividend or to vote or in any manner enjoy the benefits of a shareholder in respect of option granted to them, till shares are issued on exercise of option.

v. According to Rule 12 (8):

(a) The option granted to employees shall not be transferable to any other person.

(b) The option granted to the employees shall not be pledged, hypothecated, mortgaged or otherwise encumbered or alienated in any other manner.

(c) Subject to clause (d), no person other than the employees to whom the option is granted shall be entitled to exercise the option.

(d) In the event of the death of employee while in employment, all the options granted to him till such date shall vest in the legal heirs or nominees of the deceased employee.

(e) In case the employee suffers a permanent incapacity while in employment, all the options granted to him as on the date of permanent incapacitation, shall vest in him on that day.

(f) In the event of resignation or termination of employment, all options not vested in the employee as on that day shall expire. However, the employee can exercise the options granted to him which are vested within the period specified in this behalf, subject to the terms and conditions under the scheme granting such options as approved by the Board.

(2) Dispatch of Notice to the existing Shareholders: Section 62 (2) requires that the notice referred to in sub-clause (i) of clause (a) of sub-section (1) shall be dispatched through registered post or speed post or through electronic mode or courier or any other mode having proof of delivery to all the existing shareholders at least three days before the opening of the issue.

(3) Exception: According to Section 62 (3), Section 62 shall not apply to the increase of the subscribed capital of a company caused by the exercise of an option attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company.

It is provided 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.

(4) **Conversion of Debentures/Loan into Shares:** According to 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.

Term of Conversion not acceptable to the Company: It is provided that where the terms and conditions of such conversion are not acceptable to the company, it may, within sixty 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.

(5) **Consideration of Terms and Conditions of Conversion by the Government:** Section 62 (5) requires that in determining the terms and conditions of conversion, the Government shall have due regard to the financial position of the company, the terms of issue of debentures or loans, as the case may be, the rate of interest payable on such debentures or loans and such other matters as it may consider necessary.

(6) **If required, Memorandum needs to be Altered to accommodate increased Share Capital:** According to Section 62 (6), where the Government has, by an order made under sub-section (4), directed that any debenture or loan or any part thereof shall be converted into shares in a company and where no appeal has been preferred to the Tribunal or where such appeal has been dismissed, the memorandum of such company shall, where such order has the effect of increasing the authorised share capital of the company, stand altered and the authorised share capital of such company shall stand increased by an amount equal to the amount of the value of shares which such debentures or loans or part thereof has been converted into.

Example 10: A company, listed at Bombay Stock Exchange, intends to offer its new shares to the non-members. The existing members of the company consider such offer as invalid in view of the provisions contained in Section 62 (1) (a). However, the company is not prohibited in absolute terms while offering new shares to the non-members. It can do so after fulfilling the conditions given in Section 62 (1) (c). Thus, new shares of a company limited by shares may be issued to non-members under certain circumstances.

Issue of Bonus Shares [Section 63]

Bonus shares are shares issued proportionately by a company to its current shareholders as fully paid-up shares free of cost.

Section 63 prescribes the condition and the manner of issue of fully paid-up bonus shares by a company to its members. The provisions are as under:

1. According to Section 63 (1), a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of—

i. its free reserves;
ii. the securities premium account; or
iii. the capital redemption reserve account.

However, no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets. In other words, a company cannot issue bonus shares out of reserves created by the revaluation of assets.

2. Section 63 (2) states that no company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares, unless—

(a) it is authorised by its articles;
(b) it has on the recommendation of the Board, been authorised in the general meeting of the company;
(c) it has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;
(d) it has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
(e) the partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up;
(f) it complies with such conditions as prescribed by Rule 14 (given below).

According to Rule 14 of the Companies (Share capital and debenture) Rules, 2014, a company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same.

3. According to Section 63 (3), the bonus shares shall not be issued in lieu of dividend.

It is noteworthy that the fully paid-up bonus shares can only be issued if the articles of the company contain authorisation in this respect. Bonus shares are issued out of profits which are otherwise available for distribution among the members. Such profits are not distributed among them in cash but the shareholders are allotted further shares in the form of bonus shares. Free reserves, share premium amount and amount lying in capital redemption reserve account can be used for the purpose of issuing fully paid-up bonus shares.

Note: According to the proviso to Section 123(5) of the Companies Act, 2013, it is permissible for a company to capitalise its profits or reserves 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.

Example 11: XYZ Limited declares bonus shares in the ratio of 1:5. It means an existing shareholder of the company, say Mr. 'R', will get one bonus share free of cost for every five shares already held by him. The larger the holding of any shareholder, the more bonus shares he will get in comparison to others.

Notice to be given to Registrar for alteration of Share Capital [Section 64]

As and when, there is an alteration of share capital, the company concerned shall notify the registrar. The provisions in this respect are contained in Section 64.

(1) **Filing of Prescribed Notice:** According to Section 64 (1), where-

- a company alters its share capital in any manner specified in section 61 (1),
- an order made by the Government under section 62(4) read with 62(6) has the effect of increasing authorised capital of a company; or
- a company redeems any redeemable preference shares,

the company shall file a notice in the prescribed form36 with the Registrar within a period of thirty days of such alteration or increase or redemption, as the case may be, along with an altered memorandum.

(2) **Default in Filing of Notice:** Section 64 (2) states that where any company fails to comply with the provisions of sub-section (1), such company and every officer who is in default shall be liable to a penalty of Rs. 500 for each day during which such default continues, subject to a maximum of Rs. 5,00,000 in case of a company and Rs. 1,00,000 in case of an officer who is in default.

Reduction of Share Capital [Section 66]

As a principle of sound financial management, a company is required to keep its capital intact. At times, however, it may become necessary for the company to bring about a reduction in its capital. Accumulated business losses, assets of reduced or doubtful value like unsound investments proving bad or having paid- up capital in excess of the requirements of the company or surplus capital which cannot be employed gainfully, require corrective measures to be taken to keep the financial health of the company in a reasonably well position. Accordingly, the company may find it necessary to reduce its share capital.

Section 66 deals with the reduction of share capital. The provisions are stated as under:

(1) **Reduction of Share Capital by Special Resolution to be confirmed by Tribunal:** Section 66 (1) provides that subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in particular, may:

(a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up;

Example 12: In respect of a share of Rs. 10, a company has called only Rs. 7 per share and the same has been paid by all the shareholders. The company decides not to call remaining Rs. 3 per share and reduces its shareholders' liability. If done, the company is said to have reduced its share of Rs. 10 to Rs. 7 as fully paid-up share.

(b) either with or without extinguishing or reducing liability on any of its shares: -

i. cancel any paid-up share capital which is lost or is unrepresented by available assets; or

ii. pay off any paid-up share capital which is in excess of the wants of the company,

The company shall also alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

Reduction not permitted: Section 66 (1) further Provides that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon.

(2) Issue of Notice by the Tribunal: According to Section 66 (2), the Tribunal shall give notice of every application made to it under sub-section (1) to the Central Government37, Registrar and to the Securities and Exchange Board, in the case of listed companies, and the creditors of the company and shall take into consideration the representations, if any, made to it by that Government, Registrar, the Securities and Exchange Board and the creditors within a period of three months from the date of receipt of the notice.

Where no representation has been received from the Central Government, Registrar, the Securities and Exchange Board or the creditors within the said period, it shall be presumed that they have no objection to the reduction.

(3) Order of Tribunal: According to Section 66 (3), the Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit.

It is provided that no application for reduction of share capital shall be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is in conformity with the accounting standards specified in Section 133 or any other provision of this Act and a certificate to that effect by the company's auditor has been filed with the Tribunal.

(4) Publication of Order of Confirmation of Tribunal: Section 66 (4) states that the order of confirmation of the reduction of share capital by the Tribunal under sub-section (3) shall be published by the company in such manner as the Tribunal may direct.

(5) Delivery of Certified Copy of Order of Tribunal to Registrar: Section 66 (5) requires that the company shall deliver a certified copy of the order of the Tribunal under sub-section (3) and of a minute approved by the Tribunal showing—

(a) the amount of share capital;

(b) the number of shares into which it is to be divided;

(c) the amount of each share; and

(d) the amount, if any, at the date of registration deemed to be paid-up on each share,

to the Registrar within thirty days of the receipt of the copy of the order, who shall register the same and issue a certificate to that effect.

(6) Exemption to Buy-Back: According to Section 66 (6), nothing in this section shall apply to buy-back of its own securities by a company under Section 68.

(7) No Liability of Members: Section 66 (7) states that a member of the company, past or present, shall not be liable to any call or contribution in respect of any share held by him exceeding the amount of difference, if any, between the amount paid on the share, or reduced amount, if any, which is to be deemed to have been paid thereon, as the case may be, and the amount of the share as fixed by the order of reduction.

(8) In case where Creditor is entitled to object but was not included in the list of Creditors: According to Section 66 (8), where the name of any creditor entitled to object to the reduction of share capital under this section is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after such reduction, the company commits a default, within the meaning of section 6 of the Insolvency and Bankruptcy Code, 2016, in respect of the amount of his debt or claim-

(a) every person, who was a member of the company on the date of the registration of the order for reduction by the Registrar, shall be liable to contribute to the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced winding up on the day immediately before the said date; and

(b) if the company is wound up, the Tribunal may, on the application of any such creditor and proof of his ignorance as aforesaid, if it thinks fit, settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

(9) Rights of Contributories not affected: Section 66 (9) provides that nothing in sub-section (8) shall affect the rights of the contributories among themselves.

(10) Liability of Officers: Section 66 (10) deals with the liability of defaulting officers. Accordingly, if any officer of the company: -

(a) knowingly conceals the name of any creditor entitled to object to the reduction;

(b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or

(c) abets or is privy to any such concealment or misrepresentation as aforesaid,

he shall be liable under Section 447.

Restriction on Purchase by Company or giving of Loans by it for Purchase of its Shares [Section 67]

As a fundamental principle, a company cannot buy its own shares because in that case it will involve reduction of share capital affecting the creditors. However, this restriction is not absolute. If the prescribed procedure as laid by Section 67 is followed, the company is permitted to buy its own shares and the prohibition shall not apply. The provisions of Section 67 are mentioned below:

(1) Reduction according to the applicable Provisions: Section 67(1)41 lays down that no company limited by shares or by guarantee and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of this Act.

(2) Restriction on giving Loan, Guarantee or provision of Security, etc.: According to Section 67 (2), no public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company.

(3) Exceptions: As per Section 66(3), there are, however, certain exceptions where a company may provide the financial assistance, namely:

(a) the lending of money by a banking company in the ordinary course of its business;

(b) the provision is made by a company for lending of money in accordance with any scheme approved by company through special resolution with such requirements as may be prescribed42, for the purchase of, or subscription for, fully paid up shares in the company or its holding company, if the purchase of, or the subscription for, the shares held by trustees for the benefit of the employees or such shares held by the employee of the company;

(c) the giving of loans by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

However, disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board's report in such manner as may be prescribed.

(4) Redemption of Preference Shares Permitted: According to Section 67 (4), nothing in Section 67 shall affect the right of a company to redeem any preference shares issued under this Act or under any previous company law.

(5) Punishment for Contravention: Section 67 (5) states that if a company contravenes the provisions of this section, the punishment shall be as under:

- Company: It shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees;
- Every officer of the company who is in default: He shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

9. BUY BACK OF SECURITIES [SECTIONS 68-70]

Buy back is the re-acquisition by a company of its own securities. It is a way of returning money to its investors. Section 68 to Section 70 contain provisions for buy back of securities by the issuer company. They are stated as under:

Power of Company to Purchase its Own Securities [Section 68]

Section 68 contains provisions which describe the power a company to purchase its own securities subject to the applicable conditions.

(1) Sources of Funds for Buy-Back of Shares: According to Section 68 (1), a company may purchase its own shares or other specified securities. The purchase should be made out of:

i. its free reserves; or
ii. the securities premium account; or
iii. the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

"Specified securities" includes employees' stock option or other securities as may be notified by the Central Government from time to time.

(2) Conditions for Buy-Back: According to Section 68 (2), the company shall not purchase its own shares or other specified securities unless:

(a) the buy-back is authorised by its articles;
(b) a special resolution authorising the buy-back is passed in general meeting of the company;

Exception: A special resolution is not necessary where:

i. the buy-back is, ten per cent or less of the total paid-up equity capital and free reserves of the company; and
ii. such buy-back has been authorised by the Board by means of a resolution passed at its meeting;

(c) the buy-back is 25% or less of the aggregate of paid-up capital and free reserves of the company;

It is provided that the buy-back of equity shares in any financial year shall not exceed 25% of its total paid up equity capital in that financial year.

(d) the ratio of the aggregate debts (secured and unsecured) owed by the company after buy back is not more than twice the paid up capital and its free reserves;

It is provided that the Central Government may prescribe a higher ratio of the debt to capital and free reserves for a class or classes of companies;

The expression "free reserves" includes securities premium account44.

(e) all the shares or other specified securities for buy-back are fully paid-up;
(f) the buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by SEBI in this behalf;
(g) the buy-back in respect of shares or other specified securities other than those specified in Clause (f) is in accordance with rules as may be prescribed. [Sections 68(2)]

Provided that no offer of buy-back, shall be made within a period of one year from the date of the closure of the preceding offer of buy-back, if any.

(3) Procedure before Buy-Back: According to Section 68 (3), the notice of the meeting at which special resolution is proposed to be passed shall be accompanied by an explanatory statement stating -

(a) a full and complete disclosure of all the material facts;
(b) the necessity for the buy-back;
(c) the class of shares or securities intended to be purchased under the buy back;
(d) the amount to be invested under the buy-back; and
(e) the time limit for completion of buy-back.

(4) Time limit for Completion of Buy-Back: Section 68(4) states that every buy-back shall be completed within twelve months from the date of passing the special resolution or a resolution passed by the Board at general meeting authorising the buy-back.

(5) Whose Securities are to be Purchased under 'Buy-Back': According to Section 68 (5), the buy-back under sub-section (1) may be—

(a) from the existing shareholders or security holders on a proportionate basis; or
(b) from the open market; or
(c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

(6) Declaration of Solvency: According to Section 68 (6), where a company has passed a special resolution under clause (b) of sub-section (2) or the Board has passed a resolution under item (ii) of the proviso to clause (b) of sub-section (2) to buy-back its own shares or other securities, it shall, before making such buy-back, file with the Registrar and the SEBI, a declaration of solvency in the form as may be prescribed and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year from the date of declaration of solvency adopted by the Board. The declaration shall be signed by at least two directors of the company, one of whom shall be the managing director, if any;

Provided that no declaration of solvency shall be filed with the SEBI by a company whose shares are not listed on any recognised stock exchange.

(7) Extinguishment of Securities: Section 68 (7) requires that where a company buys back its own securities or other specified securities, it shall extinguish and physically destroy the shares or securities so bought-back within seven days of the last date of completion of buy-back.

(8) Cooling Period: Section 68 (8) casts an obligation that where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of same kind of shares including allotment of further shares under Section 62 (1) (a) or other specified securities within a period of six months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

(9) Register of Buy Back: Section 68 (9) requires that where a company buys-back its shares or other specified securities under this section, it shall maintain a register of the shares or securities so bought, the consideration paid for the shares or securities bought-back, the date of cancellation of shares or securities, the date of extinguishing

and physically destroying the shares or securities and such other particulars as may be prescribed.

(10) Filing of Return of Buy-back: According to Section 68 (10), a company shall, after completion of the buy-back under this section, file with the Registrar and the SEBI, a return containing such particulars relating to the buy-back within thirty days of such completion, as may be prescribed.

However, no return shall be filed with the SEBI by a company whose shares are not listed on any recognised stock exchange.

(11) Penalty for Default: Section 68 (11) states that if a company makes default in complying with the provisions of this section or any regulations made by SEBI, for the purposes (f) of sub-section (2), the punishment shall be as under:

- **Company:** It shall be punishable with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 3,00,000; and
- **Every officer of the company who is in default:** He shall be punishable with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 3,00,000.

Transfer of certain Sums to Capital Redemption Reserve Account [Section 69]

Section 69 requires certain amount to be transferred to the capital redemption reserve account in case a company buys back its own shares. The provisions are as under:

(1) Amount to be transferred to CRR Account: Section 69 (1) prescribes that where a company purchases its own shares out of free reserves or securities premium account, then a sum equal to the nominal value of the share so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet.

(2) Application of CRR Account: Section 69 (2) states that 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.

Prohibition for Buy-Back in Certain Circumstances [Section 70]

Section 70 prohibits a company to buy back its own securities in certain circumstances. The provisions are as under:

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

(a) through any subsidiary company including its own subsidiary companies; or

(b) through any investment company or group of investment companies; or

(c) if a default, is made by the company, in repayment of deposits, 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 thereon to any financial institutions or banking company;

It is provided that where the default is remedied and a period of three years has lapsed after such default ceased to subsist, such buy-back is not prohibited.

(2) No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of:

- Section 92 (Annual Report),
- Section 123 (Declaration and Payment of Dividend),
- Section 127 (Punishment for failure to distribute dividends), and
- Section 129 (Financial Statement).

10. DEBENTURES [SECTION 71]

Before taking up the provisions of Section 71, we may look into the definition of debenture as given below:

Definition of Debenture

As per Section 2(30), debenture includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not:

Provided that—

(a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and

(b) such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company,

shall not be treated as debenture.

Features of Debentures

- A debenture is the smallest unit of a sizeable amount of loan.
- When debentures are issued, the applicants are given certificates representing the money they have lent to the company.
- A debenture certificate is issued by the company under its common seal, if any, or under the signatures of two directors or a director and the company secretary, if he has been appointed.
- The company pays periodic interest on the amount raised by issuing debentures till they are fully redeemed.
- A debenture is generally pre-fixed with the rate of interest which the company intends to pay.

Example 13: The name '10% Debentures' indicates that the company shall pay interest at the rate of 10% on the outstanding amount till maturity of such debentures.

- Voting rights are not available in case of debentures since Section 71 (2) clearly states that no company shall issue any debentures carrying any voting rights.
- A debenture is in the nature of movable property which is transferable as per the provisions contained in the Articles of the company issuing the debentures49.
- A debenture may be secured or unsecured. In case of secured debentures, a charge is created on the assets of the company in favour of debenture trustee.

- As per the terms of the issue of debentures, they may be redeemed (i.e. repaid) at the end of full term or in installments, say yearly or bi-yearly or any other period like in two installments.
- The terms of issue may also provide for conversion of debentures at maturity into equity shares at the option of the debenture holders.
- The debenture certificates are required to be delivered within a period of six months50 from the date of allotment of debentures, unless the company is prohibited by any provision of law or any order of Court, Tribunal or any other authority.

Example 14: Sigma Computers Limited desires to borrow Rs. 50,00,000 from the public by issuing 7% Debentures. It is intended that each unit of debenture shall be of Rs. 100. Thus, it can issue 50,000 debentures of Rs. 100 each carrying 7% rate of interest which can be paid at the end of every quarter. If such debentures (secured by a charge on the assets of the company) are issued for six-year duration, the principal amount shall be repaid by the end of sixth year. The terms of issue may even allow repayment of principal amount in equal yearly instalments, in which case a portion of debentures shall be redeemed on yearly basis and the company shall be required to pay interest only on the outstanding amount. The debenture holders may also be given the option of converting their debentures into equity shares at the time of maturity.

Thus, Sigma Computers Limited is able to borrow a large sum of money from different borrowers with the help of debentures and it is not required to approach a single borrower for such a big amount. In other words, 'issue of debentures' is the most convenient way of borrowing large sums of money and at the same time the debenture holders do not exert any influence over the ownership and working of the company unless their interest is jeopardized by certain decisions.

Section 71 provides the manner in which a company may issue debentures. These provisions are stated as under:

(1) Issue of Debentures with an Option to Convert: According to Section 71 (1), a company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption.

As a pre-condition, it is provided that 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.

(2) No Voting Rights: Section 71 (2) states that no company shall issue any debentures carrying any voting rights.

(3) Issue of Secured Debentures: According to Section 71 (3), secured debentures may be issued by a company subject to such terms and conditions as are prescribed in Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014.

According to Rule 18 (1), an issue of secured debentures may be made, provided the date of its redemption shall not exceed ten years from the date of issue.

Provided that the following classes of companies may issue secured debentures for a period exceeding ten years but not exceeding thirty years,

i. Companies engaged in setting up of infrastructure projects;
ii. Infrastructure Finance Companies as defined in clause (viia) of sub direction (1) of direction 2 of Non-Banking Financial (Non-deposit accepting or holding) Companies Prudential Norms (Reserve Bank) Directions, 2007;
iii. Infrastructure Debt Fund Non-Banking Financial Companies' as defined in clause (b) of direction 3 of Infrastructure Debt Fund Non-Banking Financial Companies (Reserve Bank) Directions, 2011;
iv. Companies permitted by a Ministry or Department of the Central Government or by Reserve Bank of India or by the National Housing Bank or by any other statutory authority to issue debentures for a period exceeding ten years.

Creation of Charge: Such an issue of debentures shall be secured by the creation of a charge on the properties or assets of the company or its subsidiaries or its holding company or its associates companies. Such assets or properties shall be of value which is sufficient for the due repayment of the amount of debentures and interest thereon.

Appointment of Debenture Trustee: The company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures. Further, not later than 60 days after the allotment of the debentures, it shall execute a debenture trust deed to protect the interest of the debenture holders.

Security: The security for the debentures by way of a charge or mortgage shall be created by the company in favour of the debenture trustee.

(4) Creation of Debenture Redemption Reserve (DRR) Account: Section 71 (4) requires that where debentures are issued by a company under section 71, the company shall create a debenture redemption reserve account out of the profits of the company available for payment of dividend and the amount credited to such account shall not be utilised by the company except for the redemption of debentures. In this respect Rule 18 (7) is relevant which is mentioned below:

Rule 18 (7) specifies that the company shall comply with the requirements with regard to Debenture Redemption Reserve (DRR) and investment or deposit of sum in respect of debentures maturing during the year ending on the 31st day of March of next year, in accordance with the conditions given below: -

(a) Debenture Redemption Reserve shall be created out of profits of the company available for payment of dividend;
(b) The limits with respect to adequacy of Debenture Redemption Reserve and Investment or deposits, as the case may be, shall be as under: -
i. Debenture Redemption Reserve is not required for debentures issued by All India Financial Institutions regulated by Reserve Bank of India and Banking Companies for both public as well as privately placed debentures;
ii. For other Financial Institutions within the meaning of clause (72) of section 2 of the Companies Act, 2013, Debenture Redemption Reserve shall be as applicable to Non-Banking Finance Companies registered with Reserve Bank of India.

iii. For listed companies [other than All India financial Institutions and Banking Companies as specified in sub-clause (i)], Debenture Redemption Reserve is not required in the following cases -

A. in case of public issue of debentures

- for NBFCs registered with Reserve Bank of India under section 45-1A of the RBI Act, 1934 and for Housing Finance Companies registered with National Housing Bank;
- for other listed companies;

B. in case of privately placed debentures, for companies specified in sub-items A and B,

iv. for unlisted companies, [other than All India Financial Institutions and Banking Companies as specified in sub-clause (i)] -

A. for NBFCs registered with RBI under section 45-IA of the Reserve Bank of India Act, 1934 and for Housing Finance Companies registered with National Housing Bank, Debenture Redemption Reserve is not required in case of privately placed debentures.

B. for other unlisted companies, the adequacy of Debenture Redemption Reserve shall be 10 percent, of the value of the outstanding debentures;

v. In case a company is covered in item item (A) of sub-clause (iii) of clause (b) or item (B) of sub-clause (iv) of clause (b), 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, as the case may be, a sum which shall not be less than fifteen percent., of the amount of its debentures maturing during the year, ending on the 31st day of March of the next year in any one or more methods of investments or deposits as provided in sub-clause (vi):

Provided that the amount remaining invested or deposited, as the case may be, shall not any time fall below fifteen percent. of the amount of the debentures maturing during the year ending on 31st day of March of that year.

vi. for the purpose of sub clause (v), the methods of deposits or investments, as the case may be, are as follows: -

A. in deposits with any scheduled bank, free from any charge or lien;

B. in unencumbered securities of the Central Government or any State Government;

C. in unencumbered securities mentioned in sub-clause (a) to (d) and (ee) of section 20 of the Indian Trusts Act, 1882;

D. in unencumbered bonds issued by any other company which is notified under sub-clause (f) of section 20 of the Indian trusts Act, 1882:

Provided that the amount invested or deposited as above 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, Debenture Redemption Reserve shall be created in respect of non-convertible portion of debenture issue in accordance with this sub-rule,

(d) the amount credited to Debenture Redemption Reserve shall not be utilized by the company except for the purpose of redemption of debentures.

(5) Limitation on the Issue of Prospectus/Offer/Invitation to the public: According to Section 71 (5), no company shall issue a prospectus or make an offer or invitation to the

public or to its members exceeding five hundred 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 are prescribed in Rule 18 (2) of the Companies (Share Capital and Debentures) Rules, 2014.

The provisions of Rule 18 (2) are as under:

The company shall appoint debenture trustees under sub-section (5) of section 71, after complying with the following conditions, namely: -

(a) the names of the debenture trustees shall be stated in letter of offer inviting subscription for debentures and also in all the subsequent notices or other communications sent to the debenture holders;

(b) 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;

(c) A person shall not be appointed as a debenture trustee, if he—

i. beneficially holds shares in the company;

ii. 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;

iii. is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;

iv. is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

v. has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;

vi. has any pecuniary relationship with the company amounting to two per cent or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

vii. is relative of any promoter or any person who is in the employment of the company as a director or key managerial personnel.

(d) 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.

It is 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.

(e) 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 three fourth in value of the debentures outstanding, at their meeting.

(6) Debenture Trustee to protect Interest of Debenture Holders: Section 71 (6) requires that a debenture trustee shall take steps to protect the interests of the debenture-holders and redress their grievances in accordance with such rules as may be prescribed.

In order to protect the interest of debenture holders, Rule 18 (4) provides for the convening of the meeting of debenture-holders. Accordingly, the meeting of all the debenture holders shall be convened by the debenture trustee on:

(a) requisition in writing signed by debenture holders holding at least one-tenth in value of the debentures for the time being outstanding;

(b) 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.

(7) Liability of Debenture Trustee: According to Section 71 (7), any provision contained in a trust deed for securing the issue of debentures, or in any contract with the debenture-holders secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, any liability for breach of trust, where he fails to show the degree of care and due diligence required of him as a trustee, having regard to the provisions of the trust deed conferring on him any power, authority or discretion.

It is provided that the liability of the debenture trustee shall be subject to such exemptions as may be agreed upon by a majority of debenture-holders holding not less than three-fourths in value of the total debentures at a meeting held for the purpose.

(8) To pay Interest and Redeem Debentures: Section 71 (8) requires that a company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue.

(9) Filing of Petition before Tribunal by Debenture Trustee: Section 71 (9) states that where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal and the Tribunal may, after hearing the company and any other person interested in the matter, by order, impose such restrictions on the incurring of any further liabilities by the company as the Tribunal may consider necessary in the interests of the debenture-holders.

(10) Order of Tribunal on Failure to Redeem Debentures/Pay Interest: According to Section 71 (10), where 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 Tribunal may, on the application of any or all of the debenture-holders, or debenture trustee and, after hearing the parties concerned, direct, by order, the company to redeem the debentures forthwith on payment of principal and interest due thereon.

(11) Specific Performance of the Contract: Section 71 (12) states that a contract with the company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

(12) Procedure to be prescribed by Central Government: According to Section 71 (13), the Central Government may prescribe the procedure, for securing the issue of debentures,

the form of debenture trust deed, the procedure for the debenture-holders to inspect the trust deed and to obtain copies thereof, quantum of debenture redemption reserve required to be created and such other matters.

(13) **Limit on Borrowings through Debentures:** Before the issue of debentures, the Board of Directors of the company shall obtain approval of the shareholders through special resolution if the borrowings by issuing debentures together with the amount already borrowed exceed the aggregate of company's paid-up share capital, free reserves and securities premium amount. Temporary loans obtained from the company's bankers in the ordinary course of business are not to be included in the borrowings.

(14) **Return of Allotment:** If a company having share capital makes allotment of any debentures (falls within the definition of 'securities'), it is required to file with the jurisdictional Registrar a Return of Allotment (Form No. PAS-3) within thirty days of such allotment.

Chapter 4 : Acceptance of Deposits by Companies

1. INTRODUCTION

Acceptance of deposits from the members as well as public at large is an important source of finance for the corporate sector. It is, therefore, necessary to control the companies which invite deposits in order to safeguard the general and wider interest of all those persons who offer deposits out of their precious savings. The statutory provisions as contained in sections 73 to 76A of the Companies Act, 2013 (hereinafter referred to as 'the Act') and the Companies (Acceptance of Deposits) Rules, 2014 (hereinafter referred to as 'the Rules') govern the acceptance of deposits and also renewal thereof.

2. CERTAIN IMPORTANT TERMS EXPLAINED

A. DEPOSIT

Definition: According to section 2 (31) of the Act, the term 'deposit' includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve bank of India.

i. The above definition of 'deposit' is inclusive one.
ii. It includes any money received by way of:
   - deposit; or
   - loan; or
   - in any other form.
iii. Repayment of 'deposit' is time-bound.
iv. It can be secured or unsecured.
v. It does not include prescribed categories of amounts (given under the Rules).
vi. A private company can accept deposits from its members only.
vii. A public company can accept deposits from its members and also from the public if it fulfills certain parameters.

B. AMOUNTS NOT CONSIDERED AS DEPOSIT

Following categories of amounts are not considered as deposit [Rule 2 (1) (c)]:

i. any amount received from the Central Government or a state Government, or from any other source whose repayment is guaranteed by the Central Government or a State Government, 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;
ii. any amount received from foreign Governments, foreign or international banks, multilateral financial institutions etc. subject to the provisions of Foreign Exchange Management Act, 1999 and rules and regulations made thereunder;

iii. any amount received as a loan or facility from any banking company or from State Bank of India or its subsidiary banks or from a notified baking institution or from any co-operative bank;

iv. any amount received as a loan or financial assistance from Public Financial Institutions;

v. any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the Reserve Bank of India;

vi. any amount received by a company from any other company;

vii. any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities (including share application money or advance towards allotment of securities, pending allotment), so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

Explanation:

(a) It is clarified by way of Explanation that if the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit under these rules.

However, unless otherwise required under the Companies Act, 1956 or the Securities and Exchange Board of India Act, 1992 or rules or regulations made thereunder to allot any share, stock, bond, or debenture within a specified period, if a company had received any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed in the balance sheet for the financial year ending on or before the 31st March, 2014 against which the allotment is pending on the 31st March, 2015, the company shall, by the 1st June, 2015, either return such amounts to the persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules.

(b) Further, it is clarified that any adjustment of the amount for any other purpose shall not be treated as refund.

viii. any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the private company;

However, the director of the company or relative of the director of the private company, as the case may be, from whom money is received, is required to furnish to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report;

ix. 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 10 years;

However, if such bonds or debentures are secured by the charge of any assets referred to in Schedule III of the Act, excluding intangible assets, the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a registered valuer.

ixa. any amount raised by issue of non-convertible debenture not constituting a charge on the assets of the company and listed on a recognised stock exchange as per applicable regulations made by Securities and Exchange Board of India;

Example 1: Soorya Ltd. has raised ` 2,00,000 through issue of non-convertible debenture not constituting a charge on the assets of the company and listed on a recognised stock exchange as per applicable regulations made by Securities and Exchange Board of India. The said amount will not be considered as deposit in terms of the rule stated above [Sub-clause (ixa)]

x. 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;

Example 2: Rs. 2,50,000 received from Mr. Raghu, an employee of the company who is drawing annual salary of Rs. 2,00,000 under a contract of employment with the company in the nature of non-interest bearing security deposit. This amount received by company from employee, Mr. Raghu will be considered as deposit in terms of sub-clause (x) of the said rule, as amount received is more than his annual salary under a contract of employment with the company in the nature of non-interest bearing security deposit.

xi. any non-interest bearing amount received or held in trust;

xii. any amount received in the course of, or for the purposes of, the business of the company–

(a) as an advance for the supply of goods or provision of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of 365 days from the date of acceptance of such advance:

However, in case of any advance which is subject matter of any legal proceedings before any court of law, the said time limit of 365 days shall not apply.

(b) as advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of agreement or arrangement;

(c) as security deposit for the performance of the contract for supply of goods or provision of services;

(d) as advance received under long term projects for supply of capital goods except those covered under item (b) above;

(e) as an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;

(f) as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

(g) as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications;

However, it is clarified that if the amount received under items (a), (b) and (d) above becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission or approval, wherever required, to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules.

Further, by way of Explanation it is clarified that for the purposes of this sub-clause the amount shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund.

xiii. any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to the fulfillment of following conditions:

(a) the loan is brought because of the stipulation imposed by the lending institutions on the promoters to contribute such finance;

(b) the loan is provided by the promoters themselves or by their relatives or by both; and

(c) such exemption shall be available only till the loans of financial institution or bank are repaid and not thereafter.

xiv. any amount accepted by a Nidhi company in accordance with the rules made under section 406 of the Act;

xv. any amount received by way of subscription in respect of a chit under the Chit Fund Act, 1982;

xvi. any amount received by the company under any collective investment scheme in compliance with regulations framed by the Securities and Exchange Board of India;

xvii. an amount of twenty-five lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding ten years from the date of issue) in a single tranche, from a person;

By way of Explanation it is clarified that:

1. "Start-up company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with Notification Number G.S.R. 127 (E), dated 19-02-2019 issued by the Department for Promotion of Industry and Internal Trade;
2. "Convertible note" means an instrument evidencing receipt of money initially as a debt, which is repayable at the option of the holder, or which is convertible into such number

of equity shares of the start-up company upon occurrence of specified events and as per the other terms and conditions agreed to and indicated in the instrument.

xviii. any amount received by a company from Alternate Investment Funds, Domestic Venture Capital Funds, Infrastructure Investment Trusts, Real Estate Investment Trusts2 and Mutual Funds registered with the Securities and Exchange Board of India in accordance with regulations made by it.

Note: Clarification regarding amounts received by private companies from their members, directors or their relatives before 1st April, 2014 – whether to be considered as deposits or not under the Companies Act, 2013 (General Circular No. 5/2015, dated 30-03-2015)

It is clarified that such amounts received by private companies prior to 1st April, 2014 shall not be treated as 'deposits' subject to the condition that relevant private company shall disclose in the notes to its financial statement the figure of such amounts and the accounting head in which such amounts have been shown.

However, any renewal or acceptance of fresh deposits on or after 1st April, 2014 shall be in accordance with the Companies Act, 2013 and the rules made thereunder.

C. DEPOSITOR

Definition:

As per Rule 2 (1) (d), the term 'Depositor' means:

i. any member of the company who has made a deposit with the company in accordance with the provisions of subsection (2) of section 73 of the Act, or

ii. any person who has made a deposit with a public company in accordance with the provisions of section 76 of the Act.

In other words:

- any member of a private or public company who has deposited money with his company is a 'depositor'.
- any person (even if not a member of the company) who has deposited money with a public company is also a 'depositor'.

D. ELIGIBLE COMPANY

Definition:

As per Rule 2 (1) (e) the term "eligible company" means a public company as referred to in section 76 (1), having a net worth of not less than Rs. 100 crore or a turnover of not less than Rs. 500 crores and which has obtained the prior consent in general meeting by means of a special resolution and also filed the said resolution with the Registrar of Companies before making any invitation to the public for acceptance of deposits:

However, an eligible company, which is accepting deposits within the limits specified under section 180 (1) (c), may accept deposits by means of an ordinary resolution.

A public company is 'eligible' to accept deposits from the public at large only if it meets the above-mentioned criteria. Accordingly,

- It should be a public company.
- It should have net worth of minimum Rs. 100 crores or a turnover of minimum Rs. 500 crores.
- It has obtained the prior consent by means of a special resolution passed in general meeting.
- The special resolution has been filed with the Registrar of Companies.
- An ordinary resolution is sufficient if an eligible company is accepting deposits within the limits specified under section 180 (1) (c).

3. PROHIBITIVE PROVISIONS AND EXEMPTED COMPANIES

A. Prohibitive Provisions

According to section 73 (1) of the Act, no company can accept or renew deposits from public unless it follows the manner provided under Chapter V (contains provisions regarding acceptance of deposits by companies) of the Act for acceptance or renewal of deposits from public. Manner of acceptance of deposits from public is explained later in the Chapter.

B. Exempted Companies

Extract of Act:

According to the Section 73 (1), on and after the commencement of this Act, no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter:

Provided that nothing in this sub-section shall apply to a banking company and non-banking financial company as defined in the Reserve Bank of India Act, 1934 and to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

This brings out the fact that 'deposit provisions' as contained in the Companies Act, 2013 are meant to regulate acceptance of deposits by non-banking non-financial companies (i.e., manufacturing, trading companies, etc.) only.

4. PROVISIONS REGARDING ACCEPTANCE OF DEPOSITS FROM MEMBERS

Any company may accept or renew deposits from its members by following the provisions as set out below:

1. **Passing of a Resolution:** A company is required to pass a resolution in general meeting for acceptance of deposits from its members [Section 73 (2)].
2. **Issuance of a Circular containing Statement:** The company is required to issue 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 the prescribed form and manner. [Section 73 (2) (a)]

According to Rule 4, the company shall issue such circular to all its members by registered post with acknowledgement due or speed post or by electronic mode in Form DPT-1.

Further, 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.

In addition, 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 payment of interest on such deposits accepted either before or after the commencement of the Act. 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 five years has lapsed since the date of making good the default as the case may be.

Such Circular shall be issued on the authority and in the name of Board of Directors of the company.

The advertisement shall remain valid till the earliest of the following dates:

(a) up to six months from the closure of the financial year in which it is issued; or
(b) the date on which the financial statements are laid before the company at the Annual General Meeting (AGM), or in case no AGM has been held, the latest day on which the AGM should have been held as per the relevant statutory provisions.

A fresh circular shall be issued, in each succeeding financial year, for inviting deposits during that financial year.

3. **Filing of Circular:** The company is required to file a copy of the circular containing the statement with the Registrar within 30 days before the date of issue of the circular. [Section 73 (2) (b)]
4. **Requirement of Deposit Repayment Reserve Account:** The company is required to deposit, on or before 30th of April each year, at least 20% of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account. [Section 73 (2) (c)]

   According to Rule 13 (Maintenance of Liquid Assets and Creation of Deposit Repayment Reserve Account), every company referred to in sub-section (2) of section 73 and every eligible company shall on or before the 30th day of April of each year deposit the sum as specified in clause (c) of the said sub-section with any scheduled bank and the amount so deposited shall not be utilised for any purpose other than for the repayment of deposits:

   Provided that the amount remaining deposited shall not at any time fall below 20% of the amount of deposits maturing during the financial year.

5. **Certification as to No default in Repayment:** The company needs to certify 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.

   In case a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default. [Section 73 (2) (e)]

6. **Provision of Security:** The company may provide security, if any, for the due repayment of the amount of deposit or the interest thereon. Further, if security is provided, the company shall take steps for the creation of charge on the property or assets of the company.

   It may be noted that in case a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as "unsecured deposits". Accordingly, it shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits. [Section 73 (2) (f)]

   Exemption to certain private companies:

   Clauses (a) to (c) and (e) of sub-section (2) of section 73 with respect to issue of circular, filing the copy of such circular with the Registrar, depositing of certain amount and certification as to no default committed, shall not apply to a private company:

A. which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid-up share capital, free reserves and securities premium account; or
B. which is a start-up, for five 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 fifty crore rupees, 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.

   However, such a company [as referred to in clauses (A), (B) or (C)] shall file the details of monies accepted to the Registrar in the specified manner (i.e. in Form DPT-3).

7. **Repayment of deposit:** Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions of the agreement. [Section 73 (3)]
8. **Application to Tribunal if the Company fails to Repay:** In case a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to the Tribunal 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 the Tribunal may deem fit. [Section 73 (4)]
9. **Using the Amount of Deposit Repayment Reserve Account:** The deposit repayment reserve account shall not be used by the company for any purpose other than repayment of deposits. [Section 73 (5)]

Rule 13 also states that the amount so deposited in the account shall not be used by the company for any purpose other than repayment of deposits.

10. **Tenure for which Deposits can be Accepted:** A company is not permitted to accept or renew deposits (whether secured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty-six months.

    Example 3: A, a member of the company has deposited ₹1,00,000 with his company on 1st April, 2019. The earliest repayment date in this case shall be 30th September, 2019 and the latest repayment date shall be 31st March, 2022. Thus, the tenure will range between six months and thirty-six months, as per the policy of the company.

    Exception to the rule of tenure of six months: For the purpose of meeting any of its short-term requirements of funds, a company may accept or renew deposits for repayment earlier than six months subject to the condition that:

    i. such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company; and
    ii. such deposits are repayable only on or after three months from the date of such deposits or renewal.

11. **Maximum Amount of Deposits from Members:** A company is permitted to accept or renew any deposit from its members including other such deposits outstanding as on the date of acceptance or renewal maximum up to 35% of the aggregate of its paid-up share capital, free reserves and securities premium account.

    However, as an exception, a Specified IFSC Public company and a private company may accept from its members monies not exceeding 100% of aggregate of the paid-up share capital, free reserves and securities premium account. Further, such company shall file the details of monies so accepted with the Registrar in Form DPT-3.

    In addition, the maximum limit in respect of deposits to be accepted from members shall not apply to the following classes of private companies:

    i. a private company which is a start-up, for ten years from the date of its incorporation;
    ii. a private company which fulfils all of the following conditions, namely:
    (a) which is not an associate or a subsidiary company of any other company;
    (b) 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 fifty crore rupees, whichever is less; and
    (c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:

    Note: It may be noted that all the companies accepting deposits shall file the details of monies so accepted with the Registrar in Form DPT-3.

12. **Appointment of Trustee for Depositors:** As regards appointment of trustee, refer provisions given under 'Acceptance of Deposits from Public' because same provisions are applicable.

13. **Ceiling on Rate of Interest and Brokerage Payable on Deposits:** A company is permitted to invite or accept or renew any deposit at any rate of interest or pay any amount of brokerage but in no case, it shall exceed the maximum rate of interest or brokerage prescribed by the Reserve Bank of India in case of non-banking financial companies (NBFCs) for acceptance of deposits.

    Further, no brokerage shall be paid to any person except the person who is authorised in writing by the company to solicit deposits on its behalf and through whom deposits are actually procured.

14. **Filling of Application Form for making Deposits:** A company shall accept or renew any deposit, whether secured or unsecured, only when an application, as specified by the company, is submitted by the intending depositor for the acceptance of deposit.

    The application shall contain a declaration made 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.

15. **Deposits in Joint Names:** In case the depositors so desire, deposits may be accepted in joint names not exceeding three. A joint deposit may be accepted with or without any of the clauses, namely, "Jointly", "Either or Survivor", "First named or Survivor", "Anyone or Survivor". These clauses operate on maturity.

    Example 4: A, B and C have jointly deposited Rs. 1,00,000 in a company.

    - In case of 'Jointly' clause the repayment of deposit on maturity shall be made to all the three together i.e. A, B and C or the survivors.
    - In case of 'Either or Survivor' clause, the repayment of deposit on maturity shall be made to either of the three i.e., either A or B or C or the survivor.
    - In case of 'First named or Survivor' clause, the repayment of deposit on maturity shall be made to the first named person i.e. A if he is the first named person or the survivor.
    - In case of 'Anyone or Survivor' clause, the repayment of deposit on maturity shall be as in the case of 'Either or Survivor'.

16. **Nomination:** Every depositor may nominate any person at any time. The nominee shall be the person to whom his deposits shall vest in the event of his death.
17. **Deposit Receipt:** Within a period of 21 days from the date of receipt of money or realization of cheque or date of renewal, the company is required to furnish a deposit receipt to the depositor or his agent. The receipt shall be signed by the duly authorised officer and state the date of deposit, the name and address of the depositor, the amount of deposit, the rate of interest and the maturity date.
18. **Register of Deposits:** As regards Register of Deposits, refer provisions given under 'Acceptance of Deposits from Public' because same provisions are applicable.
19. **Premature Repayment of Deposits:** As regards premature repayment of deposits, refer provisions given under 'Acceptance of Deposits from Public' because same provisions are applicable.

20. **Filing of Return of Deposits with the Registrar:** A duly audited return of deposits in DPT-3 (containing particulars as on 31st March of every year) shall be filed with the Registrar of Companies along with requisite fee on or before the 30th June of that year.

    It is clarified by way of Explanation that DPT-3 shall be used to include particulars of deposits or particulars of transactions not considered as deposits or both by every company (other than a Government company).

21. **No Right to Alter:** The company has no right to alter any of the terms and conditions of the deposit, deposit trust deed and deposit insurance contract which may prove detrimental to the interest of the depositors after circular or circular in the form of advertisement is issued and deposits are accepted.
22. **Disclosures in Financial Statements:** A public company shall disclose in its financial statements by way of note about the money received from its directors. In case of a private company it shall disclose in its financial statements by way of note about the money received from the directors or the relatives of directors.

    As a onetime measure, every company (other than a Government company) shall file a onetime return of outstanding receipt of money or loan by a company not considered as deposits from 1st April 2014 till 31st March, 2019 in Form DPT-3 with the Registrar of Companies within ninety days from 31st March, 2019 along with requisite fee.

23. **Penal Rate of Interest:** In case the company fails to repay deposits (both secured and unsecured) on maturity, after they are claimed, it shall pay penal rate of interest of eighteen per cent per annum for the overdue period.
24. **Punishment for Contravention:** If any company inviting deposits or any other person contravenes any of the 'deposit rules' for which no punishment is provided in the Act, the company and every officer-in-default shall be punishable as under:
    - with fine extendable to five thousand rupees; and
    - in case the contravention is a continuing one, with a further fine up to five hundred rupees for every day during which the contravention continues.

5. PROVISIONS REGARDING ACCEPTANCE OF DEPOSITS FROM PUBLIC BY ELIGIBLE COMPANIES

Only 'eligible companies' are permitted to accept deposits from the public, in addition to their members.

It means not all the companies can access the public at large for raising deposits though they can accept deposits from their members. Section 76 of the Act and the Companies (Acceptance of Deposits) Rules, 2014 deal with acceptance of deposits from public by eligible companies. The acceptance of deposits from public shall be subject to compliance with section 73 (2) and the prescribed rules.

These provisions are stated as under:

(1) **Net Worth/Turnover Criterion:** A public company, having net worth of not less than one hundred crore rupees or turnover of not less than five hundred crore rupees, may accept

deposits from persons other than its members. Such type of public company is known as 'eligible company'.

(2) Passing of Special Resolution: The 'eligible company' is required to obtain the prior consent by means of a special resolution in general meeting and also file the said resolution with the Registrar of Companies before making any invitation to the public for acceptance of deposits.

However, an 'eligible company', which is accepting deposits within the limits specified under section 180 (1) (c), may accept deposits by means of an ordinary resolution.

(3) Obtaining of Credit Rating: The 'eligible company' shall be required to obtain the rating (including its net-worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency. The given rating which ensures adequate safety shall be informed to the public at the time of invitation of deposits from the public. Further, the rating shall be obtained every year during the tenure of deposits.

As per Rule 3 (8), copy of the credit rating which is being obtained at least once in a year shall be sent to the Registrar of Companies along with the Return of Deposits in Form DPT-3.

Further, the credit rating shall not be below the minimum investment grade rating or other specified credit rating for fixed deposits. It shall be obtained from any one of the approved credit rating agencies as specified for Non-Banking Financial Companies in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998, as amended from time to time.

(4) Charge Creation on Assets Necessary if the Deposits are Secured: Every company which accepts secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets. The amount of charge shall not be less than the amount of deposits accepted. The charge shall be created in favour of the deposit holders in accordance with the prescribed rules.

In respect of creation of security, Rule 6 states that the company accepting secured deposits shall create security by way of charge on its tangible assets only. The other notable points are:

- The company cannot create charge on intangible assets (i.e., goodwill, trademarks, etc.).
- Total value of security should not be less than the amount of deposits accepted and interest payable thereon.
- The market value of assets subject to charge shall be assessed by a registered valuer.
- The security shall be created in favour of a trustee for the depositors on specific movable and immovable property of the company.

(5) Tenure for which Deposits can be Accepted: A company is not permitted to accept or renew deposits (whether secured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty-six months.

Exception to the rule of tenure of six months: For the purpose of meeting any of its short-term requirements of funds, a company may accept or renew deposits for repayment earlier than six months subject to the condition that—

i. such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company; and
ii. such deposits are repayable only on or after three months from the date of such deposits or renewal.

(6) Appointment of Trustee for Depositors: Following provisions are required to be observed in this respect:

- One or more trustees for depositors need to be appointed by the company for creating security for the deposits.
- A written consent shall be obtained from the trustees before their appointment.
- A statement shall appear in the circular or advertisement with reasonable prominence to the effect that the trustees for depositors have given their consent to the company for such appointment.
- The company shall execute a deposit trust deed in Form DPT-2 at least seven days before issuing the circular or circular in the form of advertisement.
- No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the depositors, if the proposed trustee:

(a) is a director, key managerial personnel 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.

- No trustee for depositors shall 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 have independent directors, at least one independent director shall be present in such meeting of the Board.

(7) Maximum amount of Deposits: An eligible company is permitted to accept or renew deposits as under:

- **From its members:** The amount of such deposit together with outstanding deposits from the members as on the date of acceptance or renewal can be maximum ten per cent. of the aggregate of its paid-up share capital, free reserves and securities premium account;
- **From Persons other than its Members:** The amount of such deposit together with the amount of outstanding deposits (excluding deposits from members) on the date of acceptance or renewal can be maximum twenty-five per cent. of the aggregate of its paid-up share capital, free reserves and securities premium account.

(8) **Maximum Amount of Acceptable Deposit in case of an Eligible Government Company:** Such a company is permitted to accept or renew any deposit together with the amount of other outstanding deposits as on the date of acceptance or renewal maximum up to thirty-five per cent. of the aggregate of its paid-up share capital, free reserves and securities premium account.

(9) **Issuance of Circular in the Form of Advertisement:** An 'eligible company' intending to invite deposits is required to issue a circular in the form of an advertisement in DPT-1.

Such advertisement shall be published in English in an English newspaper and in vernacular language in a vernacular newspaper. Both newspapers should have wide circulation in the State in which the registered office of the company is situated.

If the company has its website, the circular shall also be placed on the website.

Such advertisement shall be issued on the authority and in the name of Board of Directors of the company.

- **Filing with the Registrar:** At least thirty days before the issue of the advertisement, its copy duly signed by a majority of the directors who approved the advertisement or otherwise signed by their duly authorised agents is required to be delivered to the Registrar of Companies for registration.
- **Validity of the Advertisement:** The advertisement shall remain valid till the earliest of the following dates:

(a) up to six months from the closure of the financial year in which it is issued; or

(b) the date on which the financial statements are laid before the company at the Annual General Meeting (AGM), or in case no AGM has been held, the latest day on which the AGM should have been held as per the relevant statutory provisions.

- **Fresh Advertisement:** A fresh advertisement shall be issued, in each succeeding financial year, for inviting deposits during that financial year.
- **Issue and Effective dates:** The date on which the advertisement appeared in the newspaper shall be taken as the date of the issue of advertisement. Further, the effective date of issue of circular shall be the date on which the circular was dispatched.

(10) **Maintenance and Using the Amount of Deposit Repayment Reserve Account:** The company is required to deposit, on or before 30th of April each year, at least 20% of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account. [Section 73 (2) (c)]

Rule 13 states that the amount so deposited in the account shall not be used by the company for any purpose other than repayment of deposits. Further, it states that such amount shall not at any time fall below twenty percent of the amount of deposits maturing during the financial year.

(11) **Ceiling on Rate of Interest and Brokerage Payable on Deposits:** An eligible company is permitted to invite or accept or renew any deposit at any rate of interest or pay any amount of brokerage but in no case, it shall exceed the maximum rate of interest or

brokerage prescribed by the Reserve Bank of India incase of non-banking financial companies (NBFCs) for acceptance of deposits.

Further, no brokerage shall be paid to any person except the person who is authorised in writing by the company to solicit deposits on its behalf and through whom deposits are actually procured.

(12) Filling of Application Form for making Deposits: A company shall acceptor renew any deposit, whether secured or unsecured, only when an application, as specified by the company, is submitted by the intending depositor for the acceptance of deposit.

The application shall contain a declaration made 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.

(13) Deposits in Joint Names: In case the depositors so desire, deposits may be accepted in joint names not exceeding three. A joint deposit may be accepted with or without any of the clauses, namely, "Jointly", "Either or Survivor", "First named or Survivor", "Anyone or Survivor". These clauses operate on maturity.

(14) Nomination: Every depositor may nominate any person at any time. The nominee shall be the person to whom his deposits shall vest in the event of his death.

(15) Deposit Receipt: Within a period of twenty-one days from the date of receipt of money or realization of cheque or date of renewal, the company is required to furnish a deposit receipt to the depositor or his agent. The receipt shall be signed by the duly authorised officer and state the date of deposit, the name and address of the depositor, the amount of deposit, the rate of interest and the maturity date.

(16) Register of Deposits:

- Every company accepting deposits shall maintain one or more separate registers for deposits accepted or renewed at its registered office.

Following particulars shall be entered separately in the case of each depositor:

(a) name, address and PAN of the depositor/s;
(b) particulars of the guardian, in case of a minor;
(c) particulars of the nominee;
(d) deposit receipt number;
(e) date and the amount of each deposit;
(f) duration of the deposit and the date on which each deposit is repayable;
(g) rate of interest on such deposits to be payable to the depositor;
(h) due date for payment of interest;
(i) mandate and instructions for payment of interest and for non-deduction of tax at source, if any;
(j) date or dates on which the payment of interest shall be made;
(k) ---
(l) particulars of security or charge created for repayment of deposits;
(m) any other relevant particulars.

- The entries shall be made within seven days from the date of issuance of the receipt duly authenticated by a director or secretary of the company or by any other officer authorised by the Board for this purpose.
- The said register shall be preserved in good order for a period of not less than eight years from the financial year in which the latest entry is made in the register.

(17) Premature Repayment of Deposits: After the expiry of six months but before the actual date of maturity, if a depositor requests for premature repayment, the rate of interest payable shall be one percent less than the rate which would be payable for the period for which the deposit has actually run.

In this respect it is to be noted that the period for which the deposit has run, if it contains any part of the year which is less than six months then it shall be excluded; otherwise if that part is six months or more it shall be taken as one year.

Reduction of rate of interest is not applicable in the following cases:

- Where the deposit is prematurely repaid to comply with Rule 3 i.e. premature repayment made in order to reduce the total amount of deposits to bring it within the permissible limits; or
- Where the deposit is prematurely repaid to provide for war risk or other related benefits to the personnel of naval, military or air forces or to their families during the period of emergency declared under Article 352 of the constitution.

(18) Premature Closure of Deposit to Earn Higher Rate of Interest: In case a depositor desires to avail higher rate of interest by renewing the deposit before its actual maturity date, the company shall pay him the higher rate of interest only if the deposit is renewed for a period longer than the unexpired period of deposit.

(19) Filing of Return of Deposits with the Registrar: A duly audited return of deposits in DPT-3 (containing particulars as on 31st March of every year) shall be filed with the Registrar of Companies along with requisite fee on or before the 30th June of that year.

It is clarified by way of Explanation that DPT-3 shall be used to include particulars of deposits or particulars of transactions not considered as deposits or both by every company (other than a Government company).

(20) Disclosures in Financial Statements: A public company shall disclose in its financial statement by way of note about the money received from its directors.

As a onetime measure, every company (other than a Government company) shall file a onetime return of outstanding receipt of money or loan by a company not considered as deposits from 1st April 2014 till 31st March, 2019 in Form DPT-3 with the Registrar of Companies within ninety days from 31st March, 2019 along with requisite fee.

(21) Penal Rate of Interest: In case the company fails to repay deposits (both secured and unsecured) on maturity, after they are claimed, it shall pay penal rate of interest of eighteen per cent per annum for the overdue period.

(22) No Right to Alter: The company has no right to alter any of the terms and conditions of the deposit, deposit trust deed and deposit insurance contract which may prove

detrimental to the interest of the depositors after circular or circular in the form of advertisement is issued and deposits are accepted.

(23) Punishment for Contravention: If any eligible company inviting deposits or any other person contravenes any of the 'deposit rules' for which no punishment is provided in the Act, the company and every officer-in-default shall be punishable as under:

- with fine extendable to five thousand rupees; and
- in case the contravention is a continuing one, with a further fine up to five hundred rupees for every day during which the contravention continues.

(24) Applicability of Section 73 and 74 to Eligible Companies: As per Rule 19, pursuant to provisions of sub-section (2) of section 76 of the Act, the provisions of sections 73 and 74 shall, mutatis mutandis, apply to acceptance of deposits from public by eligible companies.

Provided further that 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.

Note: Besides Rule 19, section 76 (2) of the Act states that the provisions of Chapter V shall, mutatis mutandis, apply to the acceptance of deposits from public under section 76.

6. PUNISHMENT FOR CONTRAVENTION OF SECTION 73 OR SECTION 76

According to section 76A of the Act, in case a company accepts or invites or allows any other person to accept or invite on its behalf any deposit in contravention of the manner or the conditions prescribed under section 73 or section 76 or rules made thereunder or if a company fails to repay the deposit or part thereof or any interest within the time specified under section 73 or section 76 or rules made thereunder or such further time as may be allowed by the Tribunal under section 73, then the following consequences will follow:

(a) **Punishment for the company:** The company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees or twice the amount of deposit accepted by the company, whichever is lower but which may extend to ten crore rupees; and

(b) **Punishment for officer-in-default:** Every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years and with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees.

Further, if it is proved that the officer of the company who is in default, has contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action under section 447 (Punishment for fraud).

7. REPAYMENT OF DEPOSITS ACCEPTED BEFORE COMMENCEMENT OF THE COMPANIES ACT, 2013

The provisions regarding repayment of deposits accepted before commencement of the Companies Act, 2013, has been dealt with in section 74. These provisions are explained as under:

i. **Filing of Statement of Deposits with the Registrar of Companies and Repayment thereafter:** As per section 74 (1), in case any deposit was accepted by a company before the commencement of this Act (i.e., before 1.4.2014), and the amount of such deposit or any interest remains unpaid as on 1.4.2014 or becomes due at any time thereafter, the company shall take the following steps:

(a) file, within a period of 3 months from such commencement or from the date on which such payments are due, with the Registrar:

- 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. This is to be done notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) repay within three years from such commencement or on or before expiry of the period for which the deposits were accepted, whichever is earlier.

Note 1: As per Explanation to Rule 19 if the company has been repaying such deposits and interest thereon without any default on due dates for the remaining period of such

deposit in accordance with the terms and conditions, point (b) above shall be deemed to have been complied with.

Note 2: It is to be noted that renewal of any such deposits shall be done in accordance with the provisions of Chapter V and the rules made thereunder.

ii. **Extension of Time for Repayment of Deposits by the Tribunal:** As per section 74 (2), the Tribunal may, on an application made by the company, after considering the financial condition of the company, the amount of deposit and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

iii. **Punishment for Non-Repayment of Deposits:** As per section 74 (3), if a company fails to repay the deposit or part thereof or any interest thereon within the time specified in section 74 (1) or such further extended time allowed by the Tribunal under section 74 (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable as under:

- company: with fine minimum of one crore rupees and maximum of ten crore rupees; and
- every officer-in-default: with imprisonment extendable to seven years or with fine minimum of twenty-five lakh rupees and maximum of two crore rupees, or with both.

Chapter 5 : Registration of Charges

1. INTRODUCTION

The law with respect to the registration of charges has been dealt in Chapter VI of the Companies Act, 2013 consisting of sections 77 to 87 as well as the Companies (Registration of Charges) Rules, 2014.

Definition of Charge

Section 2(16) of the Companies Act, 2013 defines "charge" as 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.

Whenever a company borrows money by way of loans including term loans or working capital loans from financial institutions or banks or any other persons, by offering its property or assets, as security a charge is created on such property or assets in favour of the lender. Such a charge is compulsorily registrable under the provisions of the Companies Act, 2013 in accordance with Chapter VI and the rules made in this regard.

Registration of Charge to act as Constructive Notice (Section 80)

All charges registered with the registrar are public documents. This means that any person who wishes to lend money to the company against the security of such property or buy it can refer to the MCA Portal and find out if there is any charge created on that asset.

Please remember that any document filed with the registrar for registration acts as Constructive Notice. Constructive means "deemed". Notice means "knowledge". So Constructive notice means deemed knowledge. This means even though the third party has not referred to the public document he would still be considered or deemed to have seen it. This is because a deeming provision creates a legal fiction.

This principle is contained in section 80 which states that "where any charge is registered under section 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 the date of such registration.

Thus, every person proposing to deal with a company should verify whether the asset has any charge by going through the record of charges maintained at the office of registrar of companies before entering into the transaction.

In case he enters into the transaction without making any enquiry and later on suffers loss because of charge, he cannot claim the loss from the company for it shall be deemed that he had notice of charge.

You will appreciate that compulsory registration of charges also acts as a method of preventing a company from offering the same assets as security to borrow funds fraudulently from a different lender.

Example 1: Vishnu Marketing Limited obtained a term loan of rupees fifty lacs from Beta Commercial Bank Limited by creating a charge on one of its office buildings and the charge was duly registered. Later on, if the building is sold to Neeraj, he is deemed to have notice of such charge. In other words, it is presumed that Neeraj knew beforehand that the building was mortgaged to the bank for obtaining a loan. He cannot plead against such presumption by contending that he did not know about the charge if he suffers any loss at a later date because of the mortgage. © The Institute of Chartered Accountants of India

Types of Charge

A charge may be either fixed or floating.

Fixed Charge:

A 'FIXED CHARGE' is a charge on Specific assets of the borrowing company. These assets are of permanent nature like land and building, office premises, machinery installed by the company and the like. Further, these assets are identified at the time of creation of charge. A fixed charge is usually created by way of mortgage or deposit of title deeds.

When a charge is created on such assets, the charge remains 'fixed' and the borrowing company is not permitted to sell such assets though it may use them.

Assets under fixed charge can be sold only with the permission or consent of the charge-holder.

A fixed charge is vacated when the money borrowed against the assets subject to fixed charge is repaid in full.

Floating Charge:

A 'Floating Charge' is created on assets or a class of assets which are of fluctuating nature or changing in nature like raw material, stock-in-trade, debtors, and the like. The assets under floating charge keep on changing because the borrowing company is permitted to use them for trading or producing final goods for sale.

Example 2: A retail showroom will contain numerous articles kept for sale. The owner of the showroom might have borrowed against the security of all those goods in the showroom. But he may still sell or otherwise deal with them in the ordinary course of business. The buyer will get it free of the charge.

Example 3: In case of a company which manufactures leather goods, the raw material in the form of leather, which is subject matter of floating charge, may be used to manufacture leather goods without seeking any permission from the lender.

Thus, unlike a fixed charge, the assets offered as security by the company can be dealt with by the company in the ordinary course of business. The buyer of the asset will get it free of charge.

When the creditor enforces the security or the company goes into liquidation, the floating charge will become a fixed charge on all the assets available on that date and which may come into existence thereafter.

This is called crystallization of a floating charge.

A floating charge remains dormant until it becomes fixed or crystallises. On crystallisation, the security (i.e. raw material, stock-in-trade, etc.) becomes fixed and is available for realization so that borrowed money is repaid. Crystallisation of floating charge may occur when the terms and conditions of floating charge are violated or the company ceases to continue its business or the company goes into liquidation or the creditors enforce the security covered by the floating charge.

2. DUTY TO REGISTER CHARGES, ETC. [SECTION 77]

Section 77 of the Companies Act, 2013 contains provisions regarding registration of charges with the Registrar of Companies.

A. Registration of Charges

Registration by the company creating a charge: It shall be duty of the company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise and situated in or outside India, to register the particulars of the charge.

Thus, charge may be created within India or outside India. The subject-matter of the charge i.e., the property or assets or any of the company's undertakings, may be situated within India or outside India. The property or asset charged may be a tangible asset such as land and building. It may be otherwise, i.e. it may be a financial asset like a share or debenture which may be pledged. It may also be an intangible asset such as patent, copyright or trademark.

Note: The word otherwise when used in a section would have the effect of widening the scope and operation of the provision.

A charge is created by deposit of title deeds (normally banks agree for this mode of charge instead of proper mortgage) is also registrable by the borrowing company.1

Registration by the charge-holder: Section 78 (explained later) provides that in case the company creating a charge fails to register the charge within the prescribed period of 30 days, the person in whose favour the charge is created can get the charge registered.

Registration by the purchaser: Section 79 (explained later) covers another case of registration of charge where a company purchased some property in whose case a charge was already registered. In this case also, the company purchasing the property shall get the charge registered in its name in place of seller in the records of Registrar.

B. How to Register Charge

The particulars of the charge in the prescribed form3 together with a copy of the instrument, if any, creating the charge duly signed by the company and the charge

holder, shall be filed with the Registrar within 30 days of creation of charge along with the prescribed fee.

C. Verification of Instrument of Charge

A copy of every instrument creating (or modifying) any charge and required to be filed with the Registrar, shall be verified as follows:

(a) 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, if any, 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;

(b) Where the instrument or deed relates to the property situated in India (whether wholly or partly), the copy shall be verified by a certificate issued under the hand of any director or company secretary of the company or an authorised officer of the charge holder.

Thus, in case the instrument or deed relates solely to a property situated outside India, the copy may also be additionally verified by a certificate issued under the hand of some person other than the company who is interested in the mortgage or charge. This type of verification is not possible when the instrument or deed relates to the property situated in India, whether wholly or partly.

D. Extension of Time Limit

The original period within which a charge needs to be registered is 30 days from the date of creation of charge. The Companies (Amendment) Second Ordinance, 2019 (w.r.e.f. 02-11-2018) has amended the provisions relating to extension of time limit as under:

(i) Charges created before 02-11-2018 (i.e. before the commencement of the Companies (Amendment) Second Ordinance, 2019)5: In such cases, where charge was created before 02-11-2018 but was not registered within the original period of 30 days, the Registrar may, on an application by the company, allow such registration to be made within a period of 300 days of such creation.

Further, if the charge is not registered within the extended period of 300 days, it shall be done within six months from 02-11-2018 on payment of prescribed additional fees. It is provided that different fees may be prescribed for different classes of companies.

(ii) Charges created on or after 02-11-2018 (i.e. on or after the commencement of the Companies (Amendment) Second Ordinance, 2019)

In such cases (i.e. where the charge was created on or after 02-11-2018 but the registration of charge was not effected within the original period of 30 days), the Registrar may, on an application by the company, allow such registration to be made

within a period of 60 days of such creation (i.e. a grace period of another 30 days is granted after the expiry of the original 30 days), on payment of additional fees as prescribed. If the charge is not registered within the extended period as above, the company shall make an application and the Registrar is empowered to allow such registration to be made within a further period of sixty days after payment of prescribed ad valorem fees.

Procedure for Extension of Time Limit8: The company is required to make an application to the Registrar in the prescribed form9 for seeking extension of time.

It should be supported by a declaration from the company signed by its company secretary or a director that such belated filing shall not adversely affect the rights of any other intervening creditors of the company. The Registrar on receiving an application for extension of time as aforesaid shall be satisfied that the company had sufficient cause for not filing the particulars and instrument of charge, if any within the original period of thirty days. Only then shall he allow registration of charge within the extended period. Further, requisite additional fee or ad valorem fee, as applicable, must also be paid.

E. Issue of Certificate of Registration

Where a charge or Modification is duly registered by the Registrar, a certificate of Registration/ Modification shall be issued by the Registrar in the prescribed form11.

The certificate so issued by the Registrar shall be conclusive evidence that the requirements of Chapter VI of the Act and the rules made thereunder as to registration of creation of charge have been complied with.

F. Section 77 not to apply to certain charges

The application of Section 77 shall not be made to certain charges which are prescribed in consultation with the Reserve Bank of India.12

3. CONSEQUENCE OF NON-REGISTRATION OF CHARGE [SECTION 77 (3) & (4)]

No charge created by a company shall be taken into account by the liquidator appointed under the Companies Act, 2013 or the Insolvency and Bankruptcy Code, 2016 or any other creditor unless it is duly registered and a certificate of registration of such charge is given by the Registrar.

This means that the charge will become void against the liquidator and other creditors of the company. That is to say, at the time of winding up, the creditor whose charge has not been registered will be reduced to the level of an unsecured creditor. Neither the liquidator nor any other creditor will give legal recognition to a charge that is not registered.

But this shall not prejudice any contract or obligation for the repayment of the money secured by a charge. This means that the debt is valid and may be enforced against the company through the courts by filing a suit, but the security is lost.

Further, it may be noted that failure to register charge shall not absolve a company from its liability in respect of any offence under this Chapter.

Another important consequence of non-registration is that the charge-holder loses priority. Any subsequent registration of a charge (i.e., even if it is registered within the extended period instead of original thirty days) shall not prejudice any right acquired in respect of any property before the charge is actually registered.

Example 4: Bank A has advanced Rs. One Crore to Akash Limited against the security of the company's land and building at Mulund. The charge was created by deposit of title deeds on 1st June 2019. The company did not register the charge within 30 days. Subsequently, the charge was registered on 13th August 2019 after payment of ad valorem fees and proving sufficient cause. In the meantime, Bank B has advanced Rs. Two Crore to Akash Limited against the security of the same property on 20th June 2019. This charge was duly registered on 27th June 2019.

Subsequently, Akash Limited goes into liquidation and the property realises only Rs. Two crores. Now, Bank B will receive its loan back fully, but Bank A will not realise anything. Because the subsequent registration of the charge in favour of Bank A will not prejudice the right of Bank B which obtained its right before the charge in favour of Bank A was actually registered. Thus, Bank B gets priority over Bank A even though its charge was created later.

4. APPLICATION FOR REGISTRATION OF CHARGE BY CHARGE-HOLDER [SECTION 78]

It can be seen from the foregoing discussion that non-registration or delayed registration would seriously affect the charge-holder's interest. Therefore, the law gives the charge-holder a concession. Section 78 of the Companies Act, 2013, empowers the holder of charge to get the charge registered in case the company creating the charge on its property fails to do so.

Accordingly, if a charge is created but the company primarily responsible for registering the charge fails to do so within the prescribed period of 30 days [as provided in section 77 (1)], the person in whose favour the charge is created (i.e. charge-holder) may apply to the Registrar for registration of the charge along with the instrument of charge within the prescribed time, form and manner.

On receipt of application from the charge-holder, the Registrar shall give a notice to the company and if no objection is received, allow such registration within a period of 14 days after giving notice to the company on payment of the prescribed fees.

However, the Registrar shall not allow such registration by the charge-holder, if the company itself registers the charge or shows sufficient cause why such charge should not be registered.

Recovery of fees: In case, registration is effected on application made by the holder of charge, such person shall be entitled to recover from the company the amount of any

fees or additional fees paid by him to the Registrar for the purpose of registration of charge.

5. ACQUISITION OF PROPERTY SUBJECT TO CHARGE AND MODIFICATION OF CHARGE [SECTION 79]

Two situations are contemplated.

a. Acquisition by a company of any property that is already subject to charge.

b. Modification in the terms and conditions or modification in the extent or operation of any charge already registered. Company must register charge

The provisions contained in section 77 relating to registration of charge shall as far as may be apply in both the above situations.

A. Company acquiring any Property subject to Charge [Section 79 (a)]

In case of a property where charge is already registered and if it is sold with the permission of the holder of charge, it shall be the duty of the company acquiring it to get the charge registered in accordance with Section 77. In other words, the earlier charge should get vacated and, in its place, new charge should get registered by the company which has acquired it.

B. Modification of Charge when there is Change in Terms and Conditions, etc. [Section 79 (b)]

Section 79 (b) requires any modification in charge (i.e. change in terms and conditions or change in extent or operation of any charge, etc.) to be registered by the company in accordance with Section 77.

'Modification' includes variation in any of the terms and conditions of the agreement including change in rate of interest which may be by mutual agreement or by operation of law. Variation in extent or operation of any charge is also a kind of modification. Even if the rights of a charge holder are assigned to a third party, it will be regarded as a modification.

Some other examples of 'modification' are as under:

1. where the charge is modified by varying any terms and conditions of the existing charge through an agreement;
2. where the modification is in pursuance of an agreement for enhancing or decreasing the limits;
3. where the modification is by ceding a pari passu charge;
4. where there is change in rate of interest (other than bank rate);
5. where there is change in repayment schedule of loan; (not applicable in case of working loans which are repayable on demand); and
6. where there is partial release of the charge on a particular asset or property.

C. Issue of Certificate of Modification

As per Rule 6, where the particulars of modification of charge is registered under section 79, the Registrar shall issue a certificate of modification of charge in Form CHG-3.

The certificate so issued by the Registrar shall be conclusive evidence that the requirements of Chapter VI of the Act and the rules made thereunder as to registration of modification of charge have been complied with.

6. COMPANY TO REPORT SATISFACTION OF CHARGE [SECTION 82]

1. Intimation regarding Satisfaction of Charge

Section 82 of the Companies Act, 2013, requires a company to give intimation of payment or satisfaction in full of any charge earlier registered, to the Registrar in the prescribed form. The intimation needs to be given within a period of 30 days from the date of such payment or satisfaction.

Extended period of intimation: Proviso to Section 82 (1) extends the period of intimation from thirty days to three hundred days. Accordingly, it is provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of three hundred days of such payment or satisfaction on payment of prescribed additional fees.

2. Notice to the Holder of Charge by the Registrar22

On receipt of intimation, the Registrar shall cause a notice to be sent to the holder of the charge calling upon him to show cause within such time as specified in the notice but not exceeding 14 days, as to why payment or satisfaction in full should not be recorded.

If no cause is shown by the charge-holder, the Registrar shall order entering of a memorandum of satisfaction in the register of charges kept by him and accordingly, he shall inform the company of having done so.

However, no notice is required to be sent, in case the intimation to the Registrar in this regard is in the specified form23 and signed by the holder of charge.

If any cause is shown by the charge-holder, the Registrar shall record a note to that effect in the register of charges and inform the company.

3. Issue of Certificate

As per Rule 8 (2), in case the Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.

4. Preservation of Records

The instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

7. POWER OF REGISTRAR TO MAKE ENTRIES OF SATISFACTION AND RELEASE IN ABSENCE OF INTIMATION FROM COMPANY [SECTION 83]

Section 83 of the Act of 2013 empowers the Registrar to make entries with respect to the satisfaction and release of charges even if no intimation has been received by him from the company.

This situation would arise where the property subject to a charge is sold to a third party and neither the company nor the charge-holder has intimated the Registrar regarding satisfaction of the earlier charge.

Accordingly, with respect to any registered charge if evidence is shown to the satisfaction of Registrar that the debt secured by charge has been paid or satisfied wholly or in part or that the 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, then he may enter in the register of charges a memorandum of satisfaction that:

- the debt has been satisfied in whole or in part; or
- part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking.

This power can be exercised by the Registrar despite the fact that no intimation has been received by him from the company.

According to Section 82 (4), Section 82 shall not be deemed to affect the powers of the Registrar to make an entry in the register of charges under section 83 otherwise than on receipt of an intimation from the company i.e., even if no intimation is received by him from the company.

Information to affected parties: The Registrar shall inform the affected parties within 30 days of making the entry in the register of charges.

Issue of Certificate: As per Rule 8 (2), in case the Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.

8. INTIMATION OF APPOINTMENT OF RECEIVER OR MANAGER [SECTION 84]

Section 84 of the Act of 2013 deals with the appointment of a receiver or manager and of giving intimation thereof to the company and the Registrar.

Accordingly,

- if any person obtains an order for the appointment of a receiver or a person to manage the property which is subject to a charge, or
- if any person appoints such receiver or person under any power contained in any instrument,

he shall give notice of such appointment to the company and the Registrar along with a copy of the order or instrument within 30 days from the passing of the order or making of the appointment.

In turn, the Registrar shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

On ceasing to hold such appointment24, the person appointed as above shall give a notice to that effect to the company and the Registrar. In turn, the Registrar shall register such notice.

9. PUNISHMENT FOR CONTRAVENTION [SECTION 86]

(i) According to section 86 (1) of the Act of 2013, if any company is in default in complying with any of the provisions of this Chapter, the company shall be liable to a penalty of Rs.5,00,000 and every officer of the company who is in default shall be liable to a penalty of Rs. 50,000.

(ii) With the insertion of sub-section (2), section 447 relating to 'punishment for fraud' also becomes applicable in certain cases. Accordingly, if any person wilfully furnishes:

- any false or incorrect information; or
- knowingly suppresses any material information;

which is required to be registered under section 77, he shall be liable for action under section 447.

10. RECTIFICATION BY CENTRAL GOVERNMENT IN REGISTER OF CHARGES [SECTION 87]

Rectification in Register of Charges

Section 87 of the Act of 2013 and Rule 12 empowers the Central Government to order rectification of Register of Charges in the following cases of default:

(i) when there was omission in giving intimation to the Registrar with respect to payment or satisfaction of charge within the specified time;

(ii) when there was omission or mis-statement of any particulars in any filing previously made to the Registrar. Such filing may relate to any charge or any modification of charge or with respect to any memorandum of satisfaction or other entry made under Section 82 (Company to report satisfaction of charge) or Section 83 (Power of Registrar to make entries of satisfaction and release).

Before directing that the 'time for giving the intimation of payment or satisfaction shall be extended' or the 'omission or mis-statement shall be rectified', the Central Government needs to be satisfied that such default was accidental or due to inadvertence or because of some other sufficient cause or it did not prejudice the position of creditors or shareholders.

The application in Form CHG-8 shall be filed by the company or any interested person.

The order of rectification shall be made by the Central Government on such terms and conditions as it deems just and expedient.

"According to Rule 12 of the Companies (Registration of Charges) Rules, 2014:

The Central Government may on an application filed in Form No. CHG-8 in accordance with section 87-

(a) direct rectification of the omission or misstatement of any particulars, in any filing, previously recorded with the Registrar with respect to any charge or modification thereof, or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83,

(b) direct extension of time for satisfaction of charge, if such filing is not made within a period of three hundred days from the date of such payment or satisfaction."

Chapter 6 : Management & Administration

1. INTRODUCTION

A company is an artificial legal entity distinct from its members, thus, the affairs of the company are managed by the members and Director through resolutions passed at validly held Meetings. The Board of Directors in carrying out the day-today affairs of the company has to perform the role within the power which is granted to them. Certain powers can be exercised by the board on their own and some with the consent of the company at the general meeting. The shareholders as owners of the company ratify the actions of the board at the general meetings of the company. The meetings of the shareholders serve as the focal point for the shareholders to converge and give their decisions on the actions taken by the directors.

2. REGISTERS

The provisions relating to maintaining the various registers as per the Companies Act, 2013 are contained in Sections 88 – 91. Along with these provisions, the Companies (Management & Administration) Rules, 2014 are also applicable to the maintenance of registers by a Company.

Register of Members, etc. [section 88]

Section 88(1) of the Companies Act, 2013 seeks to provide that every company shall keep and maintain the register of members, register of debenture-holders (DH) and register of any other security holders (OSH).

- **Maintenance of Register of members:** Section 88(1)(a) requires a register of members to be maintained and that the holding of each class of equity and preference shares by each member residing in or outside India will have to be shown separately in the register of members. The form and manner in which these registers are to be maintained, is contained in Rule 3 of the Companies (Management & Administration) Rules, 2014; whereas Rule 5 provides for the maintenance of the register of members.
- **Time period for entries in register:** As per Rule 5, entries have to be made in the Register within 7 days of the date of approval by the Board or Committee thereof by approving the allotment or transfer of shares, debentures or any other securities, as the case may be.
- **Place where register shall be maintained:** According to Rule 5 also, the registers shall be maintained at the registered office of the company unless a special resolution is passed in a general meeting authorising the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than 1/10th of the total members entered in the register of members reside.
- **Other informations also to be referred in register:** Any order passed by the competent authority attaching the shares or relating to dividends is also required to be referred in the register of members. The particulars of any charge, lien, pledge or

hypothecation of any securities of the company is also required to be entered in the register of members as per Rule 5(7) and 5(8).

- **Particular in register:** Rule 3 provides that every company limited by shares, shall, from the date of its registration, maintain a register of its members in Form MGT–1. In case of a company not having share capital, the register shall contain the following particulars, in respect of each member–

- Name of the member, address (registered office address in case the member is a body corporate); email address; Permanent Account Number or Corporate Identity Number ('CIN'); Nationality; in case member is a minor – name of his guardian and the date of birth of the member, name and address of the nominee;
- Date of becoming the member;
- Date of cessation;
- Amount of guarantee, if any;
- Any other interest, if any; and © The Institute of Chartered Accountants of India
- Instructions, if any, given by the member with regard to sending of notices, etc.

- **Maintenance of register of debenture holders (DH):** Section 88(1) (b) of the Act refers to the form and manner of maintenance of Register of DH, which corresponds to Rule 4 which states that every company which issues or allots debentures or any other security shall maintain a separate register for debenture holder or security holder in Form MGT-2.
- **Updating of change in status of members:** Rule 5 states that if any change occurs in the status of a member or debenture-holder or any other securityholder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund (IEPF) or due to any other reason, entries thereof explaining the change shall be made in the respective registers.
- **Index of names:** Section 88(2) provides that every register maintained undersection 88(1) shall include an index of names included therein. However, according to Rule 6 of the Companies (Management & Administration) Rules,2014 the maintenance of index is not necessary where the number of members is less than 50. Rule 6 also provides that the company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.
- **Register index of beneficial owner to be maintained of a depository:** Section 88(3) is an enabling provision, which sets out that the register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.

Foreign register – section 88(4) read with rule 7:

- **Maintenance of foreign register:** Section 88(4) read with Rule 7 provides that a company which has share capital or which has issued debentures or any other security may, if so authorised by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners, resident in that country. The register may be referred as "Foreign Register".

- **Compliances:** The Foreign Register is optional. Once company decides to keep, it shall comply to the following –

- The company shall, within 30 days from the date of the opening of any foreign register, file with the Registrar of Companies ('RoC') notice of the situation of the office in the prescribed Form No. MGT – 3 along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within 30 days from the date of such change or discontinuance, as the case may be, file notice in Form No. MGT.3 with the RoC of such change or discontinuance.
- A foreign register shall be deemed to be part of the company's register ('principal register') of members or of debenture-holders or of any other security holders or beneficial owners, as the case may be.
- The foreign register shall be maintained in the same format as the principal register.
- A foreign register shall be open to inspection and may be closed, and extracts may be taken therefrom and copies thereof may be required, in the same manner, as is applicable to the principal register, except that the advertisement before closing the register shall be inserted in at least two newspapers circulating in the place wherein the foreign register is kept.
- If a foreign register is kept by a company in any country outside India, the decision of the appropriate competent authority in regard to the rectification of the register shall be binding.
- Entries in the foreign register maintained under section 88(4) shall be made after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.
- The company shall –

❖ Transmit to its registered office in India, a copy of every entry in any foreign register within 15 days after the entry is made; and

❖ Keep at such office a duplicate register of every foreign register duly updated from time to time and it shall be deemed to part of the principal register.

❖ No transaction with respect to any shares, debentures, or any other security, registered in a foreign register shall, during the continuance of such foreign register, be registered in any other register.

❖ The company may discontinue the keeping of any foreign register, and thereupon all entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register.

- **Penalty for failure to maintain register in accordance with the provisions of Section 88(1) and 88(2) of the Act:** If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2), the company shall be liable to a penalty of Rs. 3,00,000 and every officer of the company who is in default shall be liable to a penalty of Rs. 50,000.
- **Nature of offence:** The offence under this section is a compoundable offence under section 441 of the Act.

- **Details of Nominations in the register:** It is important to note here that Form MGT – 1 and MGT – 2 require details of nomination as referred to in section 72 of the Act, read with Rule 19 of the Companies (Share Capital and Debentures) Rules, 2014 to be entered in the Register of members and register of debenture-holders or other security holders as the case may be.
- **Authentication of entries (Rule 8):**

- The entries in the registers maintained under section 88 and index included therein shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose, and the date of the board resolution authorising the same shall be mentioned.
- The entries in the foreign register shall be authenticated by the company secretary of the company or person authorised by the Board by appending his signature to each entry.

Example 1:

Mr. Zoey purchased the shares of Luxy Hairstyles Private Limited, at market price, in the name of his daughter, Mila, who is 4 years old. Mr. Joe, the Director of the Company, has approached you to advise him on the updation of said change in the register of members, since Mila, being a minor is incompetent to contract in her capacity.

Answer: Since, the minors are not competent to enter into any contract, thus their names cannot be entered in the register of members. Therefore, Mr. Joe is advised that while filing MGT – 1 and MGT – 2, the names of the minor can only be entered only if the details of the guardian are present. Thus, Zoey's name shall appear in the register of members of Luxy Hairstyles Private Limited since Mila is a minor.

Example 2:

Mrs. And Mr. Taneja, recently got married and jointly purchased the shares of New Hopes India Private Limited on 14th August 2018. Mr. Taneja intimated the company that only the name of his wife should appear in the records of the company, for the shares purchased by them. The secretary of the company is not sure whether this is possible, given that the shares are held in the names of both the persons.

Answer: Joint holders of shares may request the company to enter their names on the register in a certain order, or execute transfers to have their holding split, with the result that part of the holding is entered showing the name of one holder and part showing the name of another. However, the condition of Mr. Taneja that only the name of his wife should appear in the register as a member cannot be catered to, although the names can be entered in the order such that the name of his wife appears first. The reason for this is that the articles of most companies provide that, in the case of exclusion of the other joint holders, and for this purpose, seniority shall be determined by the order in which the names stand in the register of members.

Declaration in respect of Beneficial Interest in any Share [Section 89]

- **Declaration by registered holder of shares:** A person whose name is entered in the register of members of a company as the holder of shares in that company but who does not hold the beneficial interest in such shares (hereinafter referred to as "the registered owner"), shall file with the company, a declaration to that effect in Form No. MGT. 4, specifying the name and other particulars of the person who holds the beneficial interest in such shares, within a period of 30 days from the date on which his name is entered in the register of members of such company.
- **Declaration by person holding beneficial interest in shares:** Every person who holds or acquires a beneficial interest in share of a company shall make a declaration to the company in form MGT-5, within 30 days after acquiring such beneficial interest, specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed.
- **Declaration in case of change in beneficial interest:** Where any change occurs in the beneficial interest in any shares in respect of which a declaration has been filed u/s 89 (1) and (2), then, within 30 days of such change, a declaration is to be made to the company.
- **Filling of return by the company with the registrar:** Where any declaration under this section 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 with fee.
- **Consequence of non-filling of declaration:** where a declaration required u/s 89 is not filed by the beneficial owner, then, any right with respect to such shares shall not be enforceable by the beneficial owner or by any person claiming through him.
- **Exemption:** Trust which is created, to set up a Mutual Fund or Venture Capital Fund or such other fund as may be approved by SEBI. These entities need not file the declarations as envisaged under this section.
- **Duty of the Company to pay dividend not affected:** Nothing contained in this section shall be deemed to prejudice the obligation of a company to pay dividend to its members under this Act and the said obligation shall, on such payment, stand discharged
- **Meaning of beneficial interest:** For the purposes of this section and section 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to—

i. exercise or cause to be exercised any or all of the rights attached to such share; or
ii. receive or participate in any dividend or other distribution in respect of such share. [Section 89(10)]

Exemption from following the provisions of section 89 [Section 89(11)]

The Central Government may, by notification, exempt any class or classes of persons from complying with any of the requirements of this section, except sub-section (10), if it is considered necessary to grant such exemption in the public interest and any such

exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

Penalty for default under section 89(5) & 89(7) –

Two kinds of penal provisions are included under section 89 –

- **Related to persons required to make a declaration [Section 89(5)]-** If any person fails to make a declaration as required under sub-section (1) or sub-section (2) or sub-section (3), he shall be liable to a penalty of Rs. 50,000 and in case of continuing failure, with a further penalty of Rs. 200 for each day after the first during which such failure continues, subject to a maximum of Rs. 5,00,000.

  Related to company [Section 89(7)]- If a company, required to file a return under sub-section (6), fails to do so before the expiry of the time specified therein, the company and every officer of the company who is in default shall be liable to a penalty of Rs. 1,000 for each day during which such failure continues, subject to a maximum of Rs. 5,00,000 in the case of a company and Rs.2,00,000 in case of an officer who is in default.

Exemption to Government Company- In case of Government Company - Section 89 shall not apply - Notification dated 5th June, 2015.

The above mentioned exemption shall be applicable to a government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar- Notification dated 13th June, 2017.

Register of Significant Beneficial Owners in a Company [Section 90]

As per Section 90 of the Act, every Significant Beneficial Owner "SBO" is required to disclose the nature of his interest and other particulars within the prescribed period of time to the Company, which in turn will inform the same to the Registrar of Companies. In the said connection, MCA has issued Companies (Significant Beneficial Owners) Rules, 2018 ("SBO"), which deals with identification and reporting in connection with SBO.

Definition of Significant Beneficial Owner: The term 'significant beneficial owner' "SBO" has been defined in section 90 of the Act as every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than twenty-five per cent. or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2, over the company (herein referred to as "significant beneficial owner").

However, Companies (Significant Beneficial Owners) Amendment Rules, 2019 ("Amendment Rules") has amended the definition of the term SBO. In terms of Rule 2(1)(h) of the SBO Rules, the term 'Significant Beneficial Owner' (SBO) is defined as an individual who—

i. acting alone or together, or
ii. through one or more persons or trust,

Possess one or more of the following rights or entitlements in the Reporting Company (i.e. the company in respect of which SBO declaration is required to be filed):

i. holds indirectly, or together with any direct holdings, not less than 10% of the shares;
ii. holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;
iii. has the right to receive or participate in not less than 10% of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;
iv. Has the right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

In simple terms, SBO is an individual who either alone or together with other individuals or trust, exercises rights or entitlements in the Reporting Company by way of holding 10% shares or 10% voting rights or right to receive 10% or more dividend, both indirect and direct holdings or right taken together or such individual exercise significant influence or control, indirectly or along with direct holding in the Reporting Company. The amended Rules further explain that if an individual does not hold any indirect right or entitlement as mentioned in i., ii. or iii. above, he will not be considered to be a 'significant beneficial owner'.

Significant influence: The term "significant influence" was previously not defined specifically for the rules, and hence, to provide clarity, the following definition has been inserted through SBO rules: "Significant influence" means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies.

Majority stake: The Amendment Rules inserted a new term, "Majority Stake," which means

i. holding more than one-half of the equity share capital in the body corporate; or
ii. holding more than one-half of the voting rights in the body corporate; or
iii. Having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.

Direct and Indirect shareholding: The Amendment Rules provide that when an individual holds any rights or entitlement directly in the reporting company, the said individual shall not be considered as SBO. An individual will be considered to hold a right or entitlement directly in the Relevant Company, if he satisfies any of the following criteria:

a. the shares in the Relevant Company representing such right or entitlement are held in the name of such individual;
b. the individual holds or acquires a beneficial interest in the shares of the Relevant Company under section 89(2) of the CA 2013, and has made a declaration in this regard to the Relevant Company.

Indirect shareholding is, when a shareholder is a

(a) Body corporate;
(b) Hindu Undivided Family;
(c) Partnership;
(d) Trust;
(e) Pooled investment vehicle.

Onus on the reporting company: The duty is on the reporting company to identify a SBO and cause such SBO to make a declaration in the prescribed Form. As per the Amendment Rules, every reporting company shall give notice in the Form BEN-4 to any person whom the company knows or has reasonable cause to believe-

(a) to be a significant beneficial owner of the company;
(b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or
(c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is issued, and who is not registered as a significant beneficial owner with the company as required under this section.

Also, according to the section 90 of the Act read with amended rules every company shall maintain a register of significant beneficial owners in Form No. BEN-3 which shall be open for inspection during business hours, at such reasonable time of not less than two hours, on every working day as the board may decide, by any member of the company on payment of such fee as may be specified by the company but not exceeding fifty rupees for each inspection.

Application to Tribunal [Section 90 (7)]: The company shall:

(a) Where that person fails to give the company the information required by the notice in form no. BEN4 within 30 days of date of notice; or
(b) Where the information given is not satisfactory,

apply to the Tribunal within a period of fifteen days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of the right to receive dividend or any other distribution in relation to the shares in question; suspension of voting rights in relation to the shares in question; any other restriction on all or any of the rights attached with the shares in question.

On any application made under sub-section (7), the Tribunal may, after giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares within a period of sixty days of receipt of application or such other period as may be prescribed.

The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed within a period of one year from the date of such order.

Provided that if no such application has been filed within a period of one year from the date of the order such shares shall be transferred, without any restrictions, to the authority constituted under section 125(5), in such manner as may be prescribed;

Declaration by SBO:

a. Every individual who is a SBO in the Reporting Company, as on the date of commencement of the Amendment Rules, is required to file a declaration with the Reporting Company in Form BEN-1 within 90 days from such commencement. In turn, the Reporting Company will be required to file the said disclosure with the Registrar within 30 days of receiving it from the SBO.
b. Any individual, who subsequently becomes a significant beneficial owner in the Reporting Company or whose significant beneficial ownership undergoes any change, is required to file a declaration with the Reporting Company in Form BEN-1 within 30 days of such acquisition or change.
c. If an individual becomes a significant beneficial owner in the Reporting Company or her significant beneficial ownership undergoes any change within ninety days of the commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019, it shall be deemed that such individual became the significant beneficial owner or any change therein happened on the date of expiry of ninety days from the date of commencement of said rules, and the period of thirty days for filing will be reckoned accordingly.

NON-APPLICABILITY

The amended Rules will not be applicable where the shares of the Relevant Company are held by:

(a) the Investor Education and Protection Fund Authority;
(b) its holding company which has complied with section 90 of CA 2013 and the Rules, provided that the details of such holding company are reported in Form BEN-2;
(c) the Central Government, any State Government or any local authority;
(d) an entity/ body corporate controlled wholly or partly by the Central Government and/ or State Government(s);
(e) investment vehicles such as mutual funds, alternative investment funds (AIFs), Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InVITs) registered with and regulated by the Securities and Exchange Board of India; and
(f) investment vehicles regulated by the Reserve Bank of India, Insurance Regulatory and Development Authority of India or Pension Fund Regulatory and Development Authority.

Contravention

(a) By SBO: If any person fails to make a declaration as required under sub-section (1), he shall be liable to a penalty of Rs. 50,000 and in case of continuing failure, with a further penalty of Rs. 1,000 for each day after the first during which such failure continues, subject to a maximum of Rs. 2,00,000. [Section 90(10)]

(b) By Reporting Company: If a company, required to maintain register under sub-section (2) and file the information under sub-section (4) or required to take necessary steps under sub-section (4A), fails to do so or denies inspection as provided therein, the company shall be liable to a penalty of Rs. 1,00,000 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. 5,00,000 and every officer of the company who is in default shall be liable to a penalty of Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 200 for each day, after the first during which such failure continues, subject to a maximum of Rs. 1,00,000. [Section 90(11)]

Contravention by Company and Officer in Default of provisions of Section 90 and SBO Rules is compoundable.

Note: Where the SBO or the Officer in Default intentionally furnishes any false or incorrect information or suppresses any material information, then they will be liable for fraud under section 447.

Exemption to Government Company- In case of Government Company - Section 90 shall not apply - Notification dated 5th June, 2015.

The above mentioned exemption shall be applicable to a government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar- Notification dated 13th June, 2017.

Power to close Register of Members or Debenture-Holders or Other Security Holders [Section 91]

- The said section is divided into two parts – sub-section (1) deals with the time limits for which the register of members is allowed to be closed and sub-section (2) mentions the penalty for contravention of the provisions of sub-section (1).
- According to Section 91(1) a company may close the register of members, debenture-holders and other security holders by giving minimum 7 days' notice or such lesser period as specified by Securities Exchange Board of India ('SEBI').
- Section 91(1) further states that the registers may be closed for any period not exceeding 30 days at any one time and for an aggregate period of 45 days in one year.
- Section 91(2) sets out that if the registers is closed without giving the notice as prescribed in sub-section (1), or after giving a shorter notice than that so provided, or for a continuous period or an aggregate period in excess of the limits specified in that sub-section, the company and every officer of the company who is in default shall be liable to a penalty of Rs. 5,000 per day subject to a maximum of Rs. 1,00,000 during which the register is kept closed. However, the offence is a compoundable offence under section 441 of the Companies Act, 2013.
- According to Rule 10 of the Companies (Management & Administration) Rules, 2014, a company closing the register of members or the register of debenture holders or the register of other security holders shall give at least seven days previous notice, if such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the principal vernacular language of the district

and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district and having wide circulation in the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company. [Sub rule (1)]

- It is important to note here that the private companies have been exempted from issuing public notice in newspapers, provided it issues 7 days' notice to its members before effecting closure of the registers. [Rule 10 (2), Companies (Management & Administration) Rules, 2014]

3. ANNUAL RETURN [SECTION 92, 94]

Provisions with regard to Annual Return are contained in section 92 and Rules 11 and 12 of the Companies (Management & Administration) Rules, 2014. As per Rule 11, every company shall file its annual return in Form No.MGT-7 except One Person Company (OPC) and Small Company. One Person Company and Small Company shall file annual return from the financial year 2020-2021 onwards in Form No.MGT-7A.

- According to section 92(1), Every company shall prepare a return (hereinafter referred to as the annual return in this section) in the prescribed form containing the particulars as they stood on the close of the financial year regarding—

(a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;
(b) its shares, debentures and other securities and shareholding pattern;
(c) omitted
(d) its members and debenture-holders along with changes therein since the close of the previous financial year;
(e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;
(f) meetings of members or a class thereof, Board and its various committees along with attendance details;
(g) remuneration of directors and key managerial personnel;
(h) 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;
(i) matters relating to certification of compliances, disclosures as may be prescribed;
(j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors; and
(k) such other matters as may be prescribed,

- The afore-mentioned annual return has to be signed by a director of the company and the company secretary; and in case, there is no company secretary, by a company secretary in practice.

However, in relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

Provided further that the Central Government may prescribe abridged form of annual return for "One Person Company, small company and such other class or classes of companies as may be prescribed".

- Sub section 2 of section 92 read with Rule 11(2) of the Companies (Management & Administration) Rules, 2014, provides that the annual return, filed by a listed company or a company having paid-up share capital of Rs. 10 crore or more; or a turnover of Rs. 50 crore or more, shall be certified by a Company Secretary in practice and the certificate shall be in Form MGT – 8. It must state that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of the Act.
- Every company shall place a copy of the annual return on the website of the company, if any, and the web-link of such annual return shall be disclosed in the Board's report.
- A copy of annual return shall be filed with the RoC within 60 days from the date on which the Annual General Meeting ('AGM') is held or where no annual general meeting is held in any year within 60 days from the date on which the annual general meeting should have been held, along with the reasons for not holding the AGM.

Penalty for contravention–

- Section 92(5) of the Act specifies that 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 Rs. 10,000 and in case of continuing failure, with further penalty of Rs. 100 for each day during which such failure continues, subject to a maximum of Rs. 2,00,000 in case of a company and Rs. 50,000 in case of an officer who is in default.
- If a company secretary in practice, certifies the annual return otherwise than in accordance with this section and the rules made thereunder, he shall be liable to a penalty of Rs. 2,00,000.

Example 3:

Big Fox Private Limited called it's Annual General Meeting on 30th September, 2019 for laying down the financial statement for approval of its shareholders for the financial year ended 31st March 2019. However, due to want of quorum, the meeting could not take place and was cancelled. The company has not filed the annual financial statements or the annual return for the year ending March 2019, with the RoC till date. The director is of the view that since the annual general meeting did not take place, the period of 60 days for filing of annual return is not applicable and thus, there is no contravention of section 92. Discuss.

Answer: The director is incorrect in holding that there no contravention of the provisions of the Companies Act, 2013. Section 92 states that every company has to file an annual return with the RoC within 60 days of date on which annual general meeting was held or the date when it must have been held. In the above case, the annual general meeting of Big Fox Private Limited should have been held by 30th September 2019, but it did not take place. Thus, the company has contravened the provisions of section 92 of

the Companies Act, 2013 and shall be liable for a penalty as specified in Section 92(5) of the Act.

Place of Keeping and Inspection of Registers, Returns, etc. [section 94]

Extract of Section 94(1)

"The registers required to be kept and maintained by a company under section 88 and copies of the annual return filed under section 92 shall be kept at the registered office of the company.

Such registers or copies of return may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company.

Provided further that the period for which the registers, returns and records are required to be kept shall be such as may be prescribed."

- As per Rule 14(1), the registers and indices maintained pursuant to section 88 and copies of returns prepared pursuant to section 92, shall be open for inspection during business hours, at such reasonable time on every working day as the board may decide, by any member, debenture holder, other security holder or beneficial owner without payment of fee and by any other person on payment of such fee as may be specified in the articles of association of the company but not exceeding fifty rupees for each inspection.

  Explanation - For the purposes of this sub-rule, reasonable time of not less than two hours on every working day shall be considered by the company.

- According to Section 94(3) read with Rule 14(2), any member, debenture-holder or security holder or beneficial owner can take the extracts during any business without payment of any fee or can also get copies thereof with payment of fee not exceeding ` 10 for each page. Such copies or entries or return shall be supplied within 7 days of deposit of fee.

  Provided that such particulars of the register or index or return as may be prescribed shall not be available for inspection under sub-section (2) or for taking extracts or copies under this sub-section.

Preservation of register of members etc. and annual return–

- Preservation of register of members: Rule 15 of the Companies (Management & Administration) Rules, 2014 states that the register of members along with the index shall be preserved permanently and shall be kept in the custody of company preservation of register of members secretary of the company or any other person authorised by the Board for such purpose; and
- Preservation of register of debenture holders/ other security holders: The register of debenture-holder or any other security holder along with the index shall be preserved for a period of 8 years from the date of redemption of debentures or securities, as the case may be, and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose.
- Copies of documents filled with ROC to be preserved: Copies of all annual returns prepared under section 92 and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of 8 years from the date of filing with the RoC.
- Preservation of foreign register: shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register. Foreign register of debenture-holder or any other security holder shall be preserved for a period of 8 years from the date of redemption of debenture or securities.

Penalty for refusing the inspection or making any extract or copy required –

- 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, 00,000 during which the refusal or default continues. [Section 94(4)]
- The Central Government may also, by order, direct an immediate inspection of the document, or directs that the extract required shall forthwith be allowed to be taken by the person requiring it. [Section 94(5)]

Registers, etc. to be evidence [section 95]

It provides that the registers, indices and copies of annual return shall be prima facie evidence of any matter directed or authorised to be inserted therein by or under this Act.

4. PRE-REQUISITES OF A MEETING

Key terms:

(a) General meeting is the meeting of a company's shareholders as per the provisions of the Act. The general meeting can be an annual general meeting (AGM) or an Extraordinary General meeting (EGM). An annual general meeting (AGM) is a mandatory yearly gathering of a company's interested shareholders. The objective of holding an AGM is to provide an opportunity to members to discuss the functioning of the company and take steps to protect their interests. They can discuss any matter relating to the conduct of the affairs of the company. An Extraordinary General Meeting (an EGM) can be defined as a meeting of shareholders which is not an AGM. The objective of holding an EGM is to discuss any matter of urgent importance which cannot be postponed till the next Annual General Meeting.

(b) Board Meeting, is the meeting of the board of directors of the company

(c) Class meeting is the meeting of special class of persons, like, creditors, preference shareholders, etc.

The pre-requisites of the meetings are, in general applicable to all kinds of meetings, although the time limits may differ and there might be a specific mention of a certain type of meeting in that section.

NOTICE OF A MEETING [SECTION 101]

Section 101 of the Companies Act, 2013 states that to properly call a general meeting notice of at least 21 clear days', before the meeting, should be given to all the members, legal representative of any deceased member or the assignee of insolvent members, the auditors and directors, in writing or electronic mode or other prescribed mode.

Mode of sending the notice:

As per Rule 18 of the Companies (Management & Administration) Rules, 2014, sending of notices through electronic mode has been statutorily recognized.

For the purpose of this rule, the expression "electronic mode" shall mean any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member.

- The said rule mentions that a notice may be sent through e-mail as a-
- Text; or
- As an attachment to e-mail; or
- As a notification providing electronic link; or
- Uniform Resource Locator for accessing such notice.
- The e-mail shall be addressed to the person entitled to receive such e-mail as per the records of the company as provided by the depository. Also, the company shall provide an advance opportunity at least once in a financial year, to the member to register his e-mail address and the changes therein and such request may be made by only those

members who have not got their email id recorded or to update a fresh email id and not from the members whose email ids are already registered. ♦ The subject line in e-mail shall state the name of the company, notice of the type of meeting, place and the date on which the meeting is scheduled.

- The notice shall be placed simultaneously on the website of the Company, if any, and on the website as may be notified by Central Government.
- Where a notice of GM is sent by post, it shall be deemed to be served at the expiration of 48 hours after the letter containing the same is posted (Rule 35(6) of the Companies Incorporation Rule, 2014)

Meaning of 21 clear days:

21 clear days mean that the date on which notice is served and the date of meeting are excluded for sending the notice. A company cannot curtail the requirement of 21 clear days through its Articles.

Who is entitled to receive the notice of the general meeting? (Section 101(3))

According to Section 101(4) any accidental omission to give notice to or the nonreceipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting. The onus is on the company to prove that the omission was not deliberate.

Example 4

Mr. Abeer filed a complaint against the company, Elixir Private Limited since it did not serve the notice to him for attending the annual general meeting. The company, in turn, provided the proof that they had sent the notice, by way of an email to Mr. Abeer, inviting him to attend the annual general meeting of the company. Abeer alleges that he never received the email. State whether the company is liable as guilty for contravening the provisions of section 101 of the Companies Act, 2013 read with rules.

Answer: As per Rule 18(3) of the Companies (Management & Administration) Rules, 2014, the company's obligation shall be satisfied when it transmits the e-mail and the company shall not be held responsible for a failure in transmission beyond its control. Also, if the member entitled to receive the notice fails to provide or update relevant e-mail address to the company, or to the depository participant as the case may be, the company shall not be in default for not delivering notice via e-mail.

Meetings held at shorter notice–

Generally, general meetings need to be called by giving at least a notice of 21 clear days.

However, a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

i. in the case of an annual general meeting, by not less than ninety-five per cent. of the members entitled to vote thereat; and

ii. in the case of any other general meeting, by members of the company—

(a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than ninety-five per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or

(b) having, if the company has no share capital, not less than ninety-five per cent. of the total voting power exercisable at that meeting.

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 for the purposes of this sub section in respect of the former resolution or resolutions and not in respect of the latter.

Contents of the Notice – Section 101(2):

A valid notice must state the day, date, hour, place of the meeting and shall contain a statement of business to be transacted in that meeting.

Authority to call a GM

A general meeting (AGM, EGM) has to be called by the Board. An individual director does not have an authority to call a GM. Any notice of GM given without the sanction of the Board is invalid; however, the same can be ratified by the Board.

Explanatory Statement to be Annexed to Notice [Section 102]

Section 102 of the Companies Act, 2013 mentions that where any special business is to be transacted at the company's general meeting, then an 'Explanatory Statement' should be annexed to the notice calling such general meeting, which must specify,

(a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of:

i. every director and the manager, if any;

ii. every other key managerial personnel; and

iii. relatives of the persons mentioned in sub-clauses (i) and (ii);

(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Ordinary business and Special business:

Companies Act, 2013 sets out the two types of businesses transacted in general meetings, which are –

- Ordinary business (OB)
- Special business. (SB)

Ordinary businesses are the following business which are transacted at the annual general meeting of the company –

- In the case of AGM, all business to be transacted thereat except the ones stated above are special business. At the EGM, every business transacted is a special business. Explanatory statement is not required for transacting OB.

- Proviso to section 102(2) sets out that if special business relates to, or affects, any other company, the extent of shareholding in that other company of every promoter, director, manager and every other KMP shall be disclosed, if the extent of shareholding is 2% or more of the paid up share capital of that other company.
- In case any item of business refers to any document which is to be considered at the meeting, then the time and place where such document can be inspected should also be specified in the explanatory statement.
- **Effect of non-disclosure [Section 102(4)]:** If as a result non-disclosure or insufficient disclosure in explanatory statement, any benefit accrues to a promoter, director, manager, other key managerial personnel or their relatives, such person shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

Penalty for contravention of the provisions of this section–

Without prejudice to the provisions of sub-section (4), if any default is made in complying with the provisions of this section, every promoter, director, manager or other key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees 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 higher. [Section 102(5)]

QUORUM FOR MEETINGS [SECTION 103]

Quorum means the minimum number of members who must be present in order to constitute a valid meeting. Section 103 of the Act states that unless the articles of the company provide for a larger number, the quorum for the meeting shall be as follows–

Public Company -

If number of members is not more than 1000, quorum shall be 5 members personally present

If the number of members is more than 1000 but up to 5000, then the quorum shall be 15 members personally present

If the number of members exceed 5000, then quorum shall be 30 members personally present.

Private Company -

2 members personally present

The term 'members personally present' as mentioned above refers to the members entitled to vote in respect of the items of business on the agenda of the meeting.

Adjourned Meeting due to want of Quorum–

If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company—

(a) the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or

(b) the meeting, if called by requisitionists under section 100, shall stand cancelled:

Provided that in case of an adjourned meeting or of a change of day, time or place of meeting under clause (a), the company shall give not less than three 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.

Where quorum is not present in the adjourned meeting also within half an hour, then the members present shall form the quorum.

Example 5:

There are 54 members of Dicey Private Limited. The company held its annual general meeting on 1st July 2019 at 2:00 p.m. and 28 members were present till 2:30 p.m. The Chairman of the meeting proceeded to initiate the meeting and passed the resolutions as discussed in the meeting. Comment whether the meeting took place as per the provisions of Companies Act, 2013.

Answer: As per the provisions of Section 103 of the Companies Act, 2013, the quorum for a Private Limited Company shall be two members personally present, within half-an-hour from the time appointed for holding a meeting of the company Thus, the quorum for the annual general meeting of Dicey Private Limited was complied with and the company is not in contravention with any of the provisions of the Companies Act, 2013.

Example 6:

Abbey Limited has 2300 members and the annual general meeting of the company is to be held on 23rd February 2019 at 10.30 a.m. On the day of the meeting, 18 members were personally present by 11.00 a.m. and the Chairman proceeded to initiate the chronicles of the meeting. There were 5 special businesses to be discussed at the said meeting and by 2.30 p.m. Agenda 1 to 3 had been discussed and appropriate resolutions were passed. However, due to some emergency, 4 of the members had to leave around 3 p.m. The Chairman granted them the permission and proceeded to discuss Agenda 4 & 5 and accordingly passed resolution as per the consent of the remaining members. Comment whether the meeting is a properly convened meeting as per the provisions of section 103 of the Companies Act, 2013.

Answer: In the above case, while the appropriate quorum was present at the time when the meeting started as per section 103 of the Companies Act, 2013, the quorum was not present at the time of deciding Agenda 4 & 5. It has been held that where at the time of transacting business, the number of members is less than the quorum fixed for the meeting, the business cannot be transacted and shall be a nullity.

CHAIRMAN OF MEETING [SECTION 104]

Election of chairman by members:

Section 104 of the Companies Act, 2013 seeks to provide that unless the articles of association of the Company otherwise provide, the members, personally present, shall elect among themselves to be the Chairman by show of hands.

Demand of poll:

The section further provides that if a poll is demanded on the election of the Chairman, the Chairman elected by show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of poll, and such other elected person shall be the Chairman for rest of the meeting.

Powers of chairman:

Chairman of the meeting is the person who manages the meetings and ensures that the required decorum of the meeting is maintained at all times, till the meeting is concluded and post that, executes the minutes of the meeting. The Chairman has prima facie authority to decide all questions which arise at a meeting and which require decision at the time. In order to fulfil his duty properly, he must observe strict impartiality.

Right to cast casting vote:

The Chairman has a casting vote in Board Meetings and general meetings, if specifically empowered by the articles of the Company. A casting vote means that in event of the equality of vote on a particular business being transacted at the meeting, the Chairman of the meeting shall have a right to cast a second vote. If there is no provision in the articles for a casting vote, an ordinary resolution on which there is equality of votes is deemed to be dropped.

Exemption to Private Company-

In case of private company - Section 104 shall apply, unless otherwise specified in respective sections or the articles of the company provide otherwise. - Notification dated 5th June, 2015.

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. Notification dated 13th June 2017.

5. PROXIES [SECTION 105]

The section provides following laws related to proxy:

- Appointment of a proxy is an important right of a member of the company. Sub-section (1) provides that any member of a company who is entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

  However, a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll.

  Applicability of the sub-section (1) - Unless the articles of a company otherwise provide, this sub-section shall not apply to a company not having a share capital. CG may also prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy.

- According to Rule 19 of the Companies (Management & Administration) Rules, 2014, a member of a company registered under section 8 shall not be entitled to appoint any other person as his proxy unless such other person is also a member of such company.
- A person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and holding in aggregate not more than 10 per cent of the total share capital of the company carrying voting rights. However, a member who is holding more than 10 per cent of the total share capital of the Company carrying voting rights

may appoint a single person as a proxy and such person shall not act as a proxy for any other person or shareholder.

- The instrument appointing a proxy must be in Form No. MGT. 11 [Rule 19(3) of the Companies (Management & Administration) Rules, 2014].
- It needs to be in writing and signed by the appointer or his attorney duly authorised in writing. If the appointer is a body corporate, the instrument should be under its seal or be signed by an officer or an attorney duly authorised by the body corporate. For execution of proxy, the Articles of Association of a company cannot specify any special requirement to be complied with. [Section 105 (6)].
- As a compliance requirement, 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, there shall appear 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. [Sub-section (2)]
- Section 105(4) of the Act provides that a proxy received 48 hours before the meeting will be valid even if the articles provide for a longer period.
- Section 105(8) provides that every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.
- Penalty for default–

- If default is made in complying with sub-section (2), every officer of the company who is in default shall be liable to penalty of five thousand rupees.
- If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who issues the invitation as aforesaid or authorises or permits their issue, shall be liable to a penalty of Rs. 50,000. [Section 105(5)]
- Provided that an officer shall not be liable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

6. VOTING [SECTION 106-109]

The votes cast by the shareholders play decisive role in the business proposed in General Meetings of a Company. An equity shareholder has the right to vote for every motion. However, as per the Section 47 of the Companies Act, 2013 preference shareholder is entitled to vote only for a resolution pertaining to his rights. The companies Act provides for various modes through which a shareholder can cast his vote. These include–

- Voting by show of hands – (section 107);
- Voting by electronic means – (section 108);
- Voting by demand of poll – (section 109);
- Voting by Postal Ballot – (section 110).

The right to vote is a personal right of a shareholder and he may use it as he likes it. He may split its vote for and against the resolution.

Restriction on Voting Rights [Section – 106]

The section overrules the whole of the Companies Act, 2013 and provides that the articles of association of a company may provide that no member shall exercise any voting right in respect of any share registered in his name on which any amount is due from him on calls or any other sums payable to the company, or in regard to which the company has exercised the right of lien. [Sub section (1)]

Section – 106 (2) also suggests that a company shall not prohibit any member from exercising his voting rights on any other ground except the grounds mentioned in (1).

On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses. [Sub section (3)]

Also, such member can't sign a requisition for an extraordinary general meeting.

Note: Where the articles of the company do not contain any provision restricting the exercise of voting right of member, a member cannot be prevented from voting, even though, calls or other sum payable by him have not been paid or the company has exercised any right of lien over his shares. But, where the articles contain any such provision, and the shares forfeited for non-payment of calls have been re-allotted, the new allottee being liable for the balance remained unpaid on the shares will not be entitled to vote so long as any calls presently payable on the shares remain unpaid.

Example 7

What happens in case of voting by joint shareholders?

Suppose that Mr. & Mrs. Iyer are joint shareholders of Goal Private Limited and they hold 500 shares of the company. Regarding a particular special business being transacted at the extra-ordinary general meeting of the company, Mr. Iyer is in the favour of the decision, whereas Mrs. Iyer is against the resolution. Decide how should the vote be casted in case of this situation?

Joint shareholders must concur in voting unless the articles provide to the contrary.

The voting in case of joint shareholders is done in the order of seniority, which is determined on the basis of the order in which their names appear in the register of members/ shareholders. The joint-holders have a right to instruct the company as to the order in which their names are to appear in the register.

Example 8

Consider a situation where directors are also the shareholders of the company.

Directors, who are also the shareholders of the company, stand in a fiduciary relationship with the company in their capacity as directors. However, a director should vote as a common shareholder would vote in a general meeting, and need not be influenced by the fact of his being a director.

Voting by Show of Hands [Section 107]

- According to section 107 of the Companies Act, 2013, unless the voting is demanded by way of poll or by electronic means, the voting should be done by way of show of hands in the first instance.
- Also, section 107(2) states that the declaration by the Chairman of the meeting in the minutes books shall be the conclusive evidence that the resolution is passed.

Example 9

Can an insolvent shareholder vote at the meeting by show of hands?

Yes. Notwithstanding that he has no longer any beneficial interest in the shares and the dividends are payable only to his trustee in bankruptcy, an insolvent shareholder so long as he remains in the register of the company as a member, is entitled to exercise his votes which are attributed to his status as member.

Voting through Electronic Means [Section 108]

E- Voting has been introduced under Section 108 read with the Companies (Management and Administration) Rules, 2014 and provides that a member in the prescribed class of companies may exercise his right to vote by electronic means.

Rule 20 of the Companies (Management & Administration) Rules, 2014 provides a detailed procedure for electronic voting, which states as follows –

"Voting through electronic means" shall apply in respect of the general meetings for which notices are issued on or after the date of commencement of this rule.

Companies providing its members to exercise right to vote by electronic means: Every company which has listed its equity shares on a recognised stock exchange and company having not less than one thousand members shall provide to its members facility to exercise their right to vote on resolutions proposed to be considered at a general meeting by electronic means.

A Nidhi, or an enterprise or institutional investor referred to in Chapter XB or Chapter XC of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 is not required to provide the facility to vote by electronic means.

Explanation-I- For the purpose of this sub-rule, "Nidhi" means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

Explanation-II.- For the purposes of this rule, the expression-

- cut-off date' means a date not earlier than seven days before the date of general meeting for determining the eligibility to vote by electronic means or in the general meeting. [Explanation II(ii) to Rule 20(2)]

- '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, in such a manner that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralised server with adequate cyber security. [Explanation II(iv) to Rule 20(2)]
- 'remote e-voting' means the facility of casting votes by a member using an electronic voting system from a place other than venue of general meeting. [Explanation II(v) to Rule 20(2)]
- 'voting by electronic mean' includes "remote e-voting and voting" at the general meeting through an electronic voting system which may be the same as used for remote e-voting. [Explanation II(vii) to Rule 20(2)]

Exercise of right by a member: A member may exercise his right to vote through voting by electronic means on resolutions and the company shall pass such resolutions in accordance with the provisions of this rule.

Procedure: A company which provides the facility to its members to exercise voting by electronic means shall comply with the following procedure, namely:-

i. Notice of meeting: The notice of the meeting shall be sent to all the members, directors and auditors of the company either-

(a) by registered post or speed post; or

(b) through electronic means, namely, registered e-mail ID of the recipient; or

(c) by courier service;

ii. Notice to be hosted on website: the notice shall also be placed on the website, if any, of the company and of the agency forthwith after it is sent to the members;

iii. Notice containing the particular: the notice of the meeting shall clearly state -

(a) that the company is providing facility for voting by electronic means and the business may be transacted through such voting;

(b) that the facility for voting, either through electronic voting system or ballot or polling paper shall also be made available at the meeting and members attending the meeting who have not already cast their vote by remote e-voting shall be able to exercise their right at the meeting;

(c) that the members who have cast their vote by remote c-voting prior to the meeting may also attend the meeting but shall not been titled to cast their vote again;

iv. the notice shall:

(a) indicate the process and manner for voting by electronic means;

(b) indicate the time schedule including the time period during which the votes may be cast by remote e-voting;

(c) provide the details about the login ID;

(d) specify the process and manner for generating or receiving the password and for casting of vote in a secure manner.

v. Publication of notice: the company shall cause a public notice by way of an advertisement to be published, immediately on completion of dispatch of notices for the meeting under clause (i) of sub-rule (4) but at least twenty-one days before the date of general

meeting, 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 country-wide circulation, and specifying in the said advertisement, inter alia, the following matters, namely:-

(a) statement that the business may be transacted through voting by electronic means;

(b) the date and time of commencement of remote e-voting;

(c) the date and time of end of remote e-voting;

(d) cut-off date;

(e) The manner in which persons who have acquired shares and become members of the company after the dispatch of notice may obtain the login ID and password;

(f) the statement that-

A. remote e-voting shall not be allowed beyond the said date and time;

B. the manner in which the company shall provide for voting by members present at the meeting; and

C. a member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again in the meeting; and

D. a person whose name is recorded in the register of members or in the register of beneficial owners maintained by the depositories as on the cut-off date only shall be entitled to avail the facility of remote e-voting as well as voting in the general meeting;

(g) website address of the company, if any, and of the agency where notice of the meeting is displayed; and

(h) name, designation, address, email id and phone number of the person responsible to address the grievances connected with facility for voting by electronic means:

Provided that the public notice shall be placed on the website of the company, if any, and of the agency;

vi. Time for opening of e-voting: the facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting;

vii. Option for remote e-voting: During the period when facility for remote e-voting is provided, the members of the company, holding shares either in physical form or in dematerialized form, as on the cut-off date, may opt for remote e-voting.

Provided that once the vote on a resolution is cast by the member, he shall not be allowed to change it subsequently or cast the vote again:

Provided further that a member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again;

viii. At the end of the remote e-voting period, the facility shall forthwith be blocked:

Provided that if a company opts to provide the same electronic voting system as used during remote e-voting during the general meeting, the said facility shall be in operation till all the resolutions are considered and voted upon in the meeting and may be used for

voting only by the members attending the meeting and who have not exercised their right to vote through remote evoting.

ix. Appointment of scrutinizer: The Board of Directors shall appoint one or more scrutinizer, who may be Chartered Accountant in practice, Cost Accountant in practice, or Company Secretary in practice or an Advocate, or any other person who is not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinize the voting and remote e-voting process in a fair and transparent manner.

Provided that 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 electronic voting system;

x. Function of scrutinizer: the scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority;

xi. Role of Chairman: The Chairman shall, at the general meeting, at the end of discussion on the resolutions on which voting is to be held, allow voting, as provided in clauses (a) to (h) of sub-rule (1) of rule 21, as applicable, with the assistance of scrutinizer, by use of ballot or polling paper or by using an electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility.

xii. Counting of votes: The scrutinizer shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting, thereafter unblock the votes cast through remote e-voting in the presence of at least two witnesses not in the employment of the company and make, not later than three days of conclusion of the meeting, a consolidated scrutinizer's report of the total votes cast in favour or against, if any, to the Chairman or a person authorized by him in writing who shall countersign the same:

Provided that the Chairman or a person authorized by him in writing shall declare the result of the voting forthwith;

Explanation: It is hereby clarified that the manner in which members have cast their votes, that is, affirming or negating the resolution, shall remain secret and not available to the Chairman, Scrutiniser or any other person till the votes are cast in the meeting.

xiii. Access to details: For the purpose of ensuring that members who have cast their votes through remote e-voting do not vote again at the general meeting, the scrutiniser shall have access, after the closure of period for remote e-voting and before the start of general meeting, to details relating to members, such as their names, folios, number of shares held and such other information that the scrutiniser may require, who have cast votes through remote e-voting but not the manner in which they have cast their votes:

xiv. Maintenance of Register: The scrutiniser 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 members, number of shares held by them, nominal value of such shares and whether the shares have differential voting rights;

xv. Safe Custody of register: The register and all other papers relating to voting by electronic means shall remain in the safe custody of the scrutiniser until the Chairman considers, approves and signs the minutes and thereafter, the scrutiniser shall hand over the register and other related papers to the company.

xvi. Result on websites: The results declared along with the report of the scrutiniser shall be placed on the website of the company, if any, and on the website of the agency immediately after the result is declared by the Chairman:

Provided that in case of companies whose equity shares are listed on a recognised stock exchange, the company shall, simultaneously, forward the results to the concerned stock exchange or exchanges where its equity shares are listed and such stock exchange or exchanges shall place the results on its or their website.

xvii. Passing of date of resolution: Subject to receipt of requisite number of votes, the resolution shall be deemed to be passed on the date of the relevant general meeting.

Explanation: For the purposes of this clause, the requisite number of votes shall be the votes required to pass the resolution as the 'ordinary resolution' or the 'special resolution', as the case may be, under section 114 of the Act.

xviii. Resolution not to be withdrawn: a resolution proposed to be considered through voting by electronic means shall not be withdrawn.

Demand for Poll [Section 109]

- Section 109 provides that before or on declaration of result of the voting on any resolution by a show of hands, the Chairman of the meeting on his own, or on demand made by the 'specified' members in that behalf.

Members who can demand for poll –

- In case of a company having a share capital, by the members present in person or proxy, where allowed, and having not less than 1/10th of the total voting power or holding shares on which an aggregate sum of not less than ` 5,00,000 or such higher amount has been prescribed has been paid – up.
- In the case of any other company, by any member or members present in person or by proxy, where allowed, and having not less than 1/10th of the total voting power.

- Withdrawal of demand for poll: the demand for poll may be withdrawn by the persons who made the demand, at any time.
- A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.
- A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than 48 hours from the time when the demand was made, as the Chairman of the meeting may direct.
- Where a poll is to be taken, the Chairman of the meeting shall appoint a scrutinizer for observing the poll process and votes given on poll and to report thereon.
- The duties of a scrutinizer shall be as follows–

- To ensure proper conduct of the polling process;

- To maintain proper records of the poll;
- To submit a report to the Chairman of the meeting which shall contain the details of votes cast in the favour and against the resolution; and
- To ensure that the compliance of the provisions of section 109 and Rule 21.

- The Chairman shall regulate the manner in which the poll shall be taken at the meeting and appoint such number of scrutinizers as may be necessary. Rule 21 lays down the procedure describing the manner in which the Chairman shall get the poll process scrutinized-

- The Chairman of the 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 pursuant to sections 105, 112 and section 113.
- The Scrutinizers shall arrange for 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 and the Polling paper shall be in Form No. MGT.12.
- The Scrutinizers shall keep a record of the polling papers received in response to poll, by initialling it.
- The Scrutinizers shall lock and seal an empty polling box in the presence of the members and proxies.
- The Scrutinizers shall open the Polling box in the presence of two persons as witnesses after the voting process is over.
- In case of ambiguity about the validity of a proxy, the Scrutinizers shall 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 shall count the votes cast on poll and prepare a report thereon addressed to the Chairman.
- Where voting is conducted by electronic means under the provisions of section 108 and rules made thereunder, 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 shall 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 shall submit the Report to the Chairman who shall counter-sign the same.
- The Chairman shall declare the result of Voting on poll. The result may either be announced by him or a person authorized by him in writing.
- The scrutinizers appointed for the poll, shall submit a report to the Chairman of the meeting in Form No. MGT.13 and the report shall be signed by the scrutinizer and, in case there is more than one scrutinizer by all the scrutinizer, and the same shall be submitted by them to the Chairman of the meeting within seven days from the date the poll is taken.
- The results of the poll shall be deemed to be the decision of the meeting on the resolution.

Applicability of section 101 to 107 and 109 to Private companies- Section 101 to 107 and 109 shall apply unless otherwise specified in respective sections or the articles of the company provide otherwise. Notification dated 5th June, 2015.

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. Notification dated 13th June 2017.

Postal Ballot [Section 110]

As per section 2(65) "postal ballot" means voting by post or through any electronic mode. The provisions relating to passing of resolution by postal ballot are contained in Section 110 read with Rule 22 of the Companies (Management and administration) Rules, 2014.

Extract of the Act

(1) "Notwithstanding anything contained in this Act, a company —

(a) shall, in respect of such items of business as the Central Government may, by notification, declare 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 general meeting.

Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

(2) 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."

The section seeks to provide that the Central Government may declare items of business that can be transacted only by postal ballot and also 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.

- Only those assents/ dissents are to be considered which have been sent by the members within 30 days as prescribed in Rule 22. Sub-section (2) of Section 110 makes a deeming provision that if a resolution is assented by requisite majority of shareholders by means of postal ballot, it shall be deemed to have been passed at a general meeting convened in that behalf.
- Manner in which postal ballot shall be conducted is prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014. The same is described as follows–

- 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 therefor and requesting them to send their assent or dissent in writing on a postal ballot because postal ballot means voting by post or through electronic means within a period of thirty days from the date of dispatch of the notice.

- The notice shall be sent either

(a) by Registered Post or speed post, or
(b) through electronic means like registered e-mail id or
(c) 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.

- 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, namely: -

(a) a statement to the effect that the business is to be transacted by postal ballot which includes voting by electronic means;
(b) the date of completion of dispatch of notices;
(c) the date of commencement of voting;
(d) the date of end of voting;
(e) the statement that any postal ballot received from the member beyond the said date will not be valid and voting whether by post or by electronic means shall not be allowed beyond the said date;
(f) a statement to the effect that members, who have not received postal ballot forms may apply to the company and obtain a duplicate thereof; and
(g) contact details of the person responsible to address the grievances connected with the voting by postal ballot including voting by electronic means.

- The notice of the postal ballot shall also be placed on the website 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.
- 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.
- The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.
- Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer and 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.
- 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;
- The scrutinizer shall maintain a register either manually or electronically to record their assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the shareholder, number of shares held by them, nominal value of such

shares, whether the shares have differential voting rights, if any, details of postal ballots which are received in defaced or mutilated form and postal ballot forms which are invalid.

- 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 and thereafter, the scrutinizer shall return the ballot papers and other related papers or register to the company who shall preserve such ballot papers and other related papers or register safely.
- 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.
- The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company.
- The provisions of rule 20 regarding voting by electronic means shall apply, as far as applicable, mutatis mutandis to this rule in respect of the voting by electronic means.
- Pursuant to clause (a) of sub-section (1) of section 110, the following items of business shall be transacted only by means of voting through a postal ballot—

(a) alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum;

(b) alteration of articles of association in relation to insertion or removal of provisions which, under sub-section (68) of section 2, are required to be included in the articles of a company in order to constitute it a private company;

(c) change in place of registered office outside the local limits of any city, town or village as specified in sub-section (5) of section 12;

(d) 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 under sub-section (8) of section 13;

(e) issue of shares with differential rights as to voting or dividend or otherwise under sub-clause (ii) of clause (a) of section 43;

(f) variation in the rights attached to a class of shares or debentures or other securities as specified under section 48;

(g) buy-back of shares by a company under sub-section (1) of section 68;

(h) election of a director under section 151 of the Act;

(i) sale of the whole or substantially the whole of an undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 180;

(j) giving loans or extending guarantee or providing security in excess of the limit specified under sub-section (3) of section 186:

Provided that any aforesaid items of business under this sub-rule, required to be transacted by means of postal ballot, may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

Provided further that One Person Companies and other companies having member's upto two hundred are not required to transact any business through postal ballot.

Example 10

How does the counting happen at the time of postal ballot?

It is important to know here that, a member who is voting by way of postal ballot, has votes in proportion to his share in the paid-up share capital of the company. And in this regard, he need not use all his votes in the same way. Therefore, 4 types of ballots may be received from the shareholders–

i. Ballots which contain assents;
ii. Ballots which contain dissents;
iii. Ballots wherein the member has voted partially assenting, partially dissenting or using not all his shares in any particular way; and
iv. Invalid ballots (due to absence/ mismatch of signature, overwriting, etc.)

7. CIRCULATION OF MEMBER'S RESOLUTIONS [SECTION 111]

Circulation of members' resolution and statements: While the board enjoys the primacy in setting the agenda of the meetings, the members are given a right under section 111 to propose resolutions for consideration at the general meetings. The number of members required to make a requisition under sub-section (1) of this section are as required to requisition a general meeting in sub-section (2) of section 100.

(1) Prerequisites of a valid Requisition: The prerequisites for a valid requisition prescribed in sub-section (2) of section 111 are as under:

(a) Requisition must be made in writing and signed:

i. 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 one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;
ii. 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 one-tenth of the total voting power of all the members having on the said date a right to vote.

(b) Two or more copies of the said requisition may contain signature of all the requisitionists.

(c) It must be deposited at the registered office of the company not less than six weeks before the meeting in the case of a requisition requiring notice of a resolution. In case of other resolutions, the same is to be deposited not less than two weeks before the meeting.

(d) A sum reasonably sufficient to meet the company's expenses in giving effect to proposing the resolution is deposited or tendered. When the money is tendered, no payment is made but an unconditional offer is made to pay money.

The proviso to sub-section (2) of section 111 provides that the time period provided above need not be complied with in case an annual general meeting is called on a date within six weeks after the copy has been deposited. The copy of requisition, in such a case, shall be deemed to have been properly deposited for the purposes thereof

although not deposited within the time required by this sub-section. The company is not duty bound to circulate the notice of the resolution when the prerequisites are not complied with.

(2) Notice to members: As per section 111 of the Companies Act, 2013, a company shall, on requisition in writing of such number of members, as required in section 100 (Calling of EGM), give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting; and circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.

(3) Exception from circulation of any statement: The Company shall not be bound to circulate any statement, if on the application either on behalf of the company or of any other person who claims to be aggrieved, then the Central Government, by order, declares that the rights conferred are being abused to secure needless publicity for defamatory matter.

(4) Order to bear the cost: An order made may also direct that the cost incurred by the company shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.

(5) Default in contravention of the provision: If any default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees.

8. REPRESENTATION OF THE PRESIDENT & GOVERNORS IN MEETING OF COMPANIES TO WHICH THEY ARE MEMBER [SECTION 112]

Section 112 of the Companies Act, 2013 provides that the 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 and such other person shall be entitled to exercise the same rights and powers including the right to vote to proxy and postal ballot, as the President or, as the case may be, the Governor could exercise as a member of the company.

9. REPRESENTATIONS OF CORPORATIONS MEETING OF COMPANIES AND CREDITORS [SECTION 113]

Section 113 of the Companies Act, 2013 seeks to provide that where a body corporate is a member or a creditor including a holder of debentures of the company and it authorises any person as its representative at any meeting of the company or any class of members of the company or at any meeting of creditors of the company, such representative shall be entitled to exercise the same rights and powers including right to vote by proxy and by postal ballot on behalf of the body corporate which he represents.

10. RESOUTIONS [SECTION 114-117]

In lay man's language, a resolution is the formal decision of an organization while transacting a business at a meeting. A motion which has obtained the necessary majority

vote in its favour becomes a resolution. When a resolution is passed, a company is bound by it.

Difference between Motion & Resolution—

- Most matters come before a meeting by way of a motion recommending that the meeting may express approval or disapproval or take certain action or order something to be done.
- A motion is a proposal, and a resolution is the adoption of a motion duly made and seconded. But every motion need not be followed by a resolution, as where a motion is made for the adjournment of the meeting.
- A motion whether it is passed for the closure of discussion or adjournment, etc. can be passed by an ordinary resolution unless there is a specific provision in the articles.

As per the Companies Act, 2013, resolutions are of two types–

- Ordinary Resolutions – which are passed by simple majority; and
- Special Resolutions – which are passed by 75% majority.

Section 114 – Ordinary & Special Resolution:

Section 114 of the Act defines an Ordinary and Special Resolution. It states that:

Ordinary Resolution -

Section 114(1) states that a resolution shall be ordinary resolution, if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any cast against the resolution by members, so entitled and voting.

Simply put, the votes cast in the favour of the resolution, by any mode of voting should exceed the votes cast against it.

Special Resolution -

As per Section 114(2) of the Act, a resolution shall be a special resolution, when–

(a) The intention to propose the resolution 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;
(b) The notice required under this Act has been duly given; and
(c) The votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, are required to be not less than 3 times the number of the votes, if any, cast against the resolution by members so entitled and voting.

In simple words, a resolution shall be a special resolution, when it is duly specified in the notice, calling the general meeting and votes cast in favour is 3 times the votes cast against the resolution.

Characteristics of Special Resolution -

1. Specified Majority - 75%
2. Resolution shall be set out in the notice
3. Notice must state that resolution is to be passed as a special resolution and omission, would invalidate the resolution.
4. Proper notice of 21 days is given for holding the meeting
5. Explanatory Statement should be annexed to the notice for conducting special business

Example 11:

In the annual general meeting of Black Mango Limited, the notice contained the agenda for 8 special businesses to be transacted. The Chairman decided to move all the resolutions at one time in order to save time of the members present at the meeting. Discuss whether two or more resolutions can be moved together as per the provisions of the Companies Act, 2013.

For the sake of avoiding confusion and mixing up, the resolutions are moved separately. However, there is nothing illegal if the Chairman of the meeting desires that two or more resolutions should be moved together, unless any member requires that each resolution should be put to vote separately or unless a poll is demanded in respect of any.

The only case where a resolution should be moved separately is the one which requires that as regards the appointment of directors at a general meeting of a public or private company, where two or more directors may not be appointed as directors by a single resolution.

Where notice has been given of several resolutions, each resolution must, be put separately. However, if the meeting unanimously adopts all the resolutions, this would not be material.

Resolutions requiring Special Notice [Section 115]

Section 115 read with rule 23 of Companies (Management and Administration) Rules, 2014 deals with resolutions requiring special notice

Section 115 of the Companies Act, 2013 states that where, by any provision contained in this Act or in the Articles of Association of a company, special notice is required for passing any resolution, then the 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 the total voting power, or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up.

As per the Act, special notice is required in the following cases –

(a) Resolution for appointment of an auditors other the retiring auditor at an annual general meeting [Section 140(4)].
(b) Resolution at an annual general meeting to provide that a retiring auditor shall not be re-appointed [Section 140].
(c) Resolution to remove a director before the expiry of his period of office [Section 169(2)]
(d) Resolution to appoint another director in place of the removed director [(Section 169(5)]

Further, the articles may provide for additional matters which may require special notice.

Rule 23–Special Notice -

1. 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 5,00,000 rupees has been paid up on the date of the notice.

2. The afore-mentioned notice shall be sent by members to the company not earlier than 3 months but at least 14 days before the date of meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.
3. The company shall immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting, exclusive of the day of dispatch of notice and day of the meeting, in the same manner as it gives notice of any general meetings.
4. Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company.
5. The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

Resolutions passed at Adjourned Meeting [Section 116]

As per Section 116 where a resolution is passed at an adjourned meeting of a company; or the holders of any class of shares in a company; or the Board of Directors, the resolution shall be treated as passed on the day it was actually passed and not on any earlier date.

Example 12

The extra-ordinary general meeting of the company, Purple Banana Private Limited was due to be held on 23rd September 2019. However, due to want of quorum, the meeting was adjourned to a later date on 1st October 2019 and two resolutions were passed on that date. Now, as per section 116 of the Companies Act, 2013, the said two resolutions shall be deemed to have been passed on the original date of meeting, i.e. 1st October 2019 and not on the earlier date.

Resolutions and Agreements to be filed [Section 117]

Section 117 of the Act, provides that a copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed.

A copy of every resolution or any agreement required to be filed, together with the explanatory statement under section 102, if any, shall be filed with the Registrar in Form No. MGT.14 along with the fee. [Rule 24]

Provided that the copy of every resolution which has the effect of altering the articles and the copy of every agreement referred to in sub-section (3) shall be embodied in or

annexed to every copy of the articles issued after passing of the resolution or making of the agreement.

Resolutions and agreements to be filed with the Registrar are as under: -

- Special Resolutions
- Resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
- Any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
- Resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members.
- Resolutions requiring a company to be wound up voluntarily passed in pursuance of section 59 of the Insolvency and Bankruptcy Code, 2016.
- Resolutions passed in pursuance of sub-section (3) of section 179.

  Provided that no person shall be entitled under section 399 to inspect or obtain copies of such resolutions;

  Provided further that nothing contained in this clause shall apply in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business by: -

(a) a banking company;
(b) any class of non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934, as may be prescribed in consultation with the Reserve Bank of India;
(c) any class of housing finance company registered under the National Housing Bank Act, 1987, as may be prescribed in consultation with the National Housing Bank; and

- any other resolution or agreement as may be prescribed and placed in the public domain.

Penalty under the Act-Section 117(2)

If any company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein, such company shall be liable to a penalty of Rs. 10,000 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. 2,00,000 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. 10,000 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. 50,000.

11. MINUTES (SECTION 118)

Section 118 prescribes that every company shall prepare, sign and keep minutes of every general meeting of any class of shareholders or creditors, including the meeting called by the requisitionists, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, 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. [Sub section (1)]

- The minutes of each meeting shall contain a fair and correct summary of the proceedings that took place at the concerned meeting.
- All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.
- In the case of a Board Meeting or a meeting of a committee of the Board, the minutes shall also contain–
- The names of the directors present at the meeting; and
- 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.
- Any of the following matter shall not be included in the minutes of the meeting, which in the opinion of the Chairman of the meeting–
- Is or could reasonably be regarded as defamatory of any person; or
- Is irrelevant or immaterial to the proceedings; or
- Is detrimental to the interests of the company.
- The matter to be included or excluded in the minutes of the meetings shall be at the absolute discretion of the Chairman of the meeting.
- The minutes kept in accordance with the provisions shall serve as the evidence of the proceedings therein.
- Where the minutes have been kept in accordance with this section, 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, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.
- 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 requires by this section to be contained in the minutes of the proceedings of such meeting.
- Every company shall observe Secretarial Standards with respect to general and Board meetings, specified by the Institute of Company Secretaries of India and approved as such by the Central Government. [Sub section (10)]
- Penalty for contravention–
- If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of ` 25,000 and every officer of the company who is in default shall be liable to a penalty of ` 5,000.

- If a person is found guilty of tampering with the minutes of the proceedings of the 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 ` 25,000 but which may extend to ` 1,00,000.

  Rule 25 of the Companies (Management & Administration) Rules, 2014 prescribes the procedure for maintenance of minutes of proceedings of general meeting, meeting of Board of Directors and other meetings and resolutions passed by postal ballot as follows–

- A distinct minute book shall be maintained for each type of meeting namely:

i. general meetings of the members;
ii. meetings of the creditors
iii. meetings of the Board; and
iv. meetings of each of the committees of the Board.

- The minutes of proceedings of each meeting shall be entered in the books maintained for that purpose along with the date of such entry within thirty days of the conclusion of the meeting.
- In case of every resolution passed by postal ballot, a brief report on the postal ballot conducted including the resolution proposed, the result of the voting thereon and the summary of the scrutinizer's report shall be entered in the minutes book of general meetings along with the date of such entry within thirty days from the date of passing of resolution.
- Each page of every such book shall be initialled or signed and the last page of the record of proceedings of each meeting or each report in such books shall be dated and signed –

i. in the case of minutes of proceedings of a meeting of the Board or of a committee thereof, by the chairman of the said meeting or the chairman of the next succeeding meeting;
ii. in the case of minutes of proceedings of a general meeting, by the chairman of the same meeting within the aforesaid period of thirty days or in the event of the death or inability of that chairman within that period, by a director duly authorised by the Board for the purpose;
iii. In case of every resolution passed by postal ballot, by the chairman of the Board within the aforesaid period of thirty days or in the event of there being no chairman of the Board or the death or inability of that chairman within that period, by a director duly authorized by the Board for the purpose.

- The minute books of general meetings shall be kept at the registered office of the company and shall be preserved permanently and kept in the custody of the company secretary or any director duly authorised by the board.
- The minute books of the Board and committee meetings shall be preserved permanently and kept in the custody of the company secretary of the company or any director duly authorized by the Board for the purpose and shall be kept in the registered office or such place as Board may decide.

Exemption to Section 8 companies: In case of Section 8 company - section 118 shall not apply as a whole except that minutes may be recorded within 30 days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation - Notification dated 5th June, 2015.

The exceptions, modifications and adaptations, shall be applicable to a section 8 company which has not committed a default in filing its financial statements under 137 or Annual Return under section 92 with the Registrar. Notification dated 13th June, 2017.

12. INSPECTION OF MINUTE-BOOKS OF GENERAL MEETING [SECTION 119]

How shall the inspection take place?

As per section 119 of the Companies Act, 2013, the books containing the minutes of the proceedings of any general meeting of a company shall –

- Be kept at the registered office of the company; and
- Be open for inspection, during business hours, by any member, without charge, subject to such reasonable restrictions as specified in the articles of the company or as imposed in the general meeting. However, at least 2 hours in each business day shall be allowed for inspection [Sub – Section (1)].

  Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, and on payment of such fees as may be prescribed, with a copy of any minutes referred [Sub – Section (2)].

  What is the penalty for contravention of the provisions of the Act? [Sub section (3)]

  If any inspection under sub – section (1), is refused by the company to the member, or if the copy of minute-book is not furnished within the time specified under sub – section (2), then the company shall be liable to a penalty of ` 25,000 and every officer of the company who is in default shall be liable to a penalty of ` 5,000 for each such refusal or default as the case may be.

Power of Tribunal [Sub – Section (4)]

In the case of any such refusal or default, the Tribunal may, without prejudice to any action being taken under sub-section (3), 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.

Rule 26–Copy of minute book of general meeting –

Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, with a copy of any minutes of any general meeting, on payment of such sum as may be specified in the articles of association of the company, but not exceeding a sum of ten rupees for each page or part of any page:

Provided that a member who has made a request for provision of soft copy in respect of minutes of any previous general meetings held during a period immediately preceding three financial years shall be entitled to be furnished, with the same free of cost.

Maintenance and Inspection of Documents in Electronic Form [Section 120]

The said section seeks to provide that any document, record, register or minute, etc., required to be kept by a company or allowed to be inspected or copies given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form in such form and manner as may be specified in Rule 27, 28 and 29 of the Companies (Management and Administration) Rules, 2014.

- Rule 27 of the Companies (Management and Administration) Rules, 2014 states that every listed company or a company having at least 1000 shareholders, debenture-holders and other security holders, may maintain its records, as required to be maintained under the Act or rules made thereunder, in electronic form.
- Rule 28 sets out that the Managing Director, Company Secretary or any other director or officer of the company as the Board may decide shall be responsible for the maintenance and security of electronic records.
- Rule 29 states that the records maintained in electronic form shall be made available for inspection by the company in electronic form. Copies of the records maintained in e-form, containing a clear reproduction of the whole or part thereof, should be provided on payment of not exceeding ` 10/page.

13. MEETINGS

Now that we have understood the basic terms which are required to call, convene and conduct the meeting properly, let us discuss the provisions related to meetings given in the Companies Act, 2013. The Act describes two types of general meeting to be held in a company which are-

ANNUAL GENERAL MEETING ('AGM') [SECTION 96]

- Section 96(1) of the Companies Act, 2013 states that every company, whether public or private, except One Person Company, shall hold an annual general meeting every year and that the gap between two AGMs shall not be more than 15 months.
- The company shall specify the meeting as such [i.e. as AGM] in the notices calling it.
- Holding of annual general meeting
- Annual general meeting should be held once every year.
- First annual general meeting of the company should be held within 9 months from the closing of the first financial year. Hence it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation.
- Subsequent annual general meeting of the company should be held within 6 months from the closing of the financial year.
- The gap between two annual general meetings should not exceed 15 months.
- Extension of validity period of AGM: In case, it is not possible for a company to hold an annual general meeting within the prescribed time, the Registrar may, for any special reason, extend the time within which any annual general meeting shall be held. Such

extension can be for a period not exceeding 3 months. No such extension of time can be granted by the Registrar for the holding of the first annual general meeting.

Example 13

- Abbeys Private Limited closed its financial year on 31st March 2019. According to section 96(1) of the Act, the Company should hold its annual general meeting for the year 2018-19 by 30th September 2019 unless an extension is granted by RoC on special reasons.
- **Abbyrush Limited was incorporated on 11th December 2018. When should the company hold its AGM?**

  According to section 96(1), the company's financial year will close on 31st March 2019. The company may hold its first AGM by 31st December 2019, i.e. within 9 months of the close of its financial year.

- Time and place for holding an annual general meeting: Section 96(2) states that every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.
- Provided that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance.

  The Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.

- Explanation: For the purposes of this sub-section, "National Holiday" means and includes a day declared as National Holiday by the Central Government.

Exemption to Section 8 companies:

In case of Section 8 company- In Sub-section (2) of Section 96 after the proviso and before the explanation the following proviso shall be inserted;

Provided further that the time, date and place of each annual general meeting are decided upon before-hand by the board of directors having regard to the directions, if any, given in this regard by the company in its general meeting. - Notification dated 5th, June 2015.

The above mentioned exception shall be applicable to a section 8 company which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 with the Registrar. Notification dated 13th June, 2017.

Exemption to Government companies:

In case of Government company, section 96(2) shall be read as:

'Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at such other place within the city, town or village in which the registered office of the company is situated or such other place as the

Central Government may approve in this behalf. Notification dated 5th June, 2015 read with Notification Dated 13th June, 2017

The above mentioned exception/ modification/ adaptation shall be applicable to Government company which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 with the Registrar. Notification dated 13th June, 2017'.

Power of Tribunal to Call Annual General Meeting [Section 97]

(1) If any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, notwithstanding anything contained in this Act or the articles of the company, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act.

Power of Tribunal to Call Meetings of Members, etc. [section 98]

(1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles of the company, the Tribunal may, either suo motu or on the application of any director or member of the company who would be entitled to vote at the meeting —

(a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

(b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) Any meeting called, held and conducted in accordance with any order made under sub-section (1) shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

Punishment for Default in Complying with the provisions of Section 96 to 98 [Section 99]

This section lists out the punishment for contravention of section 96 to 98, i.e. default in holding a meeting of the company as AGM or on the directions issued by the Tribunal. It states that the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 1,00,000 and in the case of a continuing

default, with a further fine which may extend to Rs. 5,000 for every day during which the default continues.

Report on Annual General Meeting [Section 121]

According to Section 121, every listed public company shall prepare a report on each annual general meeting including the confirmation to the effect that the meeting was convened held and conducted as per the provisions of the Act and the rules made thereunder. A copy of the report is to be filed with the Registrar in Form No. MGT. 15 within thirty days of the conclusion of AGM along with the prescribed fee. According to Rule 31 of the Companies (Management and Administration) Rules, 2014, the report shall be prepared in the following manner:

(a) the report under this section shall be prepared in addition to the minutes of the general meeting;
(b) the report shall be signed and dated by the Chairman of the meeting or in case of his inability to sign, by any two directors of the company, one of whom shall be the Managing director, if there is one and company secretary of the company;
(c) the report shall contain the details in respect of the following, namely: -

i. the day, date, hour and venue of the AGM;
ii. confirmation with respect to appointment of Chairman of the meeting;
iii. number of members attending the meeting;
iv. confirmation of quorum;
v. confirmation with respect to compliance of the Act and the Rules, secretarial standards made there under with respect to calling, convening and conducting the meeting;
vi. business transacted at the meeting and result thereof;
vii. particulars with respect to any adjournment, postponement of meeting, change in venue; and
viii. any other points relevant for inclusion in the report

Penalty for default:

If the company fails to file the report within 30 days of conclusion of AGM, such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees and every officer of the company who is in default shall be liable to a penalty which shall not be less than twenty-five thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees.

Extra-Ordinary General Meetings [Section 100]

All general meetings other than annual general meetings are called extraordinary general meetings.

Who can call an EGM?

1. The Board may, whenever it deems fit, call an extraordinary general meeting of the company.

   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.

2. The Board shall on the requisition of –

(a) In the case of company having a share capital, such number of members who hold, on the date of receipt of requisition, at least 1/10th of such paid-up capital of the company as on that date carries the right of voting;

(b) In the case of company not having a share capital, such number of members who hold, on the date of receipt of requisition, at least 1/10th of total voting power of all the members having on the said date a right to vote.

The requisition shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company. The Board must, within 21 days from the date of receipt of a valid requisition, proceed to call a meeting on a day not later than 45 days from the date of receipt of such requisition.

3. By requisitionists: Iif the Board does not, within twenty-one days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition. [Sub section (4)]

A meeting under sub-section (4) by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.

Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting.

Rule 17 of the Companies (Management and Administration) Rules, 2014 provides as under with regard to calling of EGM by requisitionists:

(1) The members may requisition convening of an extraordinary general meeting in accordance with sub-section (4) of section 100, by providing such requisition in writing or through electronic mode at least clear twenty-one days prior to the proposed date of such extraordinary general meeting.

(2) The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting.

Explanation - For the purposes of this sub-rule, it is here by clarified that requistionists should convene meeting at Registered office or in the same city or town where

Registered office is situated and such meeting should be convened on any day except national holiday.

(3) If the resolution is to be proposed as a special resolution, the notice shall be given as required by sub-section (2) of section 114.

(4) The notice shall be signed by all the requistionists or by a requistionists duly authorised in writing by all other requistionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.

(5) No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requistionists and the requistionists may disclose the reasons for the resolution(s) which they propose to move at the meeting.

(6) The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within three days on which the requistionists deposit with the Company a valid requisition for calling an extraordinary general meeting.

(7) Where the meeting is not convened, the requistionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on twenty first day from the date of receipt of valid requisition together with such changes, if any, before the expiry of the forty-five days from the date of receipt of a valid requisition.

(8) The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

Example 14

1. The Board of directors of Illusions Private Limited, a company registered in New Delhi, has decided to call an EGM in Madrid, Spain on 2nd October 2018.

   Discuss whether the general meeting can be convened on the said date.

   No, the meeting cannot be convened in the manner as stated in the facts of the question. As per Rule 17(2) of the Companies (Management and Administration) Rules, 2014, the requisitionists should hold the meeting in the registered office of the company or in the same city or town in which the registered office is situated and it should be a working day.

2. The members of the Blumove Peacocks Private Limited, holding 1/10th voting power of the company, requisitioned a meeting on 14th August, 2018 to the Board of Directors. However, the directors did not pay any heed to such a requisition and did not call an extra-ordinary meeting. Discuss the consequences of the contravention of the same in accordance with the Companies Act, 2013.

   Where the Board, after the receipt of the requisition, does not within 21 days call for a meeting within 45 days of the date of requisition, then the requisitionists may themselves call and convene the meeting.

14. APPLICABILITY OF THIS CHAPTER TO ONE PERSON COMPANY [SECTION 122]

(1) The section states that the provisions of section 98 and section 100 to 111 shall not apply to One Person Company.

(2) The ordinary businesses as mentioned under section 102(2)(a), which a company is required to transact at an AGM, shall be transacted in the case of One Person Company, as provided in Sub-section (3).

(3) For the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 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 Board of Director of a One Person Company, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act.

Chapter 7 : Declaration & Payment of Dividend

1.MEANING OF DIVIDEND

Definition

Section 2(35) of the Companies Act, 2013, while defining the term dividend simply states that "dividend" includes any interim dividend.

This definition, instead of explaining the term merely enlarges its scope by including 'interim dividend' in its fold.

Dividend is the shareholders return on their investment / capital in the company. Dividend is part of the distributable profits which has been paid out to them. In simple words, it is a distribution of profits i.e. a portion of profits earned and allocated as payable to the shareholders whenever declared.

The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the Board. (Clause 80 of Table F in Schedule I)

Dividend is recommended by Board of Directors in the Board's Report1 and approved by Shareholders at the Annual General Meeting. Dividend is not a liability unless it is declared by the shareholders at a validly constituted general meeting by passing an ordinary resolution at the rates recommended by the Board or such lower rates as they may decide.

Declaration of dividend by the company at a rate higher than the rate recommended by the Board is not permitted.

Dividend is Declared as a proportion of Nominal or Face Value of a share.

Example 1: AB Ltd. has issued equity shares having face value of Rs. 10 per share. The shares are currently quoting on the NSE at Rs. 250/- per share. The Company at its AGM held on 27.7.20 has declared a dividend of 20%. Mr. Shekar owns 1000 shares which he purchased at Rs. 300/- per share. What is the amount of dividend he will receive?

The dividend is to be calculated on Face Value i.e., Rs. 10/-. So, dividend per share is 20% of Rs. 10/- = Rs. 2/- per share. So, Mr. Shekar will receive Rs. 2 * 1000 shares = Rs. 2000/-.

Example 2: The shareholders at an annual general meeting unanimously passed a resolution for payment of dividend at a rate higher than that recommended by the directors. Discuss the validity of the resolution.

Articles of Association companies usually contain provisions with regard to declaration of dividend on the pattern of regulations 80 to 85 of Table F to Schedule I of the Companies Act, 2013. Under regulation 80, the power to declare a dividend vests with the general meeting but not even all the shareholders have the power to declare a dividend exceeding the amount recommended by the Board of Directors.

2.TYPES OF DIVIDEND

I. Classification based on time i.e., when declared

Interim Dividend

Section 123 (3) and also section 123 (4) contain provisions regarding interim dividend. Following points are noteworthy:

- Interim dividend may be declared by the Board of Directors at any time during the period from closure of financial year till holding of the annual general meeting.

  The declaration of interim dividend is done out of profits before the final adoption of the accounts by the shareholders and therefore, interim dividend is said to be declared and paid between two AGMs.

- The sources for declaring interim dividend include:
  - Surplus in the profit and loss account; or
  - Profits of the financial year in which such dividend is sought to be declared; or
  - Profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.
- Declaration of interim dividend shall be ratified at the ensuing AGM by the members.
- If the company 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 average (rate of) dividend declared by the company during the immediately preceding three financial years.

  Example 3: If a company declared dividend at the rate of 16% during the immediately preceding three financial years, then in case the company incurs loss in the current financial year, it is permitted to declare interim dividend at a rate which is not higher than 16%.

- The amount of the dividend, including interim dividend, shall be deposited in a separate account maintained with a scheduled bank within five days from the date of declaration.
- All provisions which are applicable to the payment of dividend shall also apply in case of interim dividend.

Final Dividend

- When the dividend is declared at the Annual General Meeting of the company, it is known as 'final dividend'.
- The rate of dividend recommended by the Board cannot be increased by the members.

The table given below provides a quick summary of the above concepts of Interim Dividend and Final Dividend.

BASIS FOR COMPARISON	INTERIM DIVIDEND	FINAL DIVIDEND
Definition	Interim dividend is declared and paid during an accounting year, i.e. before the finalization of accounts for the year.	Final dividend is the dividend recommended by the board of directors, and approved by shareholders at the company's Annual General

		Meeting, after the close of financial year.
Announcement	Announced by Board of Directors.	Recommended by Board of Directors and approved by shareholders.
Time of Declaration	Before preparation of financial statements.	After preparation of financial statements.
Revocation	It can be revoked with the consent of all shareholders.	It cannot be revoked.
Provision in Articles of Association	It is declared only when the articles specifically permit the declaration.	It does not require any specific provision in the articles.

II. **Classification based on Nature of Shares does not require any specific provision in the articles.**

Shares can be classified into two categories i.e., preference shares and equity shares. The manner of payment of dividend is dependent upon the nature of shares.

i. **Preference Shares:** According to Section 43 of the Companies Act, 2013, shareholders holding preference shares are assured of a preferential dividend at a fixed rate during the life of the company.

Preference dividend unless otherwise agreed is Non-cumulative in nature and need not be paid in any year where there is deficiency of profits.

Classification of preference shares on the basis of payment of dividend is as follows:

(a) Cumulative Preference Shares: A cumulative preference share is one in respect of which dividend gets accumulated and any arrears of such dividend arising due to insufficiency of profits during the current year is payable from the profits earned in the later years. Until and unless dividend on cumulative preference shares is paid in full, including arrears, if any, no dividend is payable on equity shares.

(b) Non-cumulative Preference Shares: A non-cumulative preference share is one where the dividend is payable only in a year of profit. There is no accumulation of profit as in the case of cumulative preference shares. In case no dividend is declared in a year due to any reason, the right to receive such dividend for that year expires and the holder of such a share is not entitled to be paid arrears of dividend out of future years.

ii. **Equity Shares:** Equity shares are those shares, which are not preference shares. It means that they do not enjoy any preferential rights in the matter of payment of dividend or repayment of capital. The rate of dividend on equity shares is recommended by the Board of Directors and may vary from year to year. Rate of dividend depends upon the dividend policy and the availability of profits after satisfying the rights of preference shareholders.

3. PROVISIONS REGARDING DECLARATION AND PAYMENT OF DIVIDEND

A. Sources for Declaration of Dividend

According to Section 123 (1), the dividend for any financial year shall be declared or paid from the following sources:

(a) Profits of the current financial year- Profits arrived at after providing for depreciation in accordance with Schedule II.

(b) Profits of any previous financial year or years- Profits of any previous financial year(s) arrived at after providing for depreciation in accordance with Schedule II and remaining undistributed i.e., credit balance in profit and loss account and free reserves. It is to be noted that only free reserves and no other reserves are to be used for declaration or payment of dividend.

(c) Both (a) and (b).

(d) Provision of money by the Government- Money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government.

Note 1: Before declaration of any dividend, carried over previous losses and depreciation not provided in previous year or years are required to be set off against profit of the company for the current year.

Note 2: 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.

Note 3: Capital profits are not same as distributable profits because they are not earned in the normal course of business; and therefore, normally not available for distribution as dividend.

Need for providing for depreciation out of profits before declaring dividend

Dividend is an apportionment from revenue profits. Therefore, dividend should never be declared out of capital. This is also the reason for prohibition on issue of shares at a discount which you studied in the topic Share Capital and Debentures.

"Depreciation" is a notional estimate of the reduction in the value of an asset due to

i. wear and tear,
ii. efflux of time,
iii. improvements in technology etc.

If depreciation is not provided for there will be two consequences:

i. The value of the asset will be overstated in Balance Sheet
ii. The profits of the current year will be overstated.

Let us take a hypothetical case where a company declares all the profits earned during any year as dividend.

At the time of winding up of the company the value of assets appearing in the Balance-sheet would appear to be sufficient to repay the capital of the shareholders but the

actual realizable value thereof will be a paltry sum which may not be sufficient even to meet the expenses of winding up.

This is because the company has failed to retain the amount of wear and tear in the value of the asset by way of provision for depreciation. In a way the company would have declared dividend out of capital, which is prohibited.

Hence the law mandates provision for depreciation out of profits before declaration of dividend.

Example 4: Shreyas Mechanics Limited owns a plot of land which was purchased long before. As the property rates are going up, it is decided to revalue the plot at fair value which is moderately ten times the original price, thus resulting in a revaluation profit of Rs. 20,00,000. The Board of Directors is keen to utilize this Rs. 20,00,000 along with free reserves of Rs. 24,00,000 for declaration of dividend at the forthcoming Annual General Meeting (AGM) to be held on 28th September, 2019. But according to Proviso to Section 123 (1) (a), the amount of Rs. 20,00,000 cannot be considered as it does not form part of Free Reserves as the same cannot be utilized towards declaration of dividend.

B. Transfer to Reserves

Transfer of profits to reserves for any financial year has been left to the discretion of the company. Therefore, a company is free to transfer any portion of its profit to reserves as it may deem fit. It may also decide not to transfer any amount to reserves.

Example 5: For the current year, Alma Watches Limited proposes to transfer more than 10% of its profits to the reserves before declaration of dividend at the rate of 12%. Can the company do so?

Answer: The amount to be transferred to reserves out of profits for any financial year before the declaration of dividend has been left to the discretion of the company. Therefore, Alma Watches Limited is free to transfer any part of its profits to reserves as it may deem fit.

Example 6: Brix Shipyards Limited has earned a profit of ` 1,000 crores for the financial year 2018-19. It has proposed a dividend @ 8.75%. However, it does not intend to transfer any amount to the reserves out of the profits earned. Can the company do so?

Answer: The amount to be transferred to reserves out of profits for any financial year has been left to the discretion of the company. The company is free to transfer any part of its profits to reserves as it may deem fit or it may even not transfer any profits to reserve if it is deemed appropriate before the declaration of dividend. Thus, Brix Shipyards Limited is justified in its action if it does not transfer any amount of profits to the reserves.

C. Declaration of Dividend when there is inadequacy or Absence of Profits (Second Proviso to Sec. 123)

Where in any year there are no adequate profits for declaring dividend, the company may declare dividend out of the profits of any previous year transferred by it to the free reserves only in accordance with the procedure laid down in Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014.

Free Reserves 8means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend:

The following shall not be treated as free reserves;

Any amount representing unrealized gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or

Any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value.

Under Rule 3 such declaration shall be subject to the following conditions:

CONDITION I:

The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by the company in the immediately preceding three years.

Rate of Dividend ≤ (RD1 +RD2 + RD3)/3

Where, RD1, RD2, RD3 are rates at which dividend was declared by the company in the immediately preceding three years.

However, this condition shall not apply if the company has not declared any dividend in each of the three preceding financial year.

CONDITION II:

The total amount to be drawn from such accumulated profits shall not exceed 10% of its paid-up share capital and free reserves as appearing in the latest audited financial statement. In other words:

Total amount that can be drawn from accumulated profits	≤	10% of (paid up share capital + free reserves)

The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared and only thereafter, any dividend in respect of equity shares shall be declared.

CONDITION III:

The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

Free Reserves – Amount drawn for payment of dividend	>=	15 % of paid up share capital

It may be noted that all the above three conditions have to be satisfied.

The conditions prescribed by Rule 3 are not applicable to a Government company in which the entire paid up share capital is held by the Central Government, or by any Stale

Government or Governments or by the Central Government and one or more State Governments (vide Notification No. 463 (E), dated 05-06-2015).

Example 7: Capricorn Industries Limited has a paid-up capital of ` 200 lakhs and accumulated Reserves of ` 240 lakhs. Loss for the year ending 31st March 2020 is ` 30 Lakhs. Dividend was declared at the following rates during the three years immediately preceding.

Year 1	9%
Year 2	10%
Year 3	12%

What is the maximum rate at which the company can declare dividend for the current year?

Answer: In the given case, Capricorn Industries Limited has not made adequate profits during the current year ending on 31st March, 2020, but it still wants to declare dividend. Let us apply the conditions:

Condition I:

$$\text{Average rate} = \frac{9+10+12}{3} = 10.3\%$$

Therefore, the rate of dividend shall not exceed 10.3%.

i.e., 10.3% of Paid-up Capital i.e. Rs. 200 lakhs = Rs. 20.6 lakhs

Condition II:

Paid-up capital + Free reserves	=	Rs. (200+240) Lakhs
(Assuming all reserves are free)	=	Rs. 440 Lakhs
10% thereof	=	Rs. 44 Lakhs
Less: loss for the year	=	Rs. 30 Lakhs
Amount available	=	Rs. 14 Lakhs

Hence the quantum of dividend is further restricted to Rs. 14 lakhs.

Condition III:

Accumulated Reserves	Rs. 240 Lakhs
Proposed withdrawal declaration of dividend	Rs. 14 Lakhs
Balance of Reserves	Rs. 226 Lakhs

This is more than 15% of paid-up capital (i.e. 15% of Rs. 200 Lakhs) i.e., Rs. 30 lakhs.

Thus, the company can declare a dividend of Rs. 14 lakhs i.e., at a rate of 7% on its paid-up capital of Rs. 200 lakhs.

Example 8: Shipra Sugar Mills Limited has been regularly declaring dividend at the rate of 20% on its equity shares for the past 3 years. However, the company has not made adequate profits during the current year ending on 31st March, 2020, but it has got

adequate free reserves which can be utilized for maintaining the rate of dividend at 20%.

Advise the company as to how it should proceed in the matter if it wants to declare dividend at the rate of 20% for the year 2019-20, as per the provisions of the Companies Act, 2013.

Answer: The company can declare a dividend out of its Accumulated Free Reserves subject to satisfaction of the following conditions:

- The total amount to be drawn from free reserves shall not exceed 10% of its paid-up share capital and free reserves as per the latest audited financial statement.
- The amount so drawn shall first be utilised to set off the losses incurred in the current financial year and only thereafter, dividend at 20% shall be declared.
- After such withdrawal from free reserves, the residual reserves shall not fall below 15% of its paid-up share capital as per the latest audited financial statement.

The company is advised to get the desired dividend recommended by the Board of Directors and propose the same for the approval of the members at the ensuing Annual General Meeting as the authority to declare dividend lies with the members of the company.

D. Depositing of Amount of Dividend

In terms of section 123(4), the amount of the dividend (including interim dividend), shall be deposited in a separate account maintained with a scheduled bank. This is to be done within 5 days from the date of declaration of dividend9.

Example 9: The authorised and paid-up share capital of Avantika Ayurvedic Products Limited is Rs. 50.00 lacs divided into 5,00,000 equity shares of Rs. 10 each. At its Annual General Meeting (AGM) held on 24th September, 2019, the company declared a dividend of Rs. 2 per share by passing an ordinary resolution. The amount of dividend must be deposited in a scheduled bank in a separate account latest by 29th September, 2019.

E. Payment of Dividend

Section 123(5) contains provisions regarding payment of dividend. These are stated as under:

(a) Dividend shall be payable only to the registered shareholder or to his order or to his banker.

In case a shareholder informs the company to pay dividend to a particular banker and if the payment is so made by the company, then it shall be deemed to be made to the shareholder himself.

A purchaser of shares whose name is not entered in the Register of Members cannot claim payment of dividend to him though he might have made full payment to the seller of shares. In this regard we will, later in this chapter, see Section 126 which provides for keeping of dividend etc., in abeyance pending registration of transfer of shares, unless the registered holder has authorized the company to pay the dividend to the purchaser.

Example 10:

The Directors of East West Limited proposed dividend at 15% on equity shares for the financial year 2017-2018. The company announced 28th September 2018 as the record date for payment of dividend. The dividend was approved in the Annual General Meeting held on 30th September 2018.

Mr. Binoy was the holder of 2000 equity of shares on 31st March, 2018, but he transferred the shares to Mr. Mohan, whose name has been entered in the register of members on 18th June, 2018. Who will be entitled to the above dividend?

Answer: According to section 123, dividend shall be paid by a company only to the registered shareholder of such share.

Record date is the date announced by the company for determining entitlement to dividend. All those persons whose name is included in the register of members on that date shall be entitled to dividend.

In the instant case, on the date announced by the company as the record date, Mr. Mohan's name is present in the register of members (i.e. Mr. Binoy's name is NOT present therein). Therefore, the dividend should be paid to Mr. Mohan who is the registered shareholder on the record date.

Example 11:

The Board of Directors of Som Mechanical Toys Limited proposed a dividend at 12% on equity shares for the financial year 2019-20. The same was approved at the Annual General Meeting of the company held on 25th June, 2020.

Mr. Nitin Jha was holding 1,000 equity shares as on 31st March, 2020, but the same were transferred by him to Mr. Raj, whose name was registered on 20th April, 2020 in the Register of Members. State as to who will be entitled to the dividend declared by the company.

Answer: According to section 123(5), dividend shall be payable only to the registered shareholder of the shares or to his order or to his banker. Facts in the given case state that Mr. Nitin Jha, the holder of equity shares transferred his shares to Mr. Raj whose name was registered on 20th April, 2020. Since, Mr. Raj became the registered shareholder before the declaration of the dividend in the Annual General Meeting of the company held on 25th June, 2020, he will be entitled to the dividend.

Note: In terms of Section 51, a company may, if so authorised by its articles, pay dividend in proportion to the amount paid-up on each share. Suppose, some of the shareholders have paid only Rs. 5 (face value Rs. 10) on each share held by them. In case of declaration of dividend at the rate of Rs. 5 per share, the company, if authorised by its articles, shall be justified in paying dividend of Rs. 2.50 per share in respect of such partly paid shares.

(b) Dividends are payable in cash and not in kind. Dividends that are payable to the shareholders in cash may also be paid by cheque or dividend warrant or through any electronic mode.

Section 127 requires that the declared dividend must be paid to the entitled shareholders within the prescribed time limit of thirty days from the date of declaration of dividend. In case dividend is paid by issuing dividend warrants, such warrants must be posted at the registered addresses within the prescribed time. Once posted, it is immaterial whether the same are received within thirty days by the shareholders or not.

Note: Dividends shall be paid only in cash. The exception to this is 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 company10.

But you may note that while Declaration of dividend does not affect the company's power to issue fully paid up bonus shares, such shares cannot be issued in lieu of dividend.

(c) **Applicability of Section 123 (5) to Nidhis:** In terms of Notification No. GSR 465 (E), dated 05-06-2015, this sub-section shall apply to the Nidhis, subject to the modification that any dividend payable in cash may be paid by crediting the same to the account of the member, if the dividend is not claimed within 30 days from the date of declaration of the dividend.

F. Prohibition on Declaration of Dividend

In the following cases declaration and payment of dividend is prohibited.

i. Prohibition in case of any Defaulting Company:

A company which fails to comply with the provisions of section 73 (Prohibition on acceptance of deposits from public) and section 74 (Repayment of deposits, etc., accepted before the commencement of this Act of 2013) shall not, so long as such failure continues, declare any dividend on its equity shares.

ii. Prohibition in case of Section 8 Companies:

According to section 8 (1), a company having licence under Section 8 (Formation of companies with charitable objects, etc.) is prohibited from paying any dividend to its members. Its profits are intended to be applied only in promoting the objects for which it is formed.

4.UNPAID DIVIDEND ACCOUNT (UDA)

Section 124 of the Act contains the provisions relating to Unpaid Dividend Account (UDA). These are as follows:

i. **Unpaid or Unclaimed Dividend to be transferred to the Unpaid Dividend Account-** Where a dividend has been declared by a company but has not been paid or claimed within thirty (30) days from the date of declaration, the company shall, within seven (7) days from the expiry of the said period of 30 days, transfer the total amount of unpaid or unclaimed dividend to a special account called the Unpaid Dividend Account (UDA). The UDA shall be opened by the company in any scheduled bank.

ii. **Preparing of Statement of the Unpaid Dividend-** Within 90 days of transferring any amount to the Unpaid Dividend Account, the company shall prepare a statement

containing the names, last known addresses and the amount of unpaid dividend to be paid to each person and place such statement on its web-site, if any, and also on any other web-site approved by the Central Government for this purpose.

iii. **Payment of Interest if default is made in transferring the Amount-** If any default is made in transferring the total unpaid dividend amount or any part thereof to the Unpaid Dividend Account, the company shall pay, from the date of such default, interest at the rate of twelve per cent per annum on the amount not so transferred to the said account. The interest accruing on such amount shall ensure i.e., be available to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

iv. **Claimant to apply for payment of Claimed Amount-** Any person claiming to be entitled to any money transferred to the Unpaid Dividend Account may apply to the company concerned for payment of the money so claimed.

v. **Transfer of Unclaimed Amount to Investor Education and Protection Fund (IEPF)-** Any money transferred to the Unpaid Dividend Account which remains unpaid or unclaimed for seven (7) years from the date of such transfer shall be transferred by the company along with interest accrued thereon to the Investor Education and Protection Fund.

Further, the company shall send a prescribed statement containing the details of such transfer to the IEPF Authority and in turn, the Authority shall issue a receipt to the company as evidence of such transfer.

vi. **Transfer of Shares to IEPF-** All shares in respect of which dividend has not been paid or claimed for 7 consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing the prescribed details.

By way of Explanation, it is clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

vii. **Right of Owner of 'transferred shares' to Reclaim-** Any claimant of shares so transferred to IEPF shall be entitled to reclaim the 'transferred shares' from Investor Education and Protection Fund in accordance with the prescribed procedure and on submission of prescribed documents.

viii. **Punishment for Contravention-** If a company fails to comply with any of the requirements of this section, 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. 10 lakhs and every officer of the company who is in default 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. 2 lakhs.

5.INVESTOR EDUCATION AND PROTECTION FUND (IEPF)

Section 125 of the Act along with various Rules framed from time to time including Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and

Refund) Rules, 2016 deal with the Investor Education and Protection Fund (IEPF). This fund, being established by the Central Government, shall be credited with specified amounts and utilized for refund of unclaimed and unpaid amounts, promotion of investors' awareness and protection of the interests of investors, etc. The relevant provisions are discussed below:

1. **Credit of Specified Amounts to the Fund:** Following specified amounts shall be credited to the Fund:

(a) Amount given by the Central Government- The amount given by the Central Government by way of grants after due appropriation made by Parliament;

(b) Donations by the Central Government- Donations given by the Central Government, State Governments, companies or any other institution for the purposes of the Fund;

(c) Amount lying in the Unpaid Dividend Account- The amount lying in the Unpaid Dividend Account (UDA) of companies which is transferred by them to the Fund under section 124(5);

(d) Amount in the General Revenue Account of the Central Government- The amount in the General Revenue Account of the Central Government which had been transferred to that account under section 205A(5) of the Companies Act, 1956 as it stood immediately before the commencement of the Companies (Amendment) Act, 1999 and remaining unpaid or unclaimed on the commencement of the Act of 2013;

(e) Amount in IEPF- The amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956;

(f) Income from Investments- The interest or other income received out of investments made from the Fund;

(g) Amount received through disgorgement or disposal of Securities- The amount received under section 38(4) i.e., amount received through disgorgement 13or disposal of securities seized from a person who has been convicted for personation for acquisition of securities as provided in section 38(3);

(h) Application Money- The application money received by companies for allotment of any securities and due for refund (only if such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment);

(i) Matured Deposits- Matured deposits with companies other than banking companies (only if such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment);

(j) Matured Debentures- Matured debentures with companies (only if such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment);

(k) Interest- Interest accrued on the amounts referred to in clauses (h) to (j);

(l) Amount received from Sale Proceeds- Amount received from sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;

(m) Redemption Amount- Redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and

(n) Other Amounts- Such other amounts as prescribed in Rule 3 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016. They are as under:

(a) all amounts payable as mentioned in clause (a) to (n) of section 125 (2) of the Act [as stated above];

(b) all shares in accordance with section 124 (6) i.e. all those shares in whose case dividends have not been claimed or paid for seven consecutive years or more;

(c) all the resultant benefits arising out of shares held by the Authority under clause (b) above;

(d) all grants, fees and charges received by the Authority under these rules;

(e) all sums received by the Authority from such other sources as may be decided upon by the Central Government;

(f) all income earned by the Authority in any year;

(g) all amounts payable as mentioned in sub-section (3) of section 10B of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, section 10B of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 sub-section (3) of section 38A of the State Bank of India Act, 1955 and section 40A of the State Bank of India (Subsidiary Bank) Act, 1959; and; and

(h) all other sums of money collected by the Authority as envisaged in the Act.

Further, according to Rule 3 (3), in case of term deposits and debentures of companies, due unpaid or unclaimed interest shall be transferred to the Fund along with the transfer of the matured amount of such term deposits and debentures.

2. **Utilization of the Fund:** According to section 125 (3) the Fund shall be utilized for:

(a) refund of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon;

(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 Tribunal; and

(e) any other purpose incidental thereto in accordance with the rules framed under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Refund of Amount- A person amounts referred to in clauses (a) to (d) of sub-section (2) of section 205C were transferred to IEPF, after the expiry of 7 years as per provisions of the Companies Act, 1956, shall be entitled to get refund out of the fund in respect of such claims in accordance with rules made under this section.

3. **Application to the Authority for payment:** According to section 125 (4), any person claiming to be entitled to the amount referred in section 125 (2) may apply to the Authority constituted under section 125 (5) for the payment of the money claimed.
4. **Other Provisions governing the IEPF**

i. **Constitution of the Authority for Administration of Fund-** In terms of Notification dated 13.01.2016, the Ministry of Corporate Affairs has notified sub-section (5), sub-section (6) (except with respect to the manner of administration of the Fund) and sub-section (7) of section 125 of the Act w.e.f. 13.01.2016. With this Notification, an Authority is being constituted for the administration and maintenance of accounts as well as other relevant records of the Fund.

Further, with the notification of IEPF Authority (Appointment of Chairperson and Members, holding of Meetings and provision for Offices and Officers) Rules, 2016 on 13.01.2016, the Secretary, Ministry of Corporate Affairs shall be the ex-officio Chairperson of the Authority. In addition, there shall be six members (maximum limit seven) and a Chief Executive Officer who shall be the convenor of the Authority.

ii. **Provision of required Resources by the Central Government for Administration of the Fund-** The Central Government may provide to the Authority such offices, officers, employees and other resources in accordance with the IEPF Authority (Appointment of Chairperson and Members, holding of Meetings and provision for Offices and Officers) Rules, 2016.

iii. **Authority to work in consultation with CAG of India-** The Authority shall administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed after consultation with the Comptroller and Auditor- General of India.

iv. **Spending of Money-** The Authority shall be competent to spend money out of the Fund for carrying out the objects specified in section 125 (3) i.e. purposes for which the fund shall be utilized.

v. **Audit of the Fund-** The accounts of the Fund shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him. Such audited accounts together with the audit report thereon shall be forwarded annually by the Authority to the Central Government.

vi. **Preparation of Annual Report by the Authority-** For each financial year, the Authority shall prepare in the prescribed form and at prescribed time its annual report giving full account of its activities during the financial year and forward a copy thereof to the Central Government. In turn, the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor- General of India to be laid before each House of Parliament.

6.RIGHT OF DIVIDEND, RIGHTS SHARES AND BONUS SHARES TO BE HELD IN ABEYANCE PENDING REGISTRATION OF TRANSFER OF SHARES

According to Section 126, in case any instrument of transfer of shares has been delivered by a shareholder for registration and the transfer of such shares has not been registered by the company, such company shall take the following steps:

(a) Transfer the dividend in relation to such shares to the Unpaid Dividend Account unless it is authorised by the registered holder of such share in writing to pay such dividend to the transferee specified in the instrument of transfer; and

(b) Keep in abeyance in relation to such shares any offer of rights shares under section 62 (1) (a) and any issue of fully paid-up bonus shares in pursuance of first proviso to section 123 (5).

7. PUNISHMENT FOR FAILURE TO DISTRIBUTE DIVIDENDS WITHIN 30 DAYS

Section 127 of the Act contains time limit for distribution of dividends and punishment for failure to distribute dividend on time. Certain exemptions from punishments are also provided. These provisions are stated as under:

A. Time Limit for Distribution of Dividends

Where a company declares dividend, it must be paid or the dividend warrant thereof must be posted within 30 days from the date of declaration of dividend to the shareholders entitled to the same. Posting of dividend warrants within 30 days absolves the company from any punishment irrespective of whether it is received by the shareholder concerned within this time or not. The offence is committed only when the company fails to post dividend warrants to the registered address of the members within 30 days of declaration. Non-receipt of dividend warrants by the shareholders within the prescribed time does not attract any punishment.

B. Punishment for Failure

In case a company fails to pay declared dividends or fails to post dividend warrants within 30 days of declaration, following punishments are applicable:

i. Every director of the company shall be punishable with imprisonment of up to two years, if he is knowingly a party to the default. And, he shall also be liable to pay minimum fine of Rs. 1,000 for every day during which such default continues.

ii. The company shall be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.

C. Exemption from Punishment

Under the following cases, where the company has failed to pay declared dividend within 30 days of declaration, no offence shall be deemed to have been committed and therefore, no punishment is attracted:

(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 and the same has been communicated to him;

(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 prescribed period of 30 days was not due to any default on the part of the company.

Example 12: Mr. Alok, holding equity shares of face value of Rs. 10 lakhs, has not paid Rs. 80,000 towards call money due on shares. Can the dividend amount payable to him be adjusted against such dues? Give reasons for your answer.

Answer: Yes. As per clause (d) of Proviso to Section 127, where the dividend is declared by a company and there remains calls in arrears or any other sum due from a member, then the dividend can be lawfully adjusted by the company against any such dues.

Thus, the action of the company adjusting dividend payable to Mr. Alok towards call money due on shares amounting to ` 80,000 is justified and therefore, no punishment is attracted.

D. Applicability of Section 127 to Nidhis

In terms of Notification No. GSR 465 (E), dated 05-06-2015, Section 127 dealing with punishment shall apply to the Nidhis, subject to the following modification:

In case the dividend payable to a member is Rs. 100 or less, it shall be sufficient compliance of the provisions of the section 127, if the declaration of the dividend is announced in the local language in one local newspaper of wide circulation and announcement of the said declaration is also displayed on the notice board of the Nidhis for at least 3 months.

Chapter 8 : Accounts of Companies

1.INTRODUCTION

There is a need for disclosing the annual information to the shareholders by the directors about the working and financial position of the company so that the shareholders are aware of the affairs of the company. The Companies Act, 2013, lays down various provisions related to maintenance of proper books of account of the companies.

2.BOOKS OF ACCOUNTS, ETC., TO BE KEPT BY COMPANY [SECTION 128]

General requirement

Every company shall prepare books of accounts and other relevant books and records and financial statement for every financial year.

These books of accounts should give a true and fair view of the state of the affairs of the company, including that of its branch office(s) and explain the transactions effected both at the registered office and its branches

These books of accounts must be kept on accrual basis and according to the double entry system of accounting.

Accrual basis and double-entry system of accounting

Accrual basis of accounting is an accounting assumption or an accounting concept followed in preparation of the financial statements. Accrual concept is one of the four principles of accounting concepts, which involves recording income and expenses as they accrue; distinct from when they are received or paid.

Double entry book-keeping is a method of recording any transaction of a business in a set of accounts, in which every transaction has a dual aspect of debit and credit and therefore, needs to be recorded in at least two accounts. Double aspect enables effective control of business because all the books of accounts must balance.

"Books of account" as defined in Section 2(13) includes records maintained in respect of—

- all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;
- all sales and purchases of goods and services by the company;
- the assets and liabilities of the company; and
- the items of cost as may be prescribed under section 148 (Cost Audit) of the Companies Act 2013 ("Act") in the case of a company which belongs to any class of companies specified under that section.

"Book and paper" and "book or paper" as defined in Section 2(12) include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;

Place of keeping books of account

Section 128(1) requires every company to prepare and keep the books of account and other relevant books and papers and financial statements at its registered office.

Provided all or any of the books of accounts may be kept at such other place in India as the Board of directors may decide. Where such a decision is taken by the Board the company shall within seven days thereof file with the registrar a notice in writing in form AOC-5 giving full address of that other place.

Maintenance of books of account in electronic form

A company has an option of keeping books of account or other relevant papers in electronic mode as per Rule 3 of the Companies (Accounts) Rules, 2014. Rule 3 lays down the manner of books of account to be kept in electronic mode.

(1) The books of account and other relevant books and papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent reference.

Provided that for the financial year commencing on or after the 1st day of April, 2022, every company which uses accounting software for maintaining its books of account, shall use only such accounting software which has a feature of recording audit trail of each and every transaction, creating an edit log of each change made in books of account along with the date when such changes were made and ensuring that the audit trail cannot be disabled.

(2) The books of account and other relevant books and papers referred to in sub-rule (1) 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.

(3) 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.

(4) The information in the electronic record of the document shall be capable of being displayed in a legible form.

(5) 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 or rendered unusable, unless permitted by law.

The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a periodic basis.

(6) The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement following relevant information related to service provider—

(a) the name of the service provider;

(b) the internet protocol (IP) address of service provider;

(c) the location of the service provider (wherever applicable);

(d) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.

Books of account - Branch Office

Where a company has a branch office in or outside India, it shall be deemed to have complied with the provisions of sub-section (1), if proper books of account relating to the transactions effected at the branch office are kept at that office.

The summarised returns of the books of account of the company kept and maintained outside India shall be sent to the registered office at quarterly intervals, which shall be kept and maintained at the registered office of the company and kept open to directors for inspection.

Inspection by Directors

As per Section 128 (3), any director can inspect the books of account and other books and papers of the company during business hours. Such inspection may be done by any type of director - nominee, independent, promoter or whole time.

The proviso to sub-section 3 provides that a person can inspect the books of account of the subsidiary, only on authorisation by way of the resolution of Board of Directors.

Assistance by officers and Employees

As per Section 128 (4), where an inspection is made under sub-section (3), the officers and other employees of the company shall give to the person making such inspection all assistance in connection with the inspection which the company may reasonably be expected to give.

Other financial information: 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, the period for which such information is sought.

The company shall produce such financial information to the director within fifteen days of the date of receipt of the written request.

The Director can seek the information only individually and not by or through his attorney holder or agent or representative with respect to financial information maintained outside the country [Rule 4(4) of the Companies (Accounts) Rules, 2014].

Period for preservation of books [Section 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 eight years immediately preceding the relevant financial year.

In case of a company incorporated less than eight years before the financial year, the books of accounts for the entire period preceding the financial year together with the vouchers shall be so preserved.

As per proviso to sub-section 5, where an investigation has been ordered in respect of a company under Chapter XIV of the Act related to inspection, inquiry or investigation, the Central Government 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.

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Persons responsible and Penalty

As per Section 128 (6) the person responsible for the maintenance of books of account etc. shall be:

i. Managing Director,
ii. Whole-Time Director, in charge of finance
iii. Chief Financial Officer
iv. Any other person of a company charged by the Board with duty of complying with provisions of section 128.

Penalty for contravention

In case the aforementioned persons fail to take reasonable steps to secure compliance, they shall in respect of each offence, be punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5,00,000.

Example 1: XYZ Ltd. wants to maintain its books of account on cash basis. Is this a valid act of XYZ Ltd?

Answer: The Companies Act 2013 vide section 128(1) requires every company to prepare books of account and other relevant books and papers and financial statement for every financial year on accrual basis and double entry system of accounting. No exception has been given by the Act to any class or classes of companies from the above requirement. Hence XYZ Ltd. cannot maintain its books of accounts on cash basis.

3.FINANCIAL STATEMENT [SECTION 129]

Financial Statement — Definition

Financial Statement is defined under Section 2 (40), to include-

- Balance Sheet
- Profit and Loss account or
- Income and Expenditure account [for Section 8 co.]
- Cash flow Statement
- Statement of change in equity, if applicable
- any explanatory notes annexed to or forming part of financial statements

However, the financial statement with respect to one Person Company, small company and dormant company, may not include the cash flow statement.

Exemption: For private companies, the proviso to section 2(40) shall be read as follows:

"Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement;

Explanation – For the purposes of this Act, the term "start-up" or "start-up company" means a private company incorporated under the Companies Act, 2013 or the Companies Act, 1956 and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry."

The exceptions, modifications and adaptations shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.

Financial statement should be prepared for financial year and as per the requirements of Schedule III.

"Financial year" [Section 2(41)], in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Example 2: Mahindra and Mahindra Company Limited was incorporated as a company on 22nd February 2014. Now for the purpose of the first financial statements, the period ending shall be 31st March of the following year i.e. 31st March 2015.

Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year:

Provided further that any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.

Provided further that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause.

Schedule III has been amended vide Notification No. G.S.R. 404(E) dated 6th April 2016 according to which Schedule III has been divided into two divisions.

Division I deals with financial statement for a company whose financial statement are required to comply with the Companies (Accounting Standards) Rules, 2006.

Division II deals with financial statement for a company whose financial statement is required to comply with the Companies (Indian Accounting Standards) Rules, 20153.

True and fair view

As per section 129(1), the financial statements shall give a true and fair view of the state of affairs of the company or companies. It shall comply with the accounting standards notified under section 133 and shall be in the form or forms as may be provided for different class or classes of companies in Schedule III.

Provided that the items contained in such financial statements shall be in accordance with the accounting standards.

Non-applicability

Provided further that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company:

Provided also that the financial statements shall not be treated as not disclosing a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose—

Type of company	Matters
Insurance company	Matters which are not required to be disclosed by the Insurance Act, 1938, or the Insurance Regulatory and Development Authority Act, 1999
Banking company	Matters which are not required to be disclosed by the Banking Regulation Act, 1949
Company engaged in the generation or supply of electricity	Matters which are not required to be disclosed by the Electricity Act, 2003
Company governed by any other law	Matters which are not required to be disclosed by that law

Note: The proviso to section 129(1) with respect to non-applicability states that merely because of the matters which are not required to be disclosed under the above given acts, in the financial statements of the above given companies, the financial statements of such companies shall not be treated as not disclosing a true and fair view of the state of affairs of the company.

Laying of financial Statements [Section 129(2)]

At every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year.

Consolidation of financial statements [Section 129(3)]

(1) Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement (CFS) of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2).

The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in Form AOC-1 as per Rule 5 of the Companies (Accounts) Rules, 2014.

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed under Rule 6 of the Companies (Accounts) Rules, 2014.

Explanation - For the purposes of this sub-section, the word "subsidiary" shall include associate company and joint venture.

Rule 6 of the Companies (Accounts) Rules, 2014 provides for the consolidation of accounts of companies in the following manner:

Manner of consolidation of Accounts: The consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III of the Act and the applicable accounting standards.

In case where company is not required to prepare CFS: A company covered under sub-section (3) of section 129 which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions of consolidated financial statements provided in Schedule III of the Act.

Exemptions from preparation of CFS: As per Companies (Accounts) Amendment Rules, 2016, preparation of consolidated financial statements by a company is not required if it meets the following conditions:

i. it is a wholly-owned subsidiary, or is a partially-owned subsidiary of another company and all its other members, including those not otherwise entitled to vote, having been intimated in writing and for which the proof of delivery of such intimation is available with the company, do not object to the company not presenting consolidated financial statements;
ii. it is a company whose securities are not listed or are not in the process of listing on any stock exchange, whether in or outside India; and
iii. its ultimate or any intermediate holding company files consolidated financial statements with the Registrar which are in compliance with the applicable Accounting Standards.

Provided also that nothing contained in this rule shall subject to any other law or regulation, apply for the financial year commencing from the 1st day of April, 2014 and ending on the 31st March, 2015, in case of a company which does not have a subsidiary or subsidiaries but has one or more associate companies or Joint ventures or both, for the consolidation of financial statement in respect of associate companies or joint ventures or both, as the case may be.

Explanation: The above proviso states that for a company which does not have a subsidiary or subsidiaries but has one or more associate companies or Joint Ventures or both will not be required to comply with this rule of consolidation of financial statements in respect of associate companies or joint ventures or both, as the case may be, only for the financial year commencing from the 1st day of April, 2014 and ending on the 31st day of March, 2015.

Provided also that nothing in this rule shall apply in respect of consolidation of financial statement by a company having subsidiary or subsidiaries incorporated outside India commencing on or after 1st April 2014.

(2) The provisions applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, also apply to the consolidated financial statements [Section 129(4)].

(3) Without prejudice to sub-section (1), where the financial statements of a company do not comply with the accounting standards referred to in sub-section (1), the company shall disclose in its financial statements, the deviation from the accounting standards, the reasons for such deviation and the financial effects, if any, arising out of such deviation [Section 129(5)].

(4) The Central Government may, on its own or on an application by a class or classes of companies, by notification,4 exempt any class or classes of companies from complying with any of the requirements of this section or the rules made thereunder, if it is considered necessary to grant such exemption in the public interest and any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification [Section 129(6)].

Penal provisions [Section 129(7)]

If a company contravenes the provisions of this section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Explanation: For the purposes of section 129, any reference to the financial statement shall include any notes annexed to or forming part of such financial statement, giving information required to be given and allowed to be given in the form of such notes under this Act.

4.PERIODICAL FINANCIAL RESULTS [SECTION 129A]

The Central Government may, require such class or classes of unlisted companies, as may be prescribed —

(a) to prepare the financial results of the company on such periodical basis and in such form as may be prescribed;

(b) to obtain approval of the Board of Directors and complete audit or limited review of such periodical financial results in such manner as may be prescribed; and

(c) file a copy with the Registrar within a period of thirty days of completion of the relevant period with such fees as may be prescribed.

5.RE-OPENING OF ACCOUNTS ON COURT'S OR TRIBUNAL'S ORDERS [SECTION 130]

This section seeks to provide for the re-opening of books of accounts and recasting of financial statements.

(1) Apply to court for re-opening of accounts — A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by-

(a) the Central Government,

(b) the Income-tax authorities,

(c) the Securities and Exchange Board of India (SEBI),

(d) any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that—

i. the relevant earlier accounts were prepared in a fraudulent manner; or

ii. the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements:

Serving of notice: Provided that the Court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned or any other person concerned and shall take into consideration the representations, if any, made by that Government or the authorities, SEBI or the body or authority concerned or the other person concerned before passing any order under this section [Sub- section (1)].

(2) Revised accounts shall be final: The accounts so revised or re-casted, shall be final.

(3) Time Limit in respect of re-opening of books of account: No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year:

Provided that where a direction has been issued by the Central Government under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period.

6. VOLUNTARY REVISION OF FINANCIAL STATEMENTS OR BOARD'S REPORT [SECTION 131]

(1) Preparation of revised financial statement or revised report on the approval of Tribunal:

If it appears to the directors of a company that—

(a) the financial statement of the company; or

(b) the report of the Board,

do not comply with the provisions of section 129 or section 134, they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar.

Explanation: Section 131 deals with the revision of financial statement or boards report, as the case may be, on a voluntary basis in the opinion of the board of directors unlike section 130.

Tribunal to serve the notice:

Provided that the Tribunal shall give notice to the Central Government and the Income tax authorities and shall take into consideration the representations, if any, If it appears to the directors that company made by that Government or the authorities before passing any order under this section.

Number of times of revision and recast:

Provided further that such revised financial statement or report shall not be prepared or filed more than once in a financial year.

Explanation: The above provision states that when a company has revised its financial statement or boards report pertaining to any of the three preceding financial years than such revised financial statement or boards report, as the case may be, shall not be revised again for the period it has been so revised.

Reason for revision to be disclosed:

Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.

(2) Limits of revisions: Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to—

(a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and

(b) the making of any necessary consequential alternation.

(3) Framing of rules by the Central Government in relation to revised financial statement or director's report: The Central Government may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular—

(a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made;

(b) make provisions with respect to the functions of the company's auditor in relation to the revised financial statement or report;

(c) require the directors to take such steps as may be prescribed.

7. CONSTITUTION OF NATIONAL FINANCIAL REPORTING AUTHORITY [SECTION 132]

(1) The Central Government may, 5 by notification, constitute the National Financial Reporting Authority (NFRA) to provide for matters relating to accounting and auditing standards under this Act.

(1A) The National Financial Reporting Authority shall perform its functions through such divisions as may be prescribed.

(2) Notwithstanding anything contained in any other law for the time being in force, the NFRA shall—

(a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;

(b) monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed;

(c) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and

(d) perform such other functions relating to clauses (a), (b) and (c) as may be prescribed.

(3) The NFRA shall consist of a chairperson, who shall be a person of eminence and having expertise in accountancy, auditing, finance or law to be appointed by the Central Government and such other members not exceeding fifteen consisting of parttime and full-time members as may be prescribed:

(3A) Each division of the National Financial Reporting Authority shall be presided over by the Chairperson or a full-time Member authorised by the Chairperson.

(3B) There shall be an executive body of the National Financial Reporting Authority consisting of the Chairperson and full-time Members of such Authority for efficient discharge of its functions under sub-section (2) [other than clause (a)] and sub-section (4).

Provided that the terms and conditions and the manner of appointment of the chairperson and members shall be such as may be prescribed.

Provided further that the chairperson and members shall make a declaration to the Central Government in the prescribed form regarding no conflict of interest or lack of independence in respect of his or their appointment.

Provided also that the chairperson and members, who are in full-time employment with NFRA shall not be associated with any audit firm (including related consultancy firms) during the course of their appointment and two years after ceasing to hold such appointment.

(4) Notwithstanding anything contained in any other law for the time being in force, the NFRA shall—

(a) have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949.

Provided that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the NFRA has initiated an investigation under this section;

(b) have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:

i. discovery and production of books of account and other documents, at such place and at such time as may be specified by the NFRA;

ii. summoning and enforcing the attendance of persons and examining them on oath;

iii. inspection of any books, registers and other documents of any person referred to in clause (b) at any place;

iv. issuing commissions for examination of witnesses or documents;

(c) where professional or other misconduct is proved, the NFRA shall have the power to make order for—

A. imposing penalty of—

I. not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and

II. not less than five lakh rupees, but which may extend to ten times of the fees received, in case of firms;

B. debarring the 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 under section 247, for a minimum period of six months or such higher period not exceeding ten years as may be determined by the National Financial Reporting Authority.

Explanation — For the purposes of this sub-section, the expression "professional or other misconduct" shall have the same meaning assigned to it as given under section 22 of the Chartered Accountants Act, 1949.

Appeal against orders of NFRA

Any person aggrieved by any order of the National Financial Reporting Authority issued under clause (c) of sub-section (4), may prefer an appeal before the Appellate Tribunal in such manner and on payment of such fee as may be prescribed.

Meetings of NFRA

The National Financial Reporting Authority shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings in such manner as may be prescribed.

Secretary and other employees

The Central Government may appoint a secretary and such other employees as it may consider necessary for the efficient performance of functions by the National Financial Reporting Authority under this Act and the terms and conditions of service of the secretary and employees shall be such as may be prescribed.

Head office of NFRA

The head office of the National Financial Reporting Authority shall be at New Delhi and the National Financial Reporting Authority may, meet at such other places in India as it deems fit.

Maintenance of books by NFRA

The National Financial Reporting Authority shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as the Central Government may, in consultation with the Comptroller and Auditor-General of India prescribe.

Audit of account of NFRA

The accounts of the National Financial Reporting Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and such accounts as certified by the Comptroller and Auditor-General of India together with the audit report thereon shall be forwarded annually to the Central Government by the National Financial Reporting Authority.

Annual Report on working of NFRA

The National Financial Reporting Authority shall prepare in such form and at such time for each financial year as may be prescribed its annual report giving a full account of its activities during the financial year and forward a copy thereof to the Central Government and the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor-General of India to be laid before each House of Parliament.

In exercise of the powers conferred under sub-sections (2) and (4) of section 132, the Central Government made the National Financial Reporting Authority Rules, 2018 (NFRA Rules).

As per NFRA rules, NFRA shall have power to monitor and enforce compliance with accounting standards and auditing standards, oversee the quality of service under sub-section (2) of section 132 or undertake investigation under sub-section (4) of such section of the auditors. Rule 3 provides for the classes of companies and bodies corporate governed by the NFRA. These include:

(a) companies whose securities are listed on any stock exchange in India or outside India;

(b) unlisted public companies having paid-up capital of not less than rupees five hundred crores or having annual turnover of not less than rupees one thousand crores or having, in aggregate, outstanding loans, debentures and deposits of not less than rupees five hundred crores as on the 31st March of immediately preceding financial year;

(c) insurance companies, banking companies, companies engaged in the generation or supply of electricity, companies governed by any special Act for the time being in force or bodies corporate incorporated by an Act in accordance with clauses (b), (c), (d), (e) and (f) of section 1 (4) of the Companies Act, 2013;

Explanation - For the purpose of this clause, "banking company" includes 'corresponding new bank' as defined in section 2 (d) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and section 2(b) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 and 'subsidiary bank' as defined in section 2(k) of the State Bank of India (Subsidiary Bank) Act, 1959.

(d) any body corporate or company or person, or any class of bodies corporate or companies or persons, on a reference made to the NFRA by the Central Government in public interest; and

(e) a body corporate incorporated or registered outside India, which is a subsidiary or associate company of any company or body corporate incorporated or registered in India as referred to in clauses (a) to (d) above, if the income or networth of such subsidiary or associate company exceeds 20% of the consolidated income or consolidated networth of such company or the body corporate, as the case may be, referred to in clauses (a) to (d) above.

Every existing body corporate other than a company governed by these rules, shall inform the NFRA within 30 days of the commencement of NFRA rules, in Form NFRA-1, the particulars of the auditor as on the date of commencement of these rules.

A company or a body corporate other than a company governed under NFRA Rules shall continue to be governed by the NFRA for a period of 3 years after it ceases to be listed or its paid-up capital or turnover or aggregate of loans, debentures and deposits falls below the limit stated therein [i.e., mentioned in points (a) to (e) above].

Punishment in case of non-compliance - If a company or any officer of a company or an auditor or any other person contravenes any of the provisions of NFRA Rules, the company and every officer of the company who is in default or the auditor or such other person shall be punishable as per the provisions of section 450 of the Act.

8. CENTRAL GOVERNMENT TO PRESCRIBE ACCOUNTING STANDARDS [SECTION 133]

Section 133 of the Companies Act, 2013 deals with the power of the Central Government to prescribe the accounting standards.

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.

Provided that until the NFRA is constituted under section 132 of the Companies Act, 2013, 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 National Advisory Committee on Accounting Standards (NACAS) constituted under the previous company law.

9. FINANCIAL STATEMENT, BOARD'S REPORT, ETC. [SECTION 134]

Section 134 provides that the financial statement including consolidated financial statements should be approved by the Board of Directors before they are signed and submitted to auditors for their report. 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 the company. The Board's report and every annexure has to be duly signed. A signed copy of every financial statement shall be circulated, issued or published along with all notes or documents, the auditor's report and Board's report. The clause also provides for penal provisions for the company and every officer of the company in case of any contravention.

i. **Authentication of Financial statements [Section 134(1), (2) & (7)]:**

(a) The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the chairperson of the company where he is authorised by the Board OR by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One person company, only by one director, for submission to the auditor for his report thereon.

(b) The auditors' report shall be attached to every financial statement [Sub- section (2)].

(c) A signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy of [Section 134(7)] —

(1) Any notes annexed to or forming part of such financial statement;

(2) The auditor's report; and

(3) The Board's report referred to in sub section 3.

Example 3: The Board of Directors of ABC Ltd. wants to circulate unaudited accounts before the Annual General Meeting of the shareholders of the Company. Whether such an act of ABC Ltd. is tenable?

Answer: Section 129(2) of the Companies Act, 2013 provides that at every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year. Further section 134(7) provides that signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of:

(a) any notes annexed to or forming part of such financial statement;

(b) the auditor's report; and

(c) the Board's report.

It, therefore, follows that unaudited accounts cannot be sent to members or unaudited accounts cannot be filed with the Registrar of Companies. So, such an act of ABC Ltd, is not tenable.

ii. Board's report [Section 134(3) & (4) read with Rule 8 of the Companies (Accounts) Rules, 2014]:

(1) According to Rule 8 of the Companies (Accounts) Rules, 2014, the Board's Report shall be prepared based on the standalone financial statement of the company and 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 under report.

(2) Sub-section (3) of section 134 read with rule 8 prescribes the following contents of the board's report:

(a) the web address, if any, where annual return referred to in sub-section (3) of section 92 (Annual Return) has been placed;

(b) number of meetings of the Board;

(c) directors' responsibility statement;

(ca) details in respect of frauds reported by auditors under sub-section (12) of section 143 (Powers and duties of auditors and auditing standards) other than those which are reportable to the Central Government;

(d) a statement on declaration given by independent directors under sub-section (6) of section 149 (Company to have board of board of Directors in relation to independent director);

(e) in case of a company covered under sub-section (1) of section 178 (Nomination and Remuneration Committee and Stakeholders Relationship Committee), company's policy on directors' appointment and remuneration including criteria for determining qualifications,

positive attributes, independence of a director and other matters provided under sub-section (3) of section 178;

Note: The above clause (e) shall not apply in the case of a government company.

(f) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made—

i. by the auditor in his report; and

ii. by the company secretary in practice in his secretarial audit report;

(g) particulars of loans, guarantees or investments under section 186;

(h) particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the form AOC-2;

(i) the state of the company's affairs;

(j) the amounts, if any, which it proposes to carry to any reserves;

(k) the amount, if any, which it recommends should be paid by way of dividend;

(l) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the financial statements relate and the date of the report;

(m) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed; However, the Govt. companies engaged in producing defence equipment is exempted from disclosure under this clause.

(n) a statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company;

(o) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year;

(p) in case of a listed company and every other public company having such paid-up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation of the performance of the Board, its Committees and of individual directors has been made;

According to Rule 8(4), every listed company and every other public company having a paid up share capital of twenty five crore rupees or more calculated at the end of the preceding financial year shall include, in the report by its Board of directors, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.

Exemption to Government company- The above clause (p) of Sub-section (3) of Section 134 shall not apply, in case the directors are evaluated by the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government, as per its own evaluation methodology [vide Notification dated 5 June 2015].

(q) such other matters as may be prescribed [See **].

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 (o) 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.

**According to Rule 8 of the Companies (Accounts) Rules, 2014, the report of the Board shall also contain–

i. the financial summary or highlights;
ii. the change in the nature of business, if any;
iii. the details of directors or key managerial personnel who were appointed or have resigned during the year;

(iiia) a statement regarding opinion of the Board with regard to integrity, expertise and experience (including the proficiency) of the independent directors appointed during the year.

Explanation - For the purposes of this clause, the expression "proficiency" means the proficiency of the independent director as ascertained from the online proficiency self-assessment test conducted by the institute notified under sub-section (1) of section 150 (Manner of selection of Independent Directors and maintenance of databank of independent directors).

iv. the names of companies which have become or ceased to be its subsidiaries, joint ventures or associate companies during the year;
v. the details relating to deposits like-
(a) accepted during the year;
(b) remained unpaid or unclaimed as at the end of the year;
(c) whether there has been any default in repayment of deposits or payment of interest thereon during the year and if so, number of such cases and the total amount involved-
(1) at the beginning of the year;
(2) maximum during the year;
(3) at the end of the year;
vi. the details of deposits which are not in compliance with the requirements of Chapter V (Acceptance of Deposits by Companies) of the Act;
vii. the details of significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future;
viii. the details in respect of adequacy of internal financial controls with reference to the Financial Statements.
ix. a disclosure, as to whether maintenance of cost records as specified by the Central Government under sub-section (1) of section 148 of the Companies Act, 2013, is required by the Company and accordingly such accounts and records are made and maintained,

x. a statement that the company has complied with provisions relating to the constitution of Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

xi. the details of application made or any proceeding pending under the Insolvency and Bankruptcy Code, 2016 during the year alongwith their status as at the end of the financial year.

xii. the details of difference between amount of the valuation done at the time of one-time settlement and the valuation done while taking loan from the Banks or Financial Institutions along with the reasons thereof.

Non- applicability of Rule 8 of Companies (Accounts) Rules, 2014: This rule shall not apply to One Person Company or Small Company.

(3) Abridged Board's report [Section 134(3A)]: The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by One Person Company or small company.

(4) Board's Report in case of OPC [Section 134(4)]: In case of a One Person Company, the report of the Board of Directors to be attached to the financial statement under this section shall, mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

iii. **Directors' Responsibility Statement [Section 134(5)]:** The Directors' Responsibility Statement referred to in 134(3)(c) shall state that—

(1) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;

(2) 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;

(3) 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;

(4) the directors had prepared the annual accounts on a going concern basis; and

(5) 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.

Here, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information;

(6) 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.

iv. **Signing of Board's Report [Section 134(6)]:**

The Board's report and any annexures thereto under sub-section (3) shall be signed by its chairperson of the company if he is authorised by the Board and where he is not so authorised, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director.

v. **Contravention [Section 134(8)]:**

If a company is in default in complying with the provisions of this section, the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

Persons liable	Punishment for contravention of any provision of this section
Company	Rs. 3,00,000
Every officer of the company who is in default	Rs. 50,000

Example 4: ABC Company is a one person company and has only one director. Who shall authenticate the balance sheet and statement of profit & loss and the Board's report?

Answer: In case of a One Person Company, the financial statements shall be signed by only one director, for submission to the auditor for his report thereon. So, the financial statements signed by one director shall be considered in order.

10. CORPORATE SOCIAL RESPONSIBILITY [SECTION 135]

The Companies Act, 2013 lays down the provisions requiring corporates to mandatorily spend a prescribed percentage of their profits on certain specified areas of social upliftment in discharge of their social responsibilities. Broadly, Corporate Social Responsibility (CSR) implies a concept, whereby companies decide to contribute to a better society and a cleaner environment – a concept, whereby the companies integrate social and other useful concerns in their business operations for the betterment of its stakeholders and society in general.

The provisions related with Corporate Social Responsibility has been enshrined under section 135 and Companies (Social Responsibility Policy) Rules, 2014.

DEFINITIONS

(1) "Corporate Social Responsibility (CSR)" means the activities undertaken by a Company in pursuance of its statutory obligation laid down in section 135 of the Act in accordance with the provisions contained in these rules, but shall not include the following, namely: -

i. activities undertaken in pursuance of normal course of business of the company:

Provided that any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 subject to the conditions that

(a) such research and development activities shall be carried out in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII to the Act;

(b) details of such activity shall be disclosed separately in the Annual report on CSR included in the Board's Report;

ii. any activity undertaken by the company outside India except for training of Indian sports personnel representing any State or Union territory at national level or India at international level;

iii. contribution of any amount directly or indirectly to any political party under section 182 of the Act;

iv. activities benefitting employees of the company as defined in clause (k) of section 2 of the Code on Wages, 2019;

v. activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services;

vi. activities carried out for fulfilment of any other statutory obligations under any law in force in India; [Rule 2(d)]

(2) "CSR Committee" means the Corporate Social Responsibility Committee of the Board referred to in section 135 of the Act; [Rule 2(e)]

(3) "CSR Policy" means a statement containing the approach and direction given by the board of a company, taking into account the recommendations of its CSR Committee, and includes guiding principles for selection, implementation and monitoring of activities as well as formulation of the annual action plan; [Rule 2(f)]

(4) "Administrative overheads" means the expenses incurred by the company for 'general management and administration' of Corporate Social Responsibility functions in the company but shall not include the expenses directly incurred for the designing, implementation, monitoring, and evaluation of a particular Corporate Social Responsibility project or programme; [Rule 2(b)]

(5) "International Organisation" means an organisation notified by the Central Government as an international organisation under section 3 of the United Nations (Privileges and Immunities) Act, 1947, to which the provisions of the Schedule to the said Act apply; [Rule 2(g)]

(6) "Net profit" means the net profit of a company as per its financial statement prepared in accordance with the applicable provisions of the Act, but shall not include the following, namely: -

i. any profit arising from any overseas branch or branches of the company, whether operated as a separate company or otherwise; and

ii. any dividend received from other companies in India, which are covered under and complying with the provisions of section 135 of the Act:

Provided that in case of a foreign company covered under these rules, net profit means the net profit of such company as per profit and loss account prepared in terms of clause (a) of sub-section (1) of section 381, read with section 198 of the Act; [Rule 2(h)]

(7) "Ongoing Project" means a multi-year project undertaken by a Company in fulfilment of its CSR obligation having timelines not exceeding three years excluding the financial year in which it was commenced, and shall include such project that was initially not approved

as a multi-year project but whose duration has been extended beyond one year by the board based on reasonable justification; [Rule 2(i)]

(8) "Public Authority" means 'Public Authority' as defined in clause (h) of section 2 of the Right to Information Act, 2005; [Rule 2(j)]

COMPANIES REQUIRED TO CONSTITUTE CSR COMMITTEE

According to section 135(1), every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.

As per Rule 3(1), every company including its holding or subsidiary, and a foreign company defined under clause (42) of section 2 of the Act having its branch office or project office in India, which fulfills the criteria specified in sub-section (1) of section 135 of the Act shall comply with the provisions of section 135 of the Act and these rules:

Provided that net worth, turnover or net profit. of a foreign company of the Act shall be computed in accordance with balance sheet and Profit and loss account of such company prepared in accordance with the provisions of clause (a) of sub-section (1) of section 381 and section 198 of the Act.

"Net worth" [As per Section 2(57)] means the aggregate value of the paid-up share capital and all reserves created out of the profits, securities premium account and debit or credit balance of the profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.

Example 5: The statutory auditors of a company were required to issue a certificate on the net worth of the company as per the requirement of the management as on 30th September 2020 computed as per the provision of section 2(57) of the Companies Act, 2013.

The company had fair valued its property, plant and equipment in the current year which was mistakenly taken into retained earnings of the company in its books of accounts. Please advise whether this fair valuation would be covered in the net worth of the company as per the legal requirements.

Answer: As per sec 2(57) of the Companies Act 2013, any reserves created out of revaluation of assets doesn't form part of net worth. The company fair valued its property, plant and equipment and took that to retained earnings.

Even if the company has taken the fair valuation to the retained earnings in its books of accounts, the resultant credit in reserves (by whatever name called) would be in the

category of 'reserves created out of revaluation of assets' which is specifically excluded in the definition of 'net worth' in section 2 (57) and hence should be excluded by the company.

Further the auditors should also consider the matter related to accounting of this reserve separately at the time of audit of books of accounts of the company.

Example 6: ABC Ltd is a company with a turnover of more than Rs.1000 crores in the preceding three financial years and having incurred a loss in one of the preceding three financial years. Will it be required to comply with CSR?

Answer: As per section 135(1) of the Act, if any one of the three criteria (whether net worth, or turnover or net profit) gets satisfied then the company is mandatorily required to comply with the CSR provisions. Hence, ABC Ltd. will be required to comply with CSR based on its turnover. The mere fact that company has incurred loss in one of the preceding three financial years will not be considered for determining the applicability of CSR to the companies.

Exclusion of Companies [Rule 3(2) of the Companies (CSR) Rules, 2014]

Every company which ceases to be a company covered under subsection (1) of section 135 of the Act for three consecutive financial years shall not be required to-

(a) constitute a CSR Committee; and
(b) comply with the provisions contained in sub-section (2) to (6) of the said section,

till such time it meets the criteria specified in sub-section (1) of section 135.

Composition of CSR Committee

Corporate Social Responsibility Committee of the Board shall consist of three or more directors, out of which at least one director shall be an independent director.

Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.

According to Rule 5(1) of the Companies (CSR) Rules, 2014:

The companies mentioned in the rule 3 shall constitute CSR Committee as under: -

i. a company covered under subsection (1) of section 135 which is not required to appoint an independent director pursuant to sub-section (4) of section 149 of the Act, shall have its CSR Committee without such director;
ii. a private company having only two directors on its Board shall constitute its CSR Committee with two such directors;
iii. with respect to a foreign company covered under these rules, the CSR Committee shall comprise of at least two persons of which one person shall be as specified under clause (d) of sub-section (1) of section 380 of the Act and another person shall be nominated by the foreign company.

Disclosure of composition of CSR Committee

As per SECTION 135(2), the Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

Duties of CSR Committee

According to section 135(3),

The Corporate Social Responsibility Committee shall —

(a) 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, specified in Schedule VII;
(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and
(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

According to Rule 5(2) of Companies (CSR) Rules, 2014,

The CSR Committee shall formulate and recommend to the Board, an annual action plan in pursuance of its CSR policy, which shall include the following, namely:-

(a) the list of CSR projects or programmes that are approved to be undertaken in areas or subjects specified in Schedule VII of the Act;
(b) the manner of execution of such projects or programmes as specified in sub-rule (1) of rule 4;
(c) the modalities of utilisation of funds and implementation schedules for the projects or programmes;
(d) monitoring and reporting mechanism for the projects or programmes; and
(e) details of need and impact assessment, if any, for the projects undertaken by the company:

Provided that Board may alter such plan at any time during the financial year, as per the recommendation of its CSR Committee, based on the reasonable justification to that effect.

DUTIES OF THE BOARD IN RELATION TO CSR

According to 135(4), the Board of every company referred to in sub-section (1) shall —

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and
(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

Display of CSR activities on its website: - The Board of Directors of the Company shall mandatorily disclose the composition of the CSR Committee, and CSR Policy and Projects approved by the Board on their website, if any, for public access. [Rule 9 of the Companies (CSR Policy) Rules, 2014]

AMOUNT OF CONTRIBUTION TOWARDS CSR

According to section 135(5),

The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three 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, in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount and, unless the unspent amount relates to any ongoing project referred to in sub-section (6), transfer such unspent amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial year.

Provided also that if the company spends an amount in excess of the requirements provided under this sub-section, such company may set off such excess amount against the requirement to spend under this sub-section for such number of succeeding financial years and in such manner, as may be prescribed.

Explanation — For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.

According to section 135(6), any amount remaining unspent under sub-section (5), pursuant to any ongoing project, fulfilling such conditions as may be prescribed, undertaken by a company in pursuance of its Corporate Social Responsibility Policy, shall be transferred by the company within a period of thirty days from the end of the financial year 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 Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

'Calculation of Net Profits'

1. For the purposes of this section (i.e. section 135) "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198. [Explanation in section 135(5)]
2. "Net profit" means the net profit of a company as per its financial statement prepared in accordance with the applicable provisions of the Act, but shall not include the following, namely: -

i. any profit arising from any overseas branch or branches of the company, whether operated as a separate company or otherwise; and

ii. any dividend received from other companies in India, which are covered under and complying with the provisions of section 135 of the Act:

Provided that in case of a foreign company covered under these rules, net profit means the net profit of such company as per profit and loss account prepared in terms of clause (a) of sub-section (1) of section 381, read with section 198 of the Act; [Rule 2(h)]

CSR EXPENDITURE [Rule 7 of Companies (CSR) Rules, 2014]

1. The board shall ensure that the administrative overheads shall not exceed five percent of total CSR expenditure of the company for the financial year.
2. Any surplus arising out of the CSR activities shall not form part of the business profit of a company and shall be ploughed back into the same project or shall be transferred to the Unspent CSR Account and spent in pursuance of CSR policy and annual action plan of the company or transfer such surplus amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial year.
3. Where a company spends an amount in excess of requirement provided under sub-section (5) of section 135, such excess amount may be set off against the requirement to spend under sub-section (5) of section 135 up to immediate succeeding three financial years subject to the conditions that –

i. the excess amount available for set off shall not include the surplus arising out of the CSR activities, if any, in pursuance of sub-rule (2) of this rule.
ii. the Board of the company shall pass a resolution to that effect.

4. The CSR amount may be spent by a company for creation or acquisition of a capital asset, which shall be held by -

(a) a company established under section 8 of the Act, or a Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number under sub-rule (2) of rule 4; or

(b) beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities; or

(c) a public authority:

Provided that any capital asset created by a company prior to the commencement of the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, shall within a period of one hundred and eighty days from such commencement comply with the requirement of this rule, which may be extended by a further period of not more than ninety days with the approval of the Board based on reasonable justification.

Transfer of unspent CSR amount [Rule 10 of Companies (CSR Policy) Rules, 2014

Until a fund is specified in Schedule VII for the purposes of subsection (5) and (6) of section 135 of the Act, the unspent CSR amount, if any, shall be transferred by the company to any fund included in schedule VII of the Act.

Penal Provisions

If a company is in default in complying with the provisions of sub-section (5) or sub-section (6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such

Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less. [Section 135(7)].

SPECIAL INSTRUCTIONS OF THE CENTRAL GOVERNMENT

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. [Section 135(8)]

WHEN IT IS NOT NECESSARY TO CONSTITUTE A CSR COMMITTEE

According to section 135(9), where the amount to be spent by a company under sub-section (5) does not exceed Rs. 50,00,000, the requirement under sub-section (1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.

CSR IMPLEMENTATION [Rule 4 of the Companies (CSR Policy) Rules, 2014]:

1. The Board shall ensure that the CSR activities are undertaken by the company itself or through-

(a) a company established under section 8 of the Act, or a registered public trust or a registered society, registered under section 12A and 80 G of the Income Tax Act, 1961, established by the company, either singly or along with any other company, or

(b) a company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government; or

(c) any entity established under an Act of Parliament or a State legislature; or

(d) a company established under section 8 of the Act, or a registered public trust or a registered society, registered under section 12A and 80G of the Income Tax Act, 1961, and having an established track record of at least three years in undertaking similar activities.

2.

(a) Every entity, covered under sub-rule (1), who intends to undertake any CSR activity, shall register itself with the Central Government by filing the form CSR-1 electronically with the Registrar, with effect from the 01st day of April 2021:

Provided that the provisions of this sub-rule shall not affect the CSR projects or programmes approved prior to the 01st day of April 2021.

(b) Form CSR-1 shall be signed and submitted electronically by the entity and shall be verified digitally by a Chartered Accountant in practice or a Company Secretary in practice or a Cost Accountant in practice.

(c) On the submission of the Form CSR-1 on the portal, a unique CSR Registration Number shall be generated by the system automatically.

3. A company may engage international organisations for designing, monitoring and evaluation of the CSR projects or programmes as per its CSR policy as well as for capacity building of their own personnel for CSR.

4. A company may also collaborate with other companies for undertaking projects or programmes or CSR activities in such a manner that the CSR committees of respective

companies are in a position to report separately on such projects or programmes in accordance with these rules.

5. The Board of a company shall satisfy itself that the funds so disbursed have been utilised for the purposes and in the manner as approved by it and the Chief Financial Officer or the person responsible for financial management shall certify to the effect.
6. In case of ongoing project, the Board of a Company shall monitor the implementation of the project with reference to the approved timelines and year-wise allocation and shall be competent to make modifications, if any, for smooth implementation of the project within the overall permissible time period.

CSR REPORTING (Rule 8):

(1) 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 I or Annexure II, as applicable.

(2) In case of a foreign company, the balance sheet filed under clause (b) of sub-section (1) of section 381 of the Act, shall contain an annual report on CSR containing particulars specified in Annexure I or Annexure II, as applicable.

(3)

(a) Every company having average CSR obligation of ten crore rupees or more in pursuance of subsection (5) of section 135 of the Act, in the three immediately preceding financial years, shall undertake impact assessment, through an independent agency, of their CSR projects having outlays of one crore rupees or more, and which have been completed not less than one year before undertaking the impact study.

(b) The impact assessment reports shall be placed before the Board and shall be annexed to the annual report on CSR.

(c) A Company undertaking impact assessment may book the expenditure towards Corporate Social Responsibility for that financial year, which shall not exceed five percent of the total CSR expenditure for that financial year or fifty lakh rupees, whichever is less.

ACTIVITIES SPECIFIED UNDER SCHEDULE VII

Activities which may be included by companies in their CSR Policies (i.e. Activities as specified under Schedule VII) are as follows:

(1) eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation and making available safe drinking water;

(2) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;

(3) 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;

(4) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund set up by the Central Government for rejuvenation of river Ganga;

(5) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;

(6) measures for the benefit of armed forces veterans, war widows and their dependents, Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows;

(7) training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;

(8) contribution to the Prime Minister's National Relief Fund or Prime Minister's Citizen Assistance and Relief in Emergency situations Fund (PM CARES FUND) any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, Tribes, other backward classes, minorities and women;

(9)

(a) Contribution to incubators or research development projects in the field of science, technology, engineering and medicine, funded by Central Government or State Government or any agency or Public Sector Undertaking of Central Government or State Government, and

(b) contributions to public funded Universities; Indian Institute of Technology (IITs); National Laboratories and Autonomous Bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO);Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs);

(10) rural development projects;

(11) slum area development. [For the purposes of this item, the term 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

(12) disaster management, including relief, rehabilitation and reconstruction activities.

CLARIFICATIONS

The MCA vide General Circular No. 21/2014 dated 18 June 2014 has provided many clarifications with regard to provisions of Corporate Social Responsibility under section 135 of the Companies Act, 2013 which are as under:

i. The statutory provision and provisions of CSR Rules, 2014, is to ensure that while activities undertaken in pursuance of the CSR policy must be relatable to Schedule VII

of the Companies Act 2013, the entries in the said Schedule VII must be interpreted liberally so as to capture the essence of the subjects enumerated in the said Schedule. The items enlisted in the amended Schedule VII of the Act, are broad-based and are intended to cover a wide range of activities as illustratively mentioned in the Annexure.

ii. It is further clarified that CSR activities should be undertaken by the companies in project/ programme mode. One-off events such as marathons/ awards/ charitable contribution/ advertisement/ sponsorships of TV programmes etc. would not be qualified as part of CSR expenditure.

iii. Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act.

iv. "Any financial year" referred under sub-section (1) of section 135 of the Act read with the Companies CSR Rule, 2014, implies 'any of the three preceding financial years.

v. Expenditure incurred by Foreign Holding Company for CSR activities in India will qualify as CSR spend of the Indian subsidiary if, the CSR expenditures are routed through Indian subsidiaries and if the Indian subsidiary is required to do so as per section 135 of the Act.

vi. 'Registered Trust' would include Trusts registered under Income Tax Act 1956, for those States where registration of Trust is not mandatory.

vii. Contribution to Corpus of a Trust/ society/ section 8 companies etc. will qualify as CSR expenditure as long as (a) the Trust/ society/ section 8 companies etc. is created exclusively for undertaking CSR activities or (b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act.

Clarifications with respect to CSR on COVID

1. **General Circular No. 10/2020 dated 23rd March, 2020**

   The Ministry of Corporate Affairs have clarified that keeping in view of the spread of novel Corona Virus (COVID-19) in India, its declaration as pandemic by the World Health Organisation (WHO), and, decision of Government of India to treat this as a notified disaster, spending of CSR funds for COVID-19 is eligible CSR activity.

   Funds may be spent for various activities related to COVID-19 under item nos. (i) and (xii) of Schedule VII relating to promotion of health care, including preventive health care and sanitation, and, disaster management. Further, as per General Circular No. 21/2014 dated 18.06.2014, items in Schedule VII are broad based and may be interpreted liberally for this purpose.

2. **General Circular No. 01/2021 dated 13th January, 2021**

   The Ministry of Corporate Affairs, have made a clarification on spending of CSR funds for Awareness and public outreach on COVID-19 Vaccination programme.

   This Circular is in continuation to this Ministry's General Circular No. 10/2020 dated 23.03.2020 wherein it was clarified that spending of CSR funds for COVID19 is an eligible CSR activity , it is further clarified that spending of CSR funds for carrying out awareness campaigns/ programmes or public outreach campaigns on COVID-19

Vaccination programme is an eligible CSR activity under item no. (i),(ii) and (xii) of Schedule VII of the Companies Act, 2013 relating to promotion of health care, including preventive health care and sanitization, promoting education, and, disaster management respectively.

The companies may undertake the aforesaid activities subject to fulfillment of Companies (CSR Policy) Rules, 2014 and the circulars related to CSR, issued by this ministry from time to time.

3. **General Circular No. 05/2021, dated 22nd April, 2021**

A clarification has been issued on spending of CSR funds for setting up makeshift hospitals and temporary COVID Care facilities.

In continuation to this Ministry's General Circular No. 10/2020 dated 23.03.2020 wherein it was clarified that spending of CSR funds for COVID-19 is an eligible CSR activity, it is further clarified that spending of CSR funds for 'setting up makeshift hospitals and temporary COVID Care facilities ' is an eligible CSR activity under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013 relating to promotion of health care, including preventive health care, and, disaster management respectively.

11. RIGHT OF MEMBERS TO COPIES OF AUDITED FINANCIAL STATEMENT [SECTION 136]

Section 136 provides that a copy of financial statements including consolidated financial statement, if any, auditor's report and every other document required by law to be annexed or attached to the financial statements, which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled, not less than twenty-one days before the date of the meeting.

i. **What if the documents are sent less than 21 days before the date of meeting?**

According to Section 136, If the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members —

(a) holding, if the company has a share capital, majority in number entitled to vote and who represent not less than ninety-five per cent. Of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or

(b) having, if the company has no share capital, not less than ninety five percent of the total voting power exercisable at the meeting:

Provided further that in the case of a listed company, the provisions of this sub-section shall be deemed to be complied with, if the copies of the documents are made available for inspection at its registered office during working hours for a period of twenty-one days before the date of the meeting and a statement containing the salient features of such documents in the prescribed form or copies of the documents, as the company may deem fit, is sent to every member of the company and to every trustee for the holders

of any debentures issued by the company not less than twenty-one days before the date of the meeting unless the shareholders ask for full financial statements.

Provided further that the Central Government may prescribe the manner of circulation of financial statements of companies having such net worth and turnover as may be prescribed.

Provided further that a listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.

Provided also that every listed company having a subsidiary or subsidiaries shall -

(a) place separate audited accounts in respect of each of subsidiary on its website, if any;
(b) provide a copy of separate audited or unaudited financial statements, as the case may be, as prepared in respect of each of its subsidiary, to any member of the company who asks for it.

Provided also that a listed company which has a subsidiary incorporated outside India (herein referred to as "foreign subsidiary") —

(a) where such foreign subsidiary is statutorily required to prepare consolidated financial statement under any law of the country of its incorporation, the requirement of this proviso shall be met if consolidated financial statement of such foreign subsidiary is placed on the website of the listed company;
(b) where such foreign subsidiary is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the holding Indian listed company may place such unaudited financial statement on its website and where such financial statement is in a language other than English, a translated copy of the financial statement in English shall also be placed on the website.

Example 7: Reliance Industries Limited, a company incorporated under the Companies Act, 2013, has its shares listed on a recognized Stock Exchange in India. One of the subsidiary of Reliance Industries Limited is a foreign company incorporated outside India. In the annual general meeting of the company, Reliance Industries Limited has placed its audited financial statement including consolidated financial statement on its website. Reliance Industries Limited has also placed on its website separate audited accounts of all its subsidiary located in India except one subsidiary, which is a foreign company and located outside India on the grounds that such foreign company is not required to get its financial statement audited under the company law of its incorporation. You are required to examine whether Reliance Industries Limited has complied with the provisions of section 136?

Answer: No, Reliance Industries Limited has not complied with the provisions of section 136 because Reliance Industries Limited is also required to place unaudited financial statement of its foreign subsidiary on its website even if such foreign subsidiary is not required to get its financial statement audited as per the provisions of section 136.

In case of Nidhi company - Section 136 (1) shall apply, subject to the modification that, in the case of members who do not individually or jointly hold shares of more than one thousand rupees in face value or more than one per cent, of the total paid-up share capital, whichever is less, it shall be sufficient compliance with the provisions of the section if an intimation is sent by public notice in newspaper circulated in the district in which the Registered Office of the company is situated stating the date, time and venue of AGM and the financial statement with its enclosures can be inspected at the registered office of the company and the financial statement with enclosures are affixed in the notice board of the company and a member is entitled to vote either in person or through proxy

A company shall also allow every member or trustee of the debenture holder to inspect the audited financial statement at its registered office during business hours.

ii. **Manner of circulation of financial statements in certain cases:**

(a) In case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent [Rule 11 of the Companies (Accounts) Rules, 2014] -

(1) by electronic mode to such members whose shareholding is in dematerialized format and whose email Ids are registered with Depository for communication purposes;

(2) where shareholding is held otherwise than by dematerialized format, to such members who have positively consented in writing for receiving by electronic mode (this may not be relevant considering that shareholding is not held otherwise than by dematerialized form anymore); and

(3) by dispatch of physical copies through any recognised mode of delivery as specified under section 20 of the Act, in all other cases.

iii. **Contravention:**

(a) If any default is made in complying with the provisions of section 136, the company shall be liable to a penalty of 25,000 rupees and

(b) Every officer of the company who is in default shall be liable to a penalty of 5,000 Rupees.

Vide General Circular No. 11/2015, dated 21 July 2015, clarification was issued by MCA with regard to circulation and filing of financial statement.

It has been clarified that a company holding general meeting after giving shorter notice as provided under section 101 of the Act may also circulate financial statements (to be laid/ considered in the same general meeting) at such shorter notice.

It has also been clarified that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian company may place or file such unaudited accounts to comply with requirements of section 136(1) and 137(1), as applicable. These, however, would need to be translated in English, if the original accounts are not in English. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under

the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

12. COPY OF FINANCIAL STATEMENT TO BE FILED WITH REGISTRAR [SECTION 137]

This section provides that copies of financial statement including consolidated financial statement, if any, along with all the documents annexed to financial statement and adopted at AGM shall be filed with Registrar.

i. Filing of financial statements [Section 137(1)]:

(1) Section 137 read with Rule 12 of the Companies (Account Rules), 2014 states that - A copy of the financial statements with form AOC-4, including consolidated financial statement with form AOC-4 CFS, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the AGM of the company, shall be filed with the Registrar within 30 days of the date of AGM in such manner, with such fees or additional fees as may be prescribed.

(1A) Every Non-Banking Financial Company (NBFC) that is required to comply with Indian Accounting Standards (Ind AS) shall file the financial statements with Registrar together with FORM AOC-4 NBFC (Ind AS) and the consolidated financial statement, if any with FORM AOC-4 CFS NBFC (Ind AS).

As per Rule 1 of the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015-

The following class of companies shall file their financial statements and other documents under section 137 of the Act with the Registrar in e-form AOC-4 XBRL as per Annexure-I:

i. companies listed with stock exchanges in India and their Indian subsidiaries;
ii. companies having paid up capital of five crore rupees or above;
iii. companies having turnover of one hundred crore rupees or above;
iv. all companies which are required to prepare their financial statements in accordance with Companies (Indian Accounting Standards) Rules, 2015.

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.

Provided further that non-banking financial companies, housing finance companies and companies engaged in the business of banking and insurance sector are exempted from filing of financial statements under these rules.

(2) The companies which have filed their financial statements under sub-rule (1) and erstwhile rules shall continue to file their financial statements and other documents though they may not fall under the class of companies specified therein in succeeding years.

The companies which have filed their financial statements under the erstwhile rules, namely the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011, shall continue to file their financial statements and other documents as prescribed in sub-rule (1) though they do not fall under the class of companies specified therein.

Example 8: Amazon Company Limited, a company incorporated under the Companies Act, 2013, has a turnover of Rs. 150 crores and Rs. 90 crores during the financial year ended 31st March 2019 and 31st March 2020 respectively. Now Amazon Company Limited shall continue to file the financial statements and other documents under section 137 in e-form AOC-4 XBRL for the financial year ended 31st March 2020 even if the company does not fall in the class of companies provided under Rule 3 of the Companies (Filing of documents and forms in Extensible Business Reporting Language) Rules, 2015.

ii. **If the financial statements are not adopted [Section 137(1)]:**

(a) Where the financial statements are not adopted at AGM or adjourned AGM, such unadopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of AGM.

(b) The Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned AGM for that purpose.

(c) If the financial statements are adopted in the adjourned AGM, then they shall be filed with the Registrar within 30 days of the date of such adjourned AGM with such fees or such additional fees as may be prescribed.

iii. **Filing by One Person Company [Section 137(1)]:**

A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.

iv. **Company having subsidiaries [Section 137(1)]:**

A company shall, along with its financial statements to be filed with the Registrar, attach the accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India (fourth proviso to Section 137(1)).

Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the holding Indian company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English.

It has also been clarified vide General Circular no. 11/2015 dated 21 July 2015 that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian company may place or file such

unaudited accounts to comply with requirements of section 136(1) and 137(1) as applicable. These, however, would need to be translated in English, if the original accounts are not in English. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

Example 9: Vandana Ltd., based out of India, has many subsidiaries in India and outside India. It also had associates and joint ventures. For the purpose of finalization of the consolidated financial statements of the company for the year ended 31 March 2019, the company's management requested its foreign subsidiary, based out of Italy, to provide its standalone financial statements. The Italian subsidiary company prepares its financial statements in the local language of the country and the same is provided to the Indian parent company as unaudited as the audit is not required by the Italian subsidiary company. Please advise how should the Indian parent deal with this financial statement.

Answer: Vandana Ltd. would have to get the standalone financial statements of Italian subsidiary company translated in English language and also get those aligned as per the its accounting policies for the purpose of consolidation.

Further as per the requirements of section 137(1) of the Companies Act 2013, Vandana Ltd. would need to file such unaudited financial statement of Italian subsidiary company along with a declaration to this effect along with a translated copy of the financial statement in English.

Further the format of accounts of Italian subsidiary company should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

v. **Annual General meeting not held [Section 137(2)]:**

Where the AGM of a company for any year has not been held, the financial statements along with the documents required to be attached, duly signed along with the statement of facts and reasons for not holding the AGM shall be filed with the Registrar within thirty days of the last date before which the AGM should have been held and in such manner, with such fees or additional fees as may be prescribed.

vi. **Penalty [Section 137(3)]:**

If any of the provisions of this section are contravened-

(a) The company shall be liable to a penalty of Rs. 10,000 and in case of continuing failure, with a further penalty of Rs. 100 for each day during which such failure continues, subject to a maximum of Rs. 2,00,000; and

(b) The managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company,

shall be liable to a penalty which shall not be less than Rs. 10,000, and in case of continuing failure, with further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 50,000.

Person liable	Punishment for contravention of section 137
Company	with fine of Rs. 10,000 and in case of continuing failure, with a further penalty of Rs. 100 for each day during which such failure continues, subject to a maximum of Rs. 2,00,000.
Officers: – - MD and CFO of the company, if any; - In their absence, any other director who is charged by the Board with the responsibility; - In its absence, all the directors of the company.	Fine which shall not be less than Rs. 10,000, and in case of continuing failure, with further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 50,000.

Example 10: The AGM of R Ltd., for laying the Annual Accounts there at for the year ended 31 March 2018 was not held. What remedy is available with the company regarding compliance of the provisions of section 137 of the Companies Act, 2013 for filing of copies of financial statements with the Registrar of Companies?

Answer: In the present case, though AGM was not held, it ought to be held by 30 September 2018 under sections 96 of the Companies Act, 2013.

Therefore, under the provisions of section 137(2), the financial statements along with the documents required to be attached under this Act, duly signed along with the statement of facts and reasons for not holding the AGM shall be filed with the Registrar within thirty days of the last date before which the AGM should have been held i.e. by 30 October 2018 along with such fees or additional fees as may be prescribed.

Example 11: Will it make any difference in case the Annual Accounts were duly laid before the AGM held on 27 September 2018 but the same were not adopted by the shareholders?

Answer: Since the AGM has been held in time on 27 September 2018, the un-adopted financial statements along with the required documents under sub-section (1) of section 137 shall be filed with the Registrar within thirty days of the date of AGM and the Registrar shall take them in his records as provisional till the financial statements are filed with him after its adoption in the adjourned AGM for that purpose.

13. INTERNAL AUDIT [SECTION 138]

Section 138 read with Rule 13 of the Companies (Accounts) Rules 2014, provides for internal audit in a company.

Section 138 states that:

1. Such class or classes of companies as may be prescribed shall be required to appoint an internal auditor, who shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.
2. The Central Government may, by rules, prescribe the manner and the intervals in which the internal audit shall be conducted and reported to the Board."

Rule 13 of the Companies (Accounts) rules, 2014 states that:

i. Companies required to appoint Internal Auditor:

(a) The following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate, namely:

(1) every listed company;

(2) every unlisted public company having-

A. paid up share capital of 50 crore rupees or more during the preceding financial year; or

B. turnover of 200 crore rupees or more during the preceding financial year; or

C. outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year; oroutstanding deposits of 25 crore rupees or more at any point of time during the preceding financial year; and

(3) every private company having—

A. turnover of 200 crore rupees or more during the preceding financial year; or

B. outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year.

(b) 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.

ii. Transitional period:

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.

iii. Who is Internal Auditor?

(a) Internal Auditor shall either be a Chartered Accountant or a Cost Accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.

The term "Chartered Accountant" or "Cost Accountant" shall mean a "Chartered Accountant" or a "Cost Accountant", as the case may be, whether engaged in practice or not'.

(b) The internal auditor may or may not be an employee of the company.

Example 12: Perfect Ltd is a listed company. The company is in the business of manufacturing of steel and had its head office at Karnataka. The company's operations are spread out across India. The company appointed a firm of Chartered Accountants, N & Co LLP, as its internal auditors for the year ended 31st March 2019. However, for the

financial year 2019-20, the company is planning to have an in-house internal audit system commensurate with its size and operations. If the company does that then it is planning not to continue with N & Co LLP as its internal auditors. Please advise.

Answer:

In the given situation, if the internal audit function of the company is fine as per its size and operations then it may decide not to continue with N & Co LLP.

Chapter 9 : Audit and Auditors

1. INTRODUCTION

Large business corporations are managed by the directors who represent the members who are the real owners of the company through board. In the absence of any check the directors may mismanage the finances of the organisation. Thus, members appoint auditor/auditors to look into the true and fair view of the financial affairs of the company. These auditors are independent from the management of the company. Hence, they can express an un-biased opinion on the financials of the company.

2. APPOINTMENT OF AUDITORS [SECTION 139]

Section 139 of the Companies Act, 2013 provides provision for appointment of auditors. According to this section:

i. **Appointment of auditor [Section 139(1)]:**

(a) Every company shall appoint an individual or a firm as an auditor of the company at the first annual general meeting (AGM).

Example 1: Rashail Techlabs Private Limited incorporated during the financial year 2019-20. First AGM of the company held on 30.09.2020. The company appointed M/s. Rams & Associates, Chartered Accountant firm for the period of 5 Years as a subsequent statutory auditor.

(b) The auditor shall hold office from the conclusion of 1stAGM till the conclusion of its 6th AGM and thereafter till the conclusion of every sixth AGM. The manner and procedure of selection of auditors by the members of the company at AGM has been prescribed under the Companies (Audit and Auditors) Rules, 2014.

(c) Manner and procedure of selection and appointment of auditors:

1.

Categories of Companies	Competent authority	Responsibility of the competent authority
A company which is required to constitute an Audit Committee under section 177	Audit Committee	i. The competent authority shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and such qualifications and experience are commensurate with the size and requirements of the company. ii. It shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India (ICAI) or any competent authority
A Company which is not required to constitute an	Board of Directors	

Audit Committee under section 177		or any Court. iii. It may call for such other information from the proposed auditor as it may deem fit.

2.

Categories of Companies	**Competent authority**	**Responsibility of the competent authority**
A company which is required to constitute an Audit Committee under section 177	Audit Committee	the committee shall recommend the name of an individual or a firm as auditor to the Board for consideration
A Company which is not required to constitute an Audit Committee under section 177	Board of Directors	the Board shall consider and recommend an individual or a firm as auditor to the members in the AGM for appointment.

Companies that require to constitute an audit committee

For the purpose of constitution of Audit Committee, section 177 of the Act, read with Companies (Meetings of Board and its Powers) Rules, 2014 provides that:

The Board of directors of every listed public companies and the following classes of companies shall constitute an Audit Committee-

i. all public companies with a paid-up capital of ten crore rupees or more;
ii. all public companies having turnover of one hundred crore rupees or more;
iii. all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

Explanation: The paid-up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited financial statements shall be taken into account for the purposes of this rule.

3. If the Board agrees with the recommendation of the Audit Committee, it shall further recommend the appointment of an individual or a firm as auditor to the members in the AGM.
4. If the Board disagrees with the recommendation of the Audit Committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.

5. If the Audit Committee, after considering the reasons given by the Board, decides not to reconsider its original recommendation, the Board shall record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the AGM; and if the Board agrees with the recommendations of the Audit Committee, it shall place the matter for consideration by members in the AGM.

   Example 2: Audit Committee recommended KPM & Associates, Chartered Accountants firm for appointment as statutory auditor to the board of Surya Solar Limited. However, board of the company disagreed with the recommendation of the audit committee. In such condition, board shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.

(d) Before the appointment is made, the written consent of the auditor to such appointment and a certificate shall be obtained from the auditor that the appointment, if made, shall be in accordance with the conditions as may be prescribed.

   Conditions for appointment and notice to the Registrar: As per second proviso of section 139(1) read with rule 4 stipulates that written consent of the auditor must be taken before appointment. The auditor appointed shall submit a certificate that–

A. the individual or the firm (as the case may be) is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;
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.

(e) The certificate shall also indicate whether the auditor satisfies the criteria provided in section 141 [Section 141 provides provisions on eligibility, qualification and disqualification of Auditor which will be discussed later] of the Companies Act, 2013

(f) Communication to Auditor: Further the company shall inform the concerned auditor of his or its appointment, and also file a notice (in the Form ADT-1) of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed.

   Here, "appointment" includes re-appointment.

   National Financial Reporting Authority Rules, 2018 (NFRA Rules)

As per Rule 3 (2) of NFRA Rules, every existing body corporate other than a company governed by NFRA rules, shall inform the National Financial Reporting Authority (NFRA) within 30 days of the commencement of the NFRA rules, in Form NFRA-1, the particulars of the auditor as on the date of commencement of the NFRA rules.

According to Rule 3(3) of NFRA Rules, every body corporate, other than a company as defined in clause (20) of section 2 of the Act, formed in India and governed under NFRA Rules shall, within 15 days of appointment of an auditor under sub-section (1) of section 139, inform the NFRA in Form NFRA-1, the particulars of the auditor appointed by such

body corporate, provided that a body corporate governed under clause (e) of sub-rule (1) of NFRA Rules shall provide details of appointment of its auditor in Form NFRA-1.

ii. Term of Auditor [Section 139(2)]:

(a) Section 139(2) provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint—

(1) an individual as auditor for more than one term of five consecutive years; and

(2) an audit firm as auditor for more than two terms of five consecutive years.

(b) Rule 5 of the Companies (Audit and Auditors) Rules, 2014 has prescribed the following classes of companies for the purposes of section 139(2):

(1) all unlisted public companies having paid up share capital of rupees 10 crores or more;

(2) all private limited companies having paid up share capital of rupees 50 crore or more;

(3) all companies having paid up share capital of below threshold limit mentioned in (2) and (3) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crores or more.

(c) Cooling Period:

(1) An individual auditor who has completed his term (i.e. one term of five consecutive years) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

(2) An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.

Example 3: XYZ Ltd. which is a listed company appoints individual Mr. Raghav as an auditor in its AGM dated 29th September, 2016. Mr. Raghav will hold office of Auditor from the conclusion of this meeting upto conclusion of sixth AGM i.e. AGM to be held in the year 2021. Now as per sub-section (2), Mr. Raghav shall not be re-appointed as Auditor in XYZ Ltd. for further term of five years i.e. he cannot be appointed as Auditor in XYZ Ltd. upto year 2026.

Example 4: XYZ Ltd. which is a listed company appoints M/s Raghav & Associates as an audit firm in its AGM dated 29th September, 2016. M/s Raghav & Associates will hold office from the conclusion of this meeting upto conclusion of sixth AGM to be held in the year 2021. Now as per sub-section (2), M/s Raghav & Associates can be appointed or re-appointed as auditor for one more term of five years i.e. upto year 2026. It shall not be re-appointed as Audit firm in XYZ Ltd. for further term of five years after year 2026 to year 2031.

(d) Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Example 5: M/s Krishna & Associates is an audit firm having 2 partners namely Mr. Krishna and Mr. Shyam. Mr. Shyam is also a partner of another audit firm named M/s

Kukreja & Associates. M/s Krishna & Associates was appointed as the auditors in the company Golden Smith Ltd. for two consecutive periods of 5 years i.e. from year 2016 to year 2026. Now, if Golden Smith Ltd. wants to appoint M/s Kukreja & Associates as its audit firm, it cannot do so because Mr. Shyam is the common partner between both the Audit firms. This prohibition is only for 5 years i.e. upto year 2031. After 5 years, Golden Smith Ltd. may appoint M/s Kukreja & Associates or M/s. Krishna & Associates as its auditors.

(e) **Transitional period:** Every company, existing on or before the commencement of this Act which is required to comply with the provisions as mentioned in above mentioned points (a) to (d) (i.e. provisions of this sub-section), shall comply with those provisions within a period which shall not be later than the date of the first AGM of the company held, within the period specified under sub-section (1) of section 96, after three years from the date of commencement of this Act."

(f) It is also provided that nothing contained in above mentioned points (a) to (d) (i.e. this sub-section) shall prejudice the right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

iii. Rotation of auditor [section 139(3) and (4)]:

(a) Members of a company may resolve to provide that—

(1) in the audit firm appointed by them, the auditing partner and his team shall be rotated at such intervals as may be resolved by members; or

(2) the audit shall be conducted by more than one auditor.

(b) The Central Government may, by rules, prescribe the manner in which the companies shall rotate their auditors.

(c) Manner of rotation of auditors by the companies on expiry of their term as provided under the Companies (Audit and Auditors) Rules, 2014:

(1) The Audit Committee shall recommend to the Board, the name of an individual auditor or of an audit firm who may replace the incumbent auditor on expiry of the term of such incumbent.

(2) Where a company is required to constitute an Audit Committee, the Board shall consider the recommendation of such committee, and in other cases, the Board shall itself consider the matter of rotation of auditors and make its recommendation for appointment of the next auditor by the members in annual general meeting.

(3) For the purpose of the rotation of auditors:

i. in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of five consecutive years or ten consecutive years, as the case may be;

ii. the incoming auditor or audit firm shall not be eligible if such auditor or audit firm is associated with the outgoing auditor or audit firm under the same network of audit firms. The term "same network" includes the firms operating or functioning, hitherto or in future, under the same brand name, trade name or common control.

iii. For the purpose of rotation of auditors:

A. a break in the term for a continuous period of five years shall be considered as fulfilling the requirement of rotation.

B. if a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of five years.

(4) Where a company has appointed two or more individuals or firms or a combination thereof as joint auditors, the company may follow the rotation of auditors in such a manner that both or all of the joint auditors, as the case may be, do not complete their term in the same year.

(d) Here, the word "firm" shall include a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008.

Illustration explaining rotation in case of individual auditor:

Number of consecutive years for which an individual auditor has been functioning as auditor in the same company [in the first AGM held after the commencement of provisions of section 139(2)]	Maximum number of consecutive years for which he may be appointed in the same company (including transitional period)	Aggregate period which the auditor would complete in the same company in view of column I and II
I	II	III
5 years (or more than 5 years)	3 years	8 years or more
4 years	3 years	7 years
3 years	3 years	6 years
2 years	3 years	5 years
1 year	3 years	5 years

Here,

(a) Individual auditor shall include other individuals or firms whose name or trademark or brand is used by such individual, if any.

(b) Consecutive years shall mean all the preceding financial years for which the individual auditor has been the auditor until there has been a break by five years or more.

Illustration explaining rotation in case of audit firm

Number of consecutive years for which an audit firm has been functioning as auditor in the same company [in the first AGM held after the	Maximum number of consecutive years for which the firm may be appointed in the same company (including transitional period)	Aggregate period which the audit firm would complete in the same company in view of column I and II

commencement of provisions of section 139(2)]		
I	II	III
10 years (or more than 10 years)	3 years	13 years or more
9 years	3 years	12 years
8 years	3 years	11 years
7 years	3 years	10 years
6 years	4 years	10 years
5 years	5 years	10 years
4 years	6 years	10 years
3 years	7 years	10 years
2 years	8 years	10 years
1 year	9 years	10 years

Here,

(a) Audit Firm shall include other firms whose name or trade mark or brand is used by the firm or any of its partners.

(b) Consecutive years shall mean all the preceding financial years for which the firm has been the auditor until there has been a break by five years or more.

iv. First auditors [Section 139(6)]:

(a) Notwithstanding anything contained in sub-section (1) of Section 139 i.e. point 2(i) mentioned above, the first auditor of a company, other than a Government Company, shall be appointed by the Board of directors within 30 days of the date of registration of the company and the auditor so appointed shall hold office until the conclusion of the first AGM.

Example 6: Unicorn Steel Private Limited is incorporated as on 02.06.2020, board of directors of the company held board meeting as on 15.06.2020 to appoint Jain Ajmera & Associates as a first auditor of the company for a term of 5 years. As per section 139(6) of the Companies Act, 2013, the board shall appoint first director within 30 days from the date of registration of the company. State the validity of the aforesaid situation.

i. Invalid
ii. Valid after approval of shareholder in General Meeting
iii. Valid only after approval of Central Government

Answer: The given situation is Invalid i.e., option (iii)

(b) If the Board fails to exercise its powers i.e., appointment of first auditor, it shall inform the members of the company and the company may appoint the first auditor within 90 days at an extra ordinary general meeting (EGM) and such auditor shall hold office till the conclusion of the first AGM.

Example 7: Managing Director of PQR Ltd. himself wants to appoint Shri Ganpati, a practicing Chartered Accountant, as first auditor of the company. Comment on the proposed action of the Managing Director.

Answer: Provisions and Explanation: Section 139(6) of the Companies Act, 2013 provides that "the first auditor or auditors of a company shall be appointed by the Board of directors within 30 days from the date of registration of the company". In the instant case, the appointment of Shri Ganapati, a practicing Chartered Accountant as first auditors by the Managing Director of PQR Ltd by himself is in violation of Section 139(6) of the Companies Act, 2013, which requires the Board of Directors to appoint the first auditor of the company.

Conclusion: In view of the above, the Managing Director of PQR Ltd. cannot appoint the first auditor of the company himself.

v. Filling up casual vacancy [Section 139(8)]:

(a) The Board may fill any casual vacancy in the office of an auditor within 30 days but where such vacancy is caused by the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board.

(b) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

Example 8: Prakash Carriers Limited appointed Mr. Raman as its auditor in the Annual General Meeting held on 30th September, 2019. Initially, he accepted the appointment. But he resigned from his office on 31st October, 2019 for personal reasons. The Board of directors seeks advice for filling up the vacancy by appointment of Mr. Albert as auditor.

In the present case, as the auditor has resigned, the casual vacancy so created can be filled up by the Board appointing Mr. Albert. However, the appointment of Mr. Albert must be approved by the company by passing of an ordinary resolution at a general meeting of the company which must be convened by the Board within 3 months of the recommendation of the Board. Mr. Albert will be entitled to hold office till the conclusion of the next Annual General Meeting.

vi. Appointment of auditors in case of Government Company or any other company controlled by the State Government or the Central Government [Section 139(5), 139(7) and 139(8)]

(a) As per section 139(5), the Comptroller and Auditor-General of India (CAG) shall, in respect of a financial year, appoint an auditor duly qualified to be appointed as an auditor of companies under this Act in the case of:

(1) a Government company; or

(2) any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments.

(b) The auditor shall be appointed within a period of 180 days from the commencement of the financial year. The auditor appointed shall hold office till the conclusion of the annual general meeting.

(c) First auditor [section 139(7)]:

(1) in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor General of India (CAG) within 60 days from the date of registration of the company.

(2) In case the CAG does not appoint first auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next 30 days.

(3) Further, in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an EGM, who shall hold office till the conclusion of the first annual general meeting.

(d) Casual vacancy [section 139(8)]:

(1) In the case of a company whose accounts are subject to audit by an auditor appointed by the CAG, casual vacancy of an auditor shall be filled by the CAG within 30 days.

(2) In case the CAG does not fill the vacancy within the said period, the Board of Directors shall fill the vacancy within next 30 days.

vii. Re-appointment of retiring auditor [section 139(9), (10) and (11)]:

(a) A retiring auditor may be re-appointed at an AGM if—

(1) he is not disqualified for re-appointment;

(2) he has not given a notice in writing to the company of his unwillingness to be re-appointed; and

(3) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.

(b) Where at any AGM, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

viii. Audit committee's recommendation [Section 139(11)]:

Where a company is required to constitute an Audit Committee under section 177, all appointments, including the filling of a casual vacancy of an auditor under this section shall be made after taking into account the recommendations of such committee.

3. REMOVAL, RESIGNATION OF AUDITOR AND GIVING OF SPECIAL NOTICE [SECTION 140]

Section 140 of the Companies Act, 2013 provides for removal, resignation of auditor and giving of special notice. According to this section:

i. Removal of auditor before the expiry of his term [Section 140(1)]:

(a) The auditor appointed under section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government (RD) by making an application in Form ADT-2 and shall be accompanied with the prescribed fees.

(b) The application shall be made to the Central Government within 30 days of the resolution passed by the Board.

(c) The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution.

(d) Giving opportunity of being heard (Audi Alteram Partem): Before taking any action for removal of auditor before the expiry of his term, the auditor concerned shall be given a reasonable opportunity of being heard.

Example 9: Mr. Suresh, a Chartered Accountant, was appointed by the Board of Directors of AB Limited as the First Auditor. The company in General Meeting removed Mr. Suresh without seeking the approval of the Central Government and appointed Mr. Gupta as an auditor in his place. The first auditor appointed by the Board of Directors can be removed in accordance with the provision of Section 140(1) of the Companies Act, 2013. Hence, the removal of the first auditor in this case is invalid. The company contravened the provision of the Act.

ii. Resignation by Auditor [Section 140(2) & (3)]

(a) If the Auditor has resigned from the company, he shall file a statement in the form ADT-3 with the company and the Registrar within a period of 30 days from the date of such resignation.

(b) The auditor shall indicate the reasons and other facts as may be relevant with regard to his resignation, in the statement.

(c) In case of government companies or companies controlled by Central Government or State Government, the auditor shall file such statement with the CAG along with the company and the Registrar indicating the reasons and other facts as may be relevant with regard to his resignation.

(d) **Penalty for contravention:** If the auditor does not comply with aforesaid 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. 2,00,000.

iii. Appointing Auditor other than the Retiring Auditor [Section 140(4)]

(a) If the retiring auditor has not completed a consecutive tenure of 5 years or 10 years, as the case may be, as provided under sub-section (2) of section 139, special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.

(b) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(c) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so—

(1) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

(2) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company.

(d) If a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.

(e) However, if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar.

(f) If the Tribunal is satisfied on an application either of the company or of any other aggrieved person that the rights conferred by this sub-section are being abused by the auditor, then the copy of the representation may not be sent and the representation need not be read out at the meeting.

iv. **Auditor acts in a fraudulent manner or abetted or colluded in any fraud [Section 140(5)]**

(a) **On satisfaction of Tribunal that the auditor of a company has acted in a fraudulent manner etc.:** Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either—

- suo motu; or
- on an application made to it by the Central Government; or
- by any person concerned,

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, it may, by order, direct the company to change its auditors.

(b) **Requirement for change of auditor:** If the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within 15 days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

(c) **Ineligibility of auditor to be appointed:** An auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section 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 the order and the auditor shall also be liable for action under section 447 of the Companies Act 2013.

Explanation I — It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its director or officers.

Explanation II — For the purposes of this Chapter the word "auditor" includes a firm of auditors.

Example 10: FLP Ltd, engaged in the business of real estate and energy, defaulted on its borrowings which amounted to thousands of crores. During the year ended 31st March 2019, a fraud was uncovered in respect of various transactions of the company and it was observed by the Central Government that the auditors of the company were involved in such fraud. Please suggest what can be the course of action in this case.

Answer: The Central Government may apply to the Tribunal in respect of such matter highlighting that the auditors miserably failed to fulfill their duties as auditors of the company. If the Tribunal is satisfied that the auditors were involved in the fraud with the company, the Tribunal may direct the company to change its auditors and those auditors shall not be eligible to be appointed as auditor of any company for 5 years and also liable for action under section 447 of the Companies Act 2013.

4. ELIGIBILITY, QUALIFICATIONS AND DISQUALIFICATIONS OF AUDITORS [SECTION 141]

Section 141 of the Companies Act, 2013 provides for eligibility, qualifications and disqualifications of auditors. This section deals with:

i. Qualifications of an auditor [Section 141(1) & (2)]:

(a) A person shall be eligible to be appointed as an auditor of a company only if he is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949.

(b) A firm whereof majority of partners practicing in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company.

(c) Where a firm including a Limited Liability Partnership is appointed as an auditor of a company, only the partners who are Chartered Accountants shall be authorized to act and sign on behalf of the firm.

ii. Disqualifications of auditors [Section 141(3)]:

(a) Section 141 (3) of the Act read with Rule 10 of Companies (Audit and Auditors) Rule, 2014 prescribes following persons shall not be qualified for appointment as auditor of a company—

(1) A body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;

(2) an officer or employee of the company;

(3) a person who is a partner, or who is in the employment, of an officer or employee of the company;

Example 11: Mr. Anil, a Chartered accountant, is a partner of a firm and has been appointed as an auditor of Laxman Ltd. in the Annual General Meeting of the company held in September 2018 in which he accepted the assignment. Subsequently, in January 2019, he offered Bharat, another Chartered Accountant, who is the Manager Finance of Laxman Ltd., to join the firm of Anil as a partner.

Answer: Provisions and Explanation: Section 141(3)(c) of the Companies Act, 2013 prescribes that any person who is a partner or in employment of an officer or employee of the company will be disqualified to act as an auditor of a company. Sub-section (4) of Section 141 provides that an auditor who becomes subject, after his appointment, to any

of the disqualifications specified in sub-sections (3) of Section 141, shall be deemed to have vacated his office as an auditor.

Conclusion: In the present case, Anil is auditor of M/s Laxman Limited and any employee of Laxman Limited cannot become the Partner of the firm where Anil is a Partner. In case that happens, he/the firm shall be deemed to have vacated office of the auditor of M/s Laxman Limited.

(4) a person who, or his relative or partner—

A. is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company (i.e. fellow subsidiary):

Provided that the relative may hold security or interest in the company of face value not exceeding Rs. 1,00,000 as prescribed under Rule 10 of the Company (Audit and Auditors) Rules, 2014.

Further, the above condition shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities. If the relative acquires any security or interest above the prescribed threshold i.e., Rs. 1,00,000, the corrective action to maintain the limits as specified above shall be taken by the auditor within 60 days of such acquisition or interest.

Example 12: "Mr. Ashish", a practicing Chartered Accountant, is holding securities of "XYZ Ltd." having face value of Rs. 900/-. Whether Mr. Ashish is qualified for appointment as an Auditor of "XYZ Ltd."?

Answer: As per section 141 (3)(d) (i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company:

In the present case, Mr. Ashish is holding security of Rs. 900 in the XYZ Ltd, therefore he is not eligible for appointment as an Auditor of "XYZ Ltd".

Example 13: "Mr. P" is a practicing Chartered Accountant and "Mr. Q", the relative of "Mr. P", is holding securities of "ABC Ltd." Having face value of Rs. 90,000/-. Whether "Mr. P" is qualified for being appointed as an auditor of "ABC Ltd."?

Answer: As per section 141 (3)(d)(i), an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company. Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of Rs. 1,00,000.

In the present case, Mr. Q. (relative of Mr. P, an auditor), is having securities of Rs. 90,000 face value in ABC Ltd., which is as per requirement of proviso to section 141 (3)(d)(i). Therefore, Mr. P will not be disqualified to be appointed as an auditor of ABC Ltd.

Example 14: "BC & Co." is an audit firm having partners "Mr. B" and "Mr. C" and "Mr. A", relative of "Mr. C", is holding securities of "MWF Ltd." having face value of Rs. 1,01,000. Whether "BC & Co." is qualified for appointment as auditor of "MWF Ltd."?

Answer: As per section 141(3)(d)(i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company. Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of Rs. 1,00,000.

In the instant case, BC & Co, will be disqualified for appointment as an auditor of MWF Ltd as the relative of Mr. C i.e., partner of BC & Co., is holding the securities in MWF Ltd which is exceeding the limit mentioned in proviso to section 141(3)(d)(i).

B. is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of Rs. 5 Lacs; or

C. has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of Rs. 1 Lac.

(5) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company. According to the Companies (Audit and Auditors) Rules, 2014, the term "business relationship" shall be construed as any transaction entered into for a commercial purpose, except–

A. commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts;

B. commercial transactions which are in the ordinary course of business of the company at arm's length price like sale of products or services to the auditor as customer by the companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.

(6) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel;

(7) 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 persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies other than one person companies, small companies and private companies having paid-up share capital less than Rs. 100 crores.

Ceiling on numbers of audits: Before appointment is given to any auditor, the company must obtain a certificate from him to the effect that the appointment, if made, will not

result in an excess holding of company audit by the auditor concerned over the limit laid down in section 141(3)(g) of the Companies Act, 2013 which prescribes that 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 other than one person companies, dormant companies, small companies and private companies having paid-up share capital less than Rs. 100 crores (MCA notification dated 5 June 2015).

Example 15: "ABC & Co." is an audit firm having partners "Mr. A", "Mr. B" and "Mr. C", Chartered Accountants. "Mr. A", "Mr. B" and "Mr. C" are holding appointment as auditors in 4, 6 and 10 companies respectively.

i. Provide the maximum number of audits remaining in the name of "ABC & Co."
ii. Provide the maximum number of audits remaining in the name of individual partner i.e., Mr. A, Mr. B and Mr. C.

Fact of the Case: In the instant case, Mr. A is holding appointment in 4 companies, Mr. B is having appointment in 6 companies and Mr. C is having appointment in 10 companies. In aggregate all three partners are having 20 audits.

Provisions and Explanations: As per section 141(3)(g) of the Companies Act, 2013, a person shall not be eligible for appointment as an auditor if he 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 twenty companies other than one person companies, dormant companies, small companies and private companies having paid-up share capital less than Rs. 100 crores.

As per section 141 (3)(g), this limit of 20 company audits is per person. In the case of an audit firm having 3 partners, the overall ceiling will be 3 × 20 = 60 companies' audit. Sometimes, a Chartered Accountant may be a partner in a number of auditing firms. In such a case, all the firms in which he is partner or proprietor will be together entitled to 20 company audits only on his account.

Conclusion:

i. Therefore, ABC & Co. can hold appointment as an auditor of 40 more companies:

Total Number of audits for which the firm would be eligible = 20*3 = 60

Number of audits already taken by all the partners

In their individual capacity = 4+6+10 = 20

Remaining number of audits available to the firm = 40

ii. With reference to above provisions, an auditor can hold more appointment as auditor = ceiling limit as per section 141(3)(g)- already holding appointments as an auditor. Hence

(1) Mr. A can hold: 20 – 4 = 16 more audits.

(2) Mr. B can hold 20 - 6 = 14 more audits and

(3) Mr. C can hold 20-10 = 10 more audits.

Note:

It has been assumed that the companies given in the question are not one person companies, dormant companies, small companies and private companies having paid-up share capital less than Rs. 100 crores.

(8) a person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction;

(9) a person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company.

Explanation — For the purposes of this clause, the term "directly or indirectly" shall have the meaning assigned to it in the Explanation to section 144 (section 144 deals with certain services not to be tendered by auditor).

iii. **Vacation of office by an auditor [Section 141(4)]:**

If a person appointed as an auditor of a company incurs any of the disqualifications specified in Section 141(3), he shall be deemed to have vacated his office. Such vacation shall be deemed to be a casual vacancy in the office of the auditor.

5. REMUNERATION OF AUDITORS [SECTION 142]

Section 142 of the Companies Act, 2013 provides for remuneration of auditors. According to this section:

i. The remuneration of the auditors of a company shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

ii. In the case of first auditor, remuneration may be fixed by the Board.

iii. The remuneration mentioned aforesaid shall, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him. But the remuneration does not include any remuneration paid to him for any other service rendered by him at the request of the company.

Example 16: SHRD Private Ltd is engaged in the business of software and consultancy. The company has an annual turnover of INR 2,000 crores but its profit margins are not very good as compared to the industry standards. For the financial year ended 31st March 2019, the company proposed appointment of its statutory auditors at its Board meeting, however, the remuneration was not finalized. The statutory auditors completed the engagement formalities including the engagement letter between the company and the auditors and it was decided that the engagement letter be signed without fee i.e. with the clause that the fee to be mutually decided. In this situation, engagement letter with such arrangement is valid.

6. POWERS AND DUTIES OF AUDITORS AND AUDITING STANDARDS [SECTION 143]

i. Powers of Auditors [Section 143(1)]:

(a) Access to books of account and vouchers: Every auditor of a company shall have a right of access at all times to the books of accounts and vouchers of the company, whether kept at the registered office of the company or at any other place.

(b) Entitled to have necessary information and explanation: He shall be entitled to require from the officers of the company such information and explanations as the auditor may consider necessary for the performance of his duties as auditor.

(c) Access to record of all its subsidiaries: The auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries and associate companies in so far as it relates to the consolidation of its financial statements with that of its subsidiaries and associate companies.

ii. Duties of Auditors

(a) Matters of inquiry: The auditor shall inquire into the following matters, namely—

(1) Whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members;

(2) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company;

(3) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company;

(4) Whether loans and advances made by the company have been shown as deposits;

(5) Whether personal expenses have been charged to revenue account;

(6) Where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.

(b) The auditor shall make a report to the members of the company on the following:

(1) On the accounts examined by him; and

(2) On every financial statements which are required by or under this Act to be laid before the company in general meeting; and

(c) The auditor while making the report shall take into account the provisions of the Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Actor any rules made thereunder or under any order made under section 143(11).

(d) The auditor shall express his opinion on the accounts and financial statements examined by him. He shall express an opinion, according to him and to the best of his information and knowledge, whether the said accounts/financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.

(e) The auditors' report shall also state—

(1) whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements;

(2) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(3) whether the report on the accounts of any branch office of the company audited under sub-section (8) by a person other than the company's auditor has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report;

(4) whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns;

(5) whether, in his opinion, the financial statements comply with the accounting standards;

(6) the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;

(7) whether any director is disqualified from being appointed as a director under sub section (2) of section 164;

(8) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith;

(9) whether the company has adequate internal financial controls with reference to financial statements in place and the operating effectiveness of such controls;

As per the Rule 10A inserted by the Companies (Audit and Auditors) Amendments Rules, 2014 vide Notification dated 14th October, 2014, for the purposes of clause (i) of sub-section (3) of section 143 (i.e. point 9 mentioned above), for the financial years commencing on or after 1st April 2015, the report of the auditor shall state about existence of internal financial controls with reference to financial statements and its operating effectiveness.

Provided that auditor of a company may voluntarily include the statement referred to in this rule for the financial year commencing on or after 1st April 2014 and ending on or before 31st March 2015.

Exemption to Private Company: 'In case of Private Company - Clause (i) of Sub-Section (3) of Section 143 shall not apply to a private company: -

i. which is a one person company or a small company; or
ii. which has turnover less than rupees fifty crore as per latest audited financial statement and which has aggregate borrowings from banks or financial institutions or any body corporate at any point of time during the financial year less than rupees 25 crore. - Notification Dated 13th June, 2017.

The aforesaid exceptions, modifications and adaptations shall be applicable to a Private company which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar.'

(10) such other matters as may be prescribed.

(f) Rule 11 of the Companies (Audit and Auditors) Rules, 2014 provides that the auditor's report shall also include their views and comments on the following matters, namely:

(1) whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement;

(2) whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts;

(3) whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.

(4)

i. Whether the management has represented that, to the best of it's knowledge and belief, other than as disclosed in the notes to the accounts, no funds have been advanced or loaned or invested (either from borrowed funds or share premium or any other sources or kind of funds) by the company to or in any other person(s) or entity(ies), including foreign entities ("Intermediaries"), with the understanding, whether recorded in writing or otherwise, that the Intermediary shall, whether, directly or indirectly lend or invest in other persons or entities identified in any manner whatsoever by or on behalf of the company ("Ultimate Beneficiaries") or provide any guarantee, security or the like on behalf of the Ultimate Beneficiaries;

ii. Whether the management has represented, that, to the best of it's knowledge and belief, other than as disclosed in the notes to the accounts, no funds have been received by the company from any person(s) or entity(ies), including foreign entities ("Funding Parties"), with the understanding, whether recorded in writing or otherwise, that the company shall, whether, directly or indirectly, lend or invest in other persons or entities identified in any manner whatsoever by or on behalf of the Funding Party ("Ultimate Beneficiaries") or provide any guarantee, security or the like on behalf of the Ultimate Beneficiaries; and

iii. Based on such audit procedures that the auditor has considered reasonable and appropriate in the circumstances, nothing has come to their notice that has caused them to believe that the representations under sub-clause (i) and (ii) contain any material mis-statement.

(5) Whether the dividend declared or paid during the year by the company is in compliance with section 123 of the Companies Act, 2013.

(6) Whether the company, in respect of financial years commencing on or after the 1st April, 2022, has used such accounting software for maintaining its books of account which has a feature of recording audit trail (edit log) facility and the same has been operated throughout the year for all transactions recorded in the software and the audit trail feature has not been tampered with and the audit trail has been preserved by the company as per the statutory requirements for record retention.

(g) Where any of the matters is answered in the negative or with a qualification, the auditor's report shall state the reason for the same.

Example 17: MNO Ltd. is a listed company engaged in the business of trading of various products. The company also plans to start manufacturing of certain products which are currently traded.

During the course of its audit, the auditors completed all the procedures related to audit of financial statements. However, the auditor got stuck on one procedure because of which audit has not got concluded.

Auditors are waiting for certain additional information – Directors report and Management Discussion and Analysis (MD&A) for their review. However, the management is not ready with this information and wants the auditors to complete their work without review of this information. Please advise as per the legal requirements.

Answer: In the given case, the requirement of the auditors regarding additional information i.e., Directors report and MD&A without which they have not been able to conclude the audit doesn't look valid. The auditor is required to audit the financial statements and express an opinion on the same. The auditor does not audit these additional informations.

Hence the auditor should conclude the work without delaying because of this additional information.

(h) Compliance with auditing standards [Section 143(9) and 143(10)]:

(1) Every auditor shall comply with the auditing standards.

(2) The Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the ICAI, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority (NFRA).

(3) It is further provided that until any auditing standards are notified, any standard or standards of auditing specified by the ICAI shall be deemed to be the auditing standards.

(i) Additional matters to be reported in case of specified companies [Section 143(11)]: In respect of such class or description of companies, as may be specified in the general or special order by the Central Government, may in consultation with the NFRA direct, the auditor's report shall also include a statement on such matters as may be specified therein.

CARO 2020 issued by MCA should be complied by the statutory auditor of every company on which it applies.

iii. Reporting of frauds by auditors [Section 143(12)]:

Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

Provided that in case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board in other cases within such time and in such manner as may be prescribed:

Provided further that the companies, whose auditors have reported frauds under this sub-section to the audit committee or the Board but not reported to the Central Government, shall disclose the details about such frauds in the Board's report in such manner as may be prescribed.

(1) The Companies (Audit and Auditors) Amendment Rules, 2015, issued by the Ministry of Corporate Affairs, on 14 December 2015, amended Rule 13 of the Companies (Audit and Auditors) Rules, 2014. The amended Rule 13 has introduced the thresholds for the purpose of reporting on frauds and a differential reporting responsibilities of the statutory auditor with respect to the fraud(s) above or below the notified threshold.

As per the amended Rule 13, if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud, which involves or is expected to involve an amount of Rs. 1 crore or above, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government in following manner:

(a) the auditor shall report the matter to the Board or the Audit Committee, as the case may be, immediately but not later than 2 days of his knowledge of the fraud, seeking their reply or observations within 45 days;

(b) on receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days from the date of receipt of such reply or observations;

(c) in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;

(d) the report shall be sent to the Secretary, Ministry of Corporate Affairs (MCA) in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same;

(e) the report shall be on the letter-head of the auditor containing postal address, e-mail address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and

(f) The report shall be in the form of a statement as specified in Form ADT-4.

(2) In case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board immediately but not later than two days of his knowledge of fraud and he shall report the matter specifying the following:

i. Nature of fraud with description;
ii. Approximate amount involved; and
iii. Parties involved.

(3) The following details of each of the fraud reported to the Audit Committee or the Board under sub-rule (3) of amended Rule 13 during the year shall be disclosed in the Board's Report:

i. Nature of fraud with description;
ii. Approximate amount involved;
iii. Parties involved, if remedial action not taken; and
iv. Remedial actions taken.

(4) The provision of this section shall mutatis mutandis apply to a Cost Auditor and a Secretarial Auditor during the performance of his duties under section 148 and section 204 respectively.

Penalty for non-compliance of section 143(12): If any auditor, cost accountant, or company secretary in practice does not comply with the provisions of sub-section (12), he shall —

(a) in case of a listed company, be liable to a penalty of Rs. 5,00,000; and
(b) in case of any other company, be liable to a penalty of Rs. 1,00,000.

Good Faith [Section 143 (13)]: No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred to in sub-section (12) if it is done in good faith.

Example 18: NSH Ltd is engaged in the business of retail and is listed on National stock exchange. The company recently acquired a business undertaking to expand its business. During the year, certain transactions amounting to thousands of rupees were carried out by the employees/ directors of the company which the management found suspicious and appointed a forensic consultant to carry out their review. Pursuant to this review process, certain suspect transactions were identified by the management and the management reported these transactions to the appropriate authorities. During the course of statutory audit, such transactions were also made known to the statutory auditors. How should the auditor dealt with such matter?

Answer: The auditors need to report about this matter appropriately in their CARO report.

As per Section 143(12) of the Companies Act, 2013, the auditor is required to report to the Audit Committee or to the Board of Directors and, where applicable, to the Central Government an offence of fraud in the company by its officers or employees only if he is the first person to identify/note such instance in the course of performance of his duties as an auditor. In this case, the suspicious transactions have been identified by the management first and information about the same has been given by the management to the auditor. Accordingly, the auditor should report about this matter to the Audit Committee/ Board of Directors but the auditor would not be required to report the same to Central Government.

iv. Audit of Government Companies [Section 143(5), (6) & (7)]:

(a) In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the CAG shall appoint the auditor under section 139(5) or 139(7) and direct such auditor the manner in which the accounts of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the CAG.

(b) The audit report among other things, include the following:

(1) the directions, if any, issued by the CAG;

(2) the action taken thereon; and

(3) its impact on the accounts and financial statement of the company.

(c) The CAG shall within 60 days from the date of receipt of the audit report have a right to—

(1) conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorize in this behalf; and for the purposes of such audit, require information or additional information to be furnished to any person or persons, so authorized, on such matters, by such person or persons, and in such form, as the CAG may direct; and

(2) comment upon or supplement such audit report.

(d) Any comments given by the CAG upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under section 136(1) and also be placed before the AGM of the company at the same time and in the same manner as the audit report.

(e) Test Audit: For Government Company or Company controlled by State Government or Central Government, the CAG may, if he considers necessary, by an order, cause test audit to be conducted of the accounts of such company, without prejudice to the provisions related to Audit and Auditors. The provisions of section 19A of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971, shall apply to the report of such test audit.

v. Audit of accounts of branch office of company [Section 143(8)]:

(a) Branch office in India:

Where a company has a branch office, the accounts of that office shall be audited either by:

A. the company's auditor appointed under section 139, or
B. by any other person qualified for appointment as an auditor of the company under section 139.

(b) Branch office outside India:

If the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by:

A. the company's auditor or
B. by an accountant or
C. by any other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country.

(c) The duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor, if any, shall be as contained in sub-sections (1) to (4) of section 143.

(d) The branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

(e) The provisions regarding reporting of fraud by the auditor shall also extend to such branch auditor to the extent it relates to the concerned branch.

vi. Application of provisions of section 143 to Cost Accountants and Company Secretary [Section 143(14)]:

The provisions of this section shall mutatis mutandis apply to:

(a) the cost accountant conducting cost audit under section 148; or
(b) the company secretary in practice conducting secretarial audit under section 204.

7. AUDITOR NOT TO RENDER CERTAIN SERVICES [SECTION 144]

Section 144 of the Companies Act, 2013 provides for Auditor not to render certain services. According to this section:

An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be. But such services 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;

(h) management services; and

(i) any other kind of services as may be prescribed.

[However, no other kind of services has been prescribed till date]

Explanation: The term "directly or indirectly" shall include rendering of services by the auditor —

(1) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trademark or brand is used by such individual;

(2) in case of auditor being a firm, either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trademark or brand is used by the firm or any of its partners.

Example 19: MNP Ltd is a medium-sized company engaged in the business of pharmaceuticals. For the year ended 31st March 2018, the company is looking for appointment of GST (Goods and Services Tax) auditor. The company wants to appoint somebody for this work who is familiar with the business of the company i.e. who would have worked with the company in the past so that lesser efforts are required to get the GST audit completed. The company has options of Statutory auditors that can be appointed for this work for betterment of company.

8. AUDITORS TO SIGN AUDIT REPORTS, ETC. [SECTION 145]

Section 145 of the Companies Act, 2013 provides for auditors to sign audit reports, etc. According to this section:

i. The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company in accordance with the provisions of sub-section (2) of section 141 (i.e., in case of firm including LLP, only Chartered Accountants are authorized to act as statutory auditors and sign).

ii. The qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

9. AUDITORS TO ATTEND GENERAL MEETING [SECTION 146]

Section 146 of the Companies Act, 2013 provides for auditors to attend general meeting. According to this section:

i. All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company.

ii. The auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorized representative, who shall also be qualified to be an auditor, any general meeting.

iii. The auditor shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

10. PUNISHMENT FOR CONTRAVENTION [SECTION 147]

Section 147 of the Companies Act, 2013 provides for punishment for contravention. According to this section:

i. Penalty on company [Section 147(1)]:

If any of the provisions of sections 139 to 146 (both inclusive) is contravened, the company shall be punishable with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 5,00,000.

ii. Penalty on officers [Section 147(1)]:

If any of the provisions of sections 139 to 146 (both inclusive) is contravened, every officer of the company who is in default shall be punishable with fine which shall not be less than Rs. 10,000 but which may extend to Rs. 1,00,000.

iii. Penalty on auditor [Section 147(2) & (3)]:

(a) If an auditor of a company contravenes any of the provisions of section 139, section 144 or section 145, the auditor shall be punishable with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 5,00,000 or four times the remuneration of the auditor, whichever is less.

(b) If an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with-

(1) imprisonment for a term which may extend to 1 year and

(2) with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 25,00,000 or eight times the remuneration of the auditor, whichever is less.

(c) Further, where an auditor has been convicted as above, he shall be liable to—

(1) refund the remuneration received by him to the company; and

(2) pay for damages to the company, statutory bodies or authorities or to members or creditors of the company for loss arising out of incorrect or misleading statements of particulars made in his audit report.

iv. The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons. Such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification. [Section 147(4)]

v. Liability of Audit firm [Section 147(5)]:

Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in the Companies Act, 2013, or in any other law for the time being in force, for such act shall be of the partner

or partners concerned of the audit firm and of the firm jointly and severally and shall also be liable under section 447.

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.

11. CENTRAL GOVERNMENT TO SPECIFY AUDIT OF ITEMS OF COST IN RESPECT OF CERTAIN COMPANIES [SECTION 148]

Section 148 of the Companies Act, 2013 provides the provisions for Central Government to specify audit of items of cost in respect of certain companies. According to this section:

i. Notwithstanding anything contained in the provisions related to audit and auditor (Chapter X), the Central Government 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 utilisation of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept under section 128 by that class of companies.
ii. The Central Government shall, before issuing such order in respect of any class of companies regulated under a special act, consult the regulatory body constituted or established under such special Act.
iii. If the Central Government 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, which are covered aforesaid and which have a net worth of such amount as may be prescribed or a turnover of such amount as may be prescribed, shall be conducted in the manner specified in the order. An audit conducted under this section shall be in addition to the audit conducted under section 143.
iv. The cost audit shall be conducted by a Cost Accountant who shall be appointed by the Board on such remuneration as may be determined by the members in such manner as may be prescribed.
v. Rule 14 of the Companies (Audit and Auditors) Rules, 2014 provides that—

(1) in the case of companies which are required to constitute an audit committee-

A. the Board shall appoint an individual, who is a cost accountant, or a firm of cost accountants in practice, as cost auditor on the recommendations of the Audit committee, which shall also recommend remuneration for such cost auditor;

B. the remuneration recommended by the Audit Committee under (A) shall be considered and approved by the Board of Directors and ratified subsequently by the shareholders.

(2) in the case of other companies which are not required to constitute an audit committee, the Board shall appoint an individual who is a cost accountant or a firm of cost accountants in practice as cost auditor and the remuneration of such cost auditor shall be ratified by shareholders subsequently.

Companies required to	Companies not required to

constitute Audit Committee	constitute Audit Committee
(a) The Board shall appoint the cost auditor on the recommendation of the Audit Committee. (b) The Audit Committee shall recommend the remuneration for cost auditor. (c) Such remuneration as recommended by the Audit Committee shall be considered and approved by the Board of Directors. (d) Then this remuneration subsequently to be ratified by the shareholders.	(a) The Board shall appoint the cost auditor. (b) The remuneration of such cost auditor shall be ratified by shareholders subsequently.

vi. No person appointed under section 139 as an auditor of the company (i.e. company auditor) shall be appointed for conducting the audit of cost records.

vii. Cost auditor to comply with cost auditing standards: The auditor conducting the cost audit shall comply with the cost auditing standards.

Here, the expression "cost auditing standards" mean such standards as are issued by the Institute of Cost and Works Accountants of India (ICWA), constituted under the Cost and Works Accountants Act, 1959, with the approval of the Central Government.

viii. An audit conducted under section 148 shall be in addition to the audit conducted under section 143.

ix. The qualifications, disqualifications, rights, duties and obligations applicable to auditors (i.e. applicable to company auditor) shall, so far as may be applicable, apply to a cost auditor appointed under section 148 and it shall be the 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.

x. The report on the audit of cost records shall be submitted by the cost accountant to the Board of Directors of the company.

xi. A company shall within 30 days from the date of receipt of a copy of the cost audit report furnish the Central Government with such report along with full information and explanation on every reservation or qualification contained therein.

Vide Notification dated 9th September, 2015 under the Rule 4 of the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015, a company which is required to furnish cost audit report and other documents to the Central Government under sub- section 6 of the section 148 of the Act and rules made thereunder, shall file such report and other documents using the XBRL taxonomy given in Annexure III for the financial year commencing on or after 1 April 2014 in e-form CRA-4 specified under the Companies(Cost Records and Audit) Rules, 2014.

xii. If, after considering the cost audit report and the information and explanation furnished by the company, the Central Government is of the opinion that any further information or explanation is necessary, it may call for such further information and explanation and the company shall furnish the same within such time as may be specified by that Government.

xiii. **Contravention:** If any default is made in complying with the provisions of section 148—

(a) The company and every officer of the company who is in default shall be punishable in the manner as provided in section 147(1);

(b) the cost auditor of the company who is in default shall be punishable in the manner as provided in sub-sections (2) to (4) of section 147.

xiv. The provisions of section 143 shall mutatis mutandis apply to the cost accountant conducting cost audit under section 148.

Chapter 10 : Legal Framework Governing Company Secretaries

INTRODUCTION

The need to have a profession of Company Secretaries was first felt in early 50'S, when the business environment had Started changing, that had necessitated the Services of a professional to bring Corporate Discipline.

The Government Set up an Advisory Board on a non-Statutory basis, to help it in Standardizing the basic qualifications needed for manning the position of Company Secretaries and to hold the qualifying examination.

Subsequently, the Department of Company Affairs conducting examination leading to Government Diploma in Company Secretary Ship (GDCS), marked the beginning of the profession of Company Secretaries in an organized manner. Later in the wake of substantial increase in the number of candidates for GDCS, the Institute of Company Secretaries of India was set up and registered as a company on 4th October, 1968 under Section 25 of the Companies Act, 1956 (i.e. not for profit company) with its registered office at New Delhi. The work relating to Company Secretaries' Examination and all allied matters were taken over by the Institute with effect from 1st January 1969.

In 1980, the Government moved the Company Secretaries Bill, 1980 to convert the Institute into a statutory body.

Some legal terminologies and interpretation

According to Section 2(1)(c)of the Company Secretaries Act, 1980**"Company Secretary"** means a person who is a member of the Institute of Company Secretaries of India.

Under the Companies Act, 2013 Company Secretary has been defined under Section 2(24) as: 'Company Secretary' or 'Secretary' means a Company Secretary as defined in Section 2(1)(c) of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of the Company Secretary under the Companies Act, 2013.

Associates and Fellows

The members of the Institute Shall be divided into two classes designated respectively as Associates and Fellows.

(1) Associate Members

According to Regulation 4(1) of The Company Secretaries Regulations, 1982 as amended by The Company Secretaries (Amendment) Regulations, 2020.

No person shall be entitled to have his name entered in the Register as an Associate, unless he-

(a) has passed examinations conducted by the dissolved company and has completed practical training either as prescribed in the earlier regulations or as prescribed in the Company Secretaries (Amendment) Regulations, 2020 or has passed the qualifying

examinations and completed the practical training as prescribed in these regulations; or

(b) has passed such other examination and completed such other training outside India as is recognized by the Central Government or the Council as being equivalent to the examination and training prescribed in these regulations; or

(c) had registered himself as a student with the Institute of Chartered Secretaries and Administrators, London on or before 31st December, 1972 and had passed the Final Examination or Professional Programmed Examination of that Institute and had either possessed the required practical experience or undergone the prescribed practical training as stipulated for candidates passing the Final Examination or Professional Programmed Examination conducted by the Institute; or

(d) is an Indian citizen who is a "person resident outside India" as defined in Foreign Exchange Management Act, 1999 and has become a member of the Institute of Chartered Secretaries and Administrators, London, after passing the qualifying examination conducted by that Institute and had either possessed and required practical experience in India or abroad, or undergone the prescribed practical training as stipulated for the candidates passing the Final Examination or Professional Programmed Examination conducted by the Institute.

(2) Fellow Members

According to Regulation 4(2) of The Company Secretaries Regulations, 1982 as amended by The Company Secretaries (Amendment) Regulations, 2020.

(i) No person Shall be entitled to have his name entered in the Register as a Fellow unless he -

(a) was a Fellow including Honorary Fellow of the dissolved company immediately before the commencement of the Act; or

(b) was admitted as a Fellow under the earlier regulations; or

(c) is an Associate and has been in continuous practice in India as a Company Secretary for at least 5 years; or

(d) is an Associate for a continuous period of not less than 5 years and possesses such qualifications or practical experience as may be determined by the Council.

(ii) No Associate member Shall be admitted as a fellow member of the Institute, if; -

(a) he has been found guilty of any professional or other misconduct and his name has been removed from the Register or he has been imposed fine referred in Section 21A(3) or Section 21B(3) at any time during the preceding 5 years on the date of application; or

(b) he has not completed such minimum numbers of Professional Development Credit Hours as may be Determined by the Council:

Certificate of Practice

A member is entitled to continue the practice of Company Secretary, whether in India or elsewhere, only after obtaining a Certificate of Practice.

Deemed "to be in Practice"

A member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognized professions as may be prescribed, he, in consideration of remuneration received or to be received, -

(a) engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or

(b) offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganization or winding up of companies; or

(c) offers to perform or performs such services as may be performed by -

(i) unauthorized representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,

(ii) a Share transfer agent,

(iii) an issue house,

(iv) a share and stock broker,

(v) a secretarial auditor or consultant,

(vi) an adviser to a company on management, including any legal or procedural matters

(vii) issuing certificates on behalf of, or for the purposes of, a company; or

(d) holds himself out to the public as a Company Secretary in practice; or

(e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or

(f) Renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice.

Register of Members

The Council shall maintain in the prescribed manner a Register of the members of the Institute. The Register shall include the following particulars about every member of the Institute, namely: —

(a) his full name, date of birth, domicile, residential and professional addresses;

(b) the date on which his name is entered in the Register;

(c) his qualifications;

(d) whether he holds a certificate of practice; and

(e) any other particulars which may be prescribed.

The Council shall cause to be published in the list of members of the Institute as on the 1st day of April of each year. Every member of the Institute Shall, on his name being entered in the Register, pay annual membership fee as may be decided by the council

from time to time.

Removal from the Register of members

In the following cases the Council may remove from the Register the name of any member of the Institute—

(a) who is dead; or

(b) from whom a request has been received to that effect; or

(c) who has not paid any prescribed fee required to be paid by him; or

(d) who is found to have been subject at the time when his name was entered in the Register, or who at any time thereafter has become subject, to any of the disabilities mentioned in section 8, or who for any other reason has ceased to be entitled to have his name borne on the Register.

The Council Shall remove from the Register the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute.

Disciplinary Mechanism

The member of the Institute is subject to the Disciplinary mechanism provided for under Chapter V of the Company Secretaries Act, 1980 (the Act).

Disciplinary Directorate

Section 21 of the Act provides for the establishment of a Disciplinary Directorate headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it. On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct.

Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, the matter shall be placed before the Board of Discipline.

Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, the matter shall be placed the Disciplinary Committee.

Board of Discipline

The Board of Discipline Shall be constituted by the Council of the Institute under Section 21A of the Companies Act, 1980. The Board of Discipline shall follow summary disposal procedure in dealing with all the cases before it.

Where the Board of Discipline is of the opinion that a member is guilty of a professional or other misconduct mentioned in the First Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:—

(a) reprimand the member;

(b) remove the name of the member from the Register up to a period of three months;

(c) impose Such fine as it may think fit which may extend to Rs.1 lakh.

The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter.

Disciplinary Committee

According to Section 21B a Disciplinary Committee Shall be constituted by the Council. The Disciplinary Committee Shall consist of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy.

The Council may constitute more Disciplinary Committees as and when it considers necessary. The Disciplinary Committee, while considering the cases placed before it, Shall follow such procedure as may be specified.

Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely: —

(a) Reprimand the member;

(b) Remove the name of the member from the Register permanently or for Such period, as it thinks fit;

(c) Impose such fine as it may think fit, which may extend to rupees five lakhs.

Authority, Disciplinary committee, Board of Disciplinary and director (Disciplinary) to have power of civil court

Section 21C provides that for the purposes of an inquiry under the provisions of this Act, the Authority, the Disciplinary Committee, Board of Discipline and the Director (Discipline) shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely: —

(a) Summoning and enforcing the attendance of any person and examining him on oath;

(b) the discovery and production of any document; and

(c) Receiving evidence on affidavit.

Appeal to Authority

Under Section 22A of the Act the Appellate Authority constituted under Sub-Section (1) of Section 22A of the Chartered Accountants Act, 1949, Shall be deemed to be the Appellate Authority for the purposes of this Act, Subject to certain modifications.

Accordingly, any member of the Institute aggrieved by any order of the Board of

Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in Section 21A and Section 21B, may within 90 days from the date on which the order is communicated to him, prefer an appeal to the Authority.

The Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority if so authorized by the Council, within ninety days.

The Authority may entertain any such appeal after the expiry of the said period of 90 days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under Section 21A(3) and Section 21B(3) and may –

(a) confirm, modify or set aside the order;

(b) impose any penalty or set aside, reduce, or enhance the penalty imposed by the order;

(c) remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of the case; or

(d) pass such other order as the Authority thinks fit.

Provided that the Authority shall give an opportunity of being heard to the parties concerned before passing any order.

Certain provisions relating to misconduct under the Company Secretaries Act, 1980

Professional misconduct in relation to members of the Institute is broadly structured under Schedule I and Schedule II of the Act:

(a) Professional misconduct in relation to **Company Secretaries in Practice** (Part I of the First Schedule);

(b) Professional misconduct in relation to **members of the Institute in Service** (Part II of the First Schedule);

(c) Professional misconduct in relation to **members of the Institute generally** (Part III of the First Schedule);

(d) Other misconduct in relation to **members of the Institute generally** (Part IV of the First Schedule);

(e) Professional misconduct in relation to **Company Secretaries in practice requiring action by disciplinary committee** (Part I of the Second Schedule);

(f) Professional misconduct in relation to **members of the Institute generally, requiring action by disciplinary committee** (Part II of the Second Schedule);

(g) Other misconduct in relation to members of the Institute generally (Part III of the Second Schedule).

The detailed provisions relating to misconduct and disciplinary mechanism are contained in Sections 21, 21A, 21B, 21C, 21D & 22 and the First and the Second Schedules to the

Act and the Rules made thereunder.

(a) Professional misconduct in relation to company secretaries in practice (Part 1 of the First Schedule to the Act)

Part I of the First Schedule to the Act deals with professional misconduct in relation to Company Secretaries in practice. It contains 11 clauses in all. The implications of various clauses in Part I are briefly explained herein below:

Clause (1)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he -

"Allows any person to practice in his name as a Company Secretary unless such person is also a Company Secretary in Practice and is in partnership with or employed by him."

This rule is intended to ensure that the professional work is done by a qualified professional so as to protect the client's/public interest. The rule permits another person to practice in the name of a Company Secretary in Practice provided such other person is also a Company Secretary in Practice and is in partnership with or is employed by the Company Secretary in Practice in whose name the work is to be carried out.

This clause read with clause 11 of Part I of the First scheduled does not permit PCS to allow any person to practice in his name as a Company Secretary or to allow any person to Sign as PCS, unless such person is also a Company Secretary in Practice or is in partnership with or employed by him.

On a question as to how CA / CWA can become partner(S) of PCS, council has opined that though for the time being CA/CWA etc. cannot become partners of a PCS but after the amendments to the relevant provisions, person(S) who are non-members, may become partners of PCS and may be allowed to provide non-attestation services.

Two persons are said to be in Partnership when they work together on mutual faith and agency. Sharing of remuneration does not make them partners. Thus, an associate who is not a part of decision making process does not become a partner. Following tests if fulfilled cumulatively may make two persons partners of each other:

i. sharing of profits and or losses.
ii. taking decisions together.
iii. sharing the responsibilities of such decision making.
iv. acting on behalf of each other and binding other person with one own acts of commission or omission.

Sharing of common infrastructure at same or different geographical location are not relevant at all to decide the Relationship.

Clause (2)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner or a member of any other professional body or with such other persons having such qualifications as may be prescribed, for the purpose of rendering Such professional services from time to time in or outside India.

Explanation **— in this item, 'partner' includes a person residing outside India with whom a Company Secretary in Practice has entered into partnership which is not in contravention of item (4) of this part."**

This clause does not prohibit a Company Secretary in Practice from sharing fees, commission or brokerage in the fees or profits of his professional business, with any other member of the Institute or a partner or a retired partner or the legal representative of a deceased partner. Such Sharing of fees, commission or brokerage in the fees or profits of professional business is also permissible with members of such professional bodies or with such other persons having such qualifications as may be prescribed from time to time. This provision is made primarily to encourage multi-disciplinary partnership.

In terms of clause (2) of Part II of the First Schedule to the Act, a member of the Institute in Service shall be deemed to be guilty of professional misconduct, if he being an employee of any company, firm or person, accepts or agrees to accept any part of fees, profits, or gains from a lawyer, a Company Secretary or broker engaged by such company firm or person or agent or customer of such company, firm or person by way of commission or gratification. Accordingly, a Practicing Company Secretary cannot Share fees with an employee Company Secretary.

In the case of a Sole proprietorship firm, on the death of the proprietor of the firm, there cannot be any sharing of fees between the purchaser of the goodwill of the firm and the legal representative of the proprietor. Payment of goodwill is permissible, which can be in installments as provided in the agreement of Sale of goodwill. The payment of goodwill shall, in no circumstances be linked with participation in the earnings of the firm of the buyer of the goodwill.

It may appear that this Clause permits sharing of fees by PCS with members of the Institute who are not employed but are practicing as CA / CWA or an Advocate. However, this does not appear to be the intention. The term "Professional Business" used may be understood as professional activities.

CA/CWA may become partners of PCS only for non-attestation Services i.e., only for the purposes as contemplated by clause n. 2, 3, 4 & 5 of the First Schedule and CA / CWA cannot become full-fledged partners as contemplated by Clause 1 of Part I of the First Schedule. That is to say a PCS even if he is allowed to be a partner of a Chartered Accountant, will not be able to sign the Auditors report on behalf of the multidisciplinary firm.

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Council in its 177th meeting held on 27th November 2007 has passed following resolution:

"168A: Other Professional bodies: —

(1) For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, a person has to be member of any of the following, namely:

(a) The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;

(b) The Institute of Cost Accountants of India established under the Cost and Works Accountants Act, 1959;

(c) The 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 Secretaryship are recognized by the Council under Section 38(2) of the Act.

(2) For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, the following shall be the persons qualified in India, namely:

(a) Chartered Accountant within the meaning of the Chartered Accountants Act, 1949;

(b) Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959;

(c) Actuary within the meaning of the Actuaries Act, 2006;

(d) Bachelor in Engineering from a University established by law or an institution recognized by law;

(e) Bachelor in Technology from a University established by law or an institution recognized by law;

(f) Bachelor in Architecture from a University established by law or an institution recognized by law;

(g) Bachelor of Law from a University established by law or an institution recognized by law;

(h) Master in Business Administration from Universities established by Law or Technical Institutions recognized by All India Council for Technical Education."

Clause (3)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute:

Provided that nothing herein contained shall be construed as prohibiting a member from entering into profit sharing or other similar arrangements, including receiving any share commission or brokerage in the fees, with a member of such professional body or other person having qualifications, as is referred to in item (2) of this part."

This is the converse of clause (2) wherein a Company Secretary in Practice 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, under clause a Company Secretary in Practice 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, as is referred to in clause (2).

Clause (4)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

"he enters into partnership, in or outside India, with any person other than a Company Secretary in Practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause of Section 4(1) - or whose qualifications are recognized by the Central Government or the Council for the purpose of permitting such partnerships."

This clause prohibits a Company Secretary in Practice entering into partnership with any person other than a Company Secretary in Practice or a member of any other recognized profession. Even entering into partnership with persons, who are not members of the Institute, for the purposes of carrying on a business and not the profession of Company Secretaries, would attract the mischief of the clause.

Also, partnership with any other person residing outside India but possessing qualifications recognized by the Central Government or the Council under Section 4(1)(e) of the Act, is permitted.

The purpose behind clause (4) is that a Company Secretary in Practice should not enter into partnership with any non-recognized professionals. In recognizing any other profession for partnership, the compatibility of the other profession with the Company Secretaries' profession would be a relevant factor.

The council has passed the resolution by inserting the following regulation in The Company Secretaries Regulations, 1982.

"168B. Membership of Professional body for Partnership —

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:

(a) The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;

(b) The Institute of Cost Accountants of India established under the Cost and Works Accountants Act, 1959;

(c) Bar Council of India established under the Advocates Act, 1961;

(d) The Institute of Engineers or Engineering from a University established by law or an institution recognized by law;

(e) The Indian Institute of Architects established under the Architects Act, 1972;

(f) The Institute of Actuaries of India established, under the Actuaries Act, 2006;

(g) Professional bodies or institutions outside India whose qualifications relating to Company Secretary recognized by the Council under Section 38(2) of the Act.";

Clause (5)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

"he Secures, either through the Services of a person who is not an employee of such Company Secretary or who is not his partner or by means which are not open to a Company Secretary, any professional business.

Provided that nothing herein contained shall be construed as prohibiting any arrangement permitted in terms of items (2), (3) and (4) of this part."

The clause covers instances of obtaining professional work by unethical means and by means which are not open to a Company Secretary.

Council has issued guidelines for advertisement by PCS. These guidelines were approved by the council in its 178th Meeting held on 29th of December, 2007. A PCS can therefore, within the parameters of the above guidelines issue advertisement / launch his own website and such action on the part of PCS would not be treated as violation of Clause 5 as well as Clause 6 of the Part I of the First Schedule.

Clause 5 of part I of first Schedule is very clear that no member in practice should Secure any professional business through propagation, etc., the member in practice have to be cautious that any kind of wording or message in the website created by them shall not indicate or imply Securing/Solicitation of business/client.

However, any act of omission or commission beyond the permitted methods as per the guidelines would amount to Misconduct.

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Clause (6)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if:

"he Solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means:

Provided that nothing herein contained shall be construed as preventing or prohibiting:

(i) any Company Secretary from applying or requesting for or inviting or securing professional work from another Company Secretary in practice; or

(ii) a member from responding to tenders or enquires issued by various users of professional services an organization's from time to time and securing professional work as a consequence."

This clause further fortifies the proposition under clause (5) about securing clients or professional work. Solicitation of clients or solicitation of professional work or both, are prohibited. Such a solicitation may be direct or indirect and such a solicitation may further be by means of a circular, advertisement, personal communication or interview or any other means.

The bedrock of this rule is that a professional should gain recognition by rendering expert services, to a few though in the beginning, who would themselves lead others to him. A true professional should command honor and not demand it. The conduct of the member is noted all the times by the society at large and their ethics and integrity towards the profession itself is sufficient for growth. So, the purpose of this clause is, to ensure that a professional secures work by his credibility, reliability and integrity in the public eyes and not by advertisement adversely affecting the image of the professional and also the profession.

The word 'Solicit' has various shades of meaning. According to Legal Thesaurus, it means bait, (lure) desire, importune, inquire, lobby, petition, plead (implore), apply (request), pray, pressure, pursue, (Strive to gain), urge. 'Solicit' means 'ask for' or 'Seek'. Means of Solicitation may be a circular, advertisement, personal communication or by any other means. The phrase 'by any other mean's used in this clause would perhaps exhaust other means like telephonic conversation, mail, electronic means and messages/social media or even third-party Solicitation.

The word 'indirectly' used in this clause suggests that even innuendos would not be tolerated under this clause. If the overall message of the alleged act is Solicitation of clients or professional work, though this lurks or lies beneath what has apparently been done, clause 6 would Stand attracted.

1. Circular or advertisement in newspapers indicating the range of Services offered by him.
2. A circular letter offering Secretarial Services and professional work.
3. Any circular, advertisement or communication which creates an impression that certain professional work would be done much more expeditiously than is normally the case. Like

for instance, registration of a company in, say, two days' time or registration of a charge in one day's time, etc.

4. Circular, advertisement or personal communication highlighting any provision of any law, to person other than existing clients, which provides for certification/ authentication by a Company Secretary in Practice of any form/return/application/document.
5. Issuing hand bills covering matters in (1) to (4) above.
6. Publication in the telephone directory, name and address in extra bold typeface or opting for more than one listing. However, where Separate Sections are devoted in the telephone directory (yellow pages, for instance) for a classified list, publishing the name and address by a member in such sub-section in the directory would not be treated as misconduct.
7. Communicating or holding out, as being prepared to provide professional services at fees that are less than reasonable and appropriate in the circumstances, in order to obtain professional work.
8. Communicating or describing himself as a 'Specialist' in any branch of law/work or knowingly permitting himself to be so described.
9. A member allowing a company to carry in its prospectus or other circular letters that 'Mr. X a Specialist in corporate laws is the adviser to the company' would offend clause (6). However, printing the name of Practicing Company Secretary as Secretarial Auditor in Annual Report will not violate the provisions of the Act.
10. Requesting his client(s) to recommend his/their acquaintances to him for professional work.
11. Frequent press announcements or circulars about his not being available for professional work for a certain period at the place whereat he normally has his office.
12. Highlighting or causing to be highlighted in public interviews over the television, AIR, etc. their professional attainments, more than just necessary or warranted by the circumstances of such an interview, making tall claims, indicating Supremacy over other professional colleagues, etc. However, sending bio data to organizers of the programmers/seminars, etc., where they have been invited as a faculty, is not violate of this clause.
13. Writing to any institution/agency that though, he is in the panel; no work has been allotted to him. Even approaching through a third person is violate of this clause.
14. Approaching any trade association/chamber of commerce/ business forum, communicating his ready availability for rendering any professional Service to the constituents of any association or chamber.
15. Sending his profile to persons/companies/firms without any requisition for the same.
16. Including names of other professionals in his profile circulated to various persons.

The Professional Development Committee of the Council of the Institute has opined that listing of Services by a Company Secretary with a group for creation of network of affiliates which is non-professional and not a group of company Secretaries would amount to commercialization of the profession and therefore such listing would amount to violation of the Code of Conduct.

However, the following would not fall into the mischief of clause (6):

1. publishing in the journal of the Institute or newspaper any change in the professional address;
2. publishing in professional journals, newspapers and magazines in any classified column, any advertisement for recruitment of Staff without in any way giving an impression about the services that he can render, or in other manner Smacking of Solicitation of work;
3. publishing information regarding changes in the constitution of firm, provided the information contained therein is limited to bare facts and consideration given to appropriateness of the area in which the newspaper or magazine is circulating and the number of insertions;
4. Sending New Year or any other Seasonal greetings without narrating the list of Services, professional attainments, Supremacy or any kind of indication Seeking clients;
5. Appearance in AIR, TV or any Stage in private capacity as a Speaker, actor or otherwise on programmers having no nexus with his profession. Any reference to him only as a Company Secretary and nothing beyond that in such programmers would not offend clause (6);
6. appearance or participation in professional capacity in the AIR/TV or other forums where a reasonable amount of biographical material may be given without in any way referring to the member as specialist in any branch of work;
7. editing/publishing any professional journal, newspaper and magazines;
8. writing articles/comments in professional journals, magazines and newspapers;
9. associating with charitable, other welfare associations and trade associations without in any way using such position to Solicit clients/ professional work;
10. writing to his existing clients about implications/interpretations of any law or amendments thereof by way of any circular, newsletter or any personal communication or by way of print/electronic means of communication;

    The Council of the Institute in a case held that the Conduct of the member in practice by mentioning against his name 'Company Secretary' in the issue of 'Secretarial Aid' a journal edited by him was violate of Clause (6) of Part I of First Schedule to the Act. It was observed that the words 'for further clarification please contact the Editor' was an indirect attempt to Solicit professional work;

    Responding to a Specific letter or a follow up of personal discussions and Sending a profile of a firm/ individual to Specific addresses is not prohibited;

11. Stating the assignments handled by him in his profile. However, the name of the clients

Should be Supplied only against Specific request of the client for the Same;

12. Issuing advertisement in Chartered Secretary for opening branch or Seeking partnership with other members;
13. Issuing advertisement or launching website within the frame work of guidelines issued by the council about advertisement by PCS;
14. Securing professional work from another PCS is now expressly permitted;
15. Responding to tenders or enquires issued by various users of professional Services and Securing professional work as a consequence is now expressly permitted.

Clause (7)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if:

"He advertises his professional attainments or services, or uses any designation or expressions other than Company Secretary on professional documents, visiting cards, letterheads or Signboards, unless it be a degree of a University established by law in India or recognized by the Central Government or a title indicating membership of the Institute of Company Secretaries of India or of any other institution that has been recognized by the Central Government or may be recognized by the Council.

Provided that a member in practice may advertise through a write up Setting out the Services provided by him or his firm and particulars of his firm Subject to Such guidelines as may be issued by the Council."

This clause covers two aspects –

i. Advertisement of professional attainments or Services by a Company Secretary in Practice; and
ii. Using the designation 'Company Secretary';

As regards the ban on advertisement of professional attainments or Services, almost all the professions all over the world had this type of restriction at least to start with. The idea behind this restriction was that advertisement by professionals is incompatible with the qualities of integrity and independence which a professional is expected to possess, especially when these acts are motivated by a desire for personal gain. The advertisement of professional attainment or services under this clause is completely prohibited except where the Company Secretary in Practice advertises as per the guidelines issued by the council, through a write up setting forth Services provided by him or his firm.

A PCS cannot include in his advertisement following particulars like the infrastructure available in his own office, details of Associate PCS, details of his networking in other places within & outside India, infrastructure at such networked offices, number of trainees who have completed training from his office, certain landmark achievements like number of companies incorporated Since he Started his practice, number of appearances made before CLB/ NCLT, CBDT, Tribunals , Regulatory Authorities,

Commissions , number of Foreign Collaborations handled, number of Merger & Acquisitions handled, Number of due diligence carried out etc.

Council is of the view that a PCS can be permitted to allow his clients to use his name in their brochure/ hoardings etc. e.g. Builders invariably write the names of Architects, RCC Consultants, legal advisors on the Board at the construction site. Similarly, the name of PCS may also be written. Certain software companies desire to use the name of PCS in their marketing brochure for their products while giving a list of satisfied customers. A PCS is permitted to allow his name to be used as one of the satisfied customers of particular software.

What amounts to advertisement of professional attainments or services is to be decided on a case to case basis, having regard to the attendant facts. For instance, where in the visiting card or name board or letterhead, a member in practice mentions that he is a specialist or expert in company law, tax law, etc. it would amount to advertisement of professional attainments or services.

Where a member in practice furnishes upon a specific request by a prospective client, a list of companies for whom he is a consultant/ retainer or writes his specific subjects of Specialization, it may not be objectionable.

Where in the letterhead or visiting card, a member in practice mentions that he was or is holding directorships in any company; it would be offending this clause.

Advertisement by a Practicing member for Staff for his office in the press should in no way Savor of any advertisement of professional attainments or Services. The use of certain adjectives like "a reputed firm", "a well-known firm", etc. may be treated as inconsistent with the Spirit of this clause.

Similarly, announcement in the press by a Practicing member in regard to certain attainments like having been named for certain public awards, acquisition of merit in other professional examinations and other recognitions in any important committee, commission, governing body, etc. Should be suitably modified so as not to be construed as amounting to advertisement of professional attainments or Services. Advertisement for part-time assignments fall under the mischief of this clause.

Circulars or announcement regarding change of address, or change in the constitution of the firm should be very cautiously worded to tell just the minimum necessary facts.

Where a Company Secretary in Practice has been appointed as retainer/consultant by certain companies, it would not be proper to either list the names of such companies in letterheads, visiting cards or Signboards or to circulate the list among prospective clients by way of circular. However, including such names, while sending individual profile in response to a specific enquiry is permitted.

Where a Company Secretary in Practice takes up the position of a director in a company, it is incumbent on his part to exercise great care in regard to references in any explanatory statement in notice of the general meeting reappointing the Practicing Company Secretary brochure or circular brought out in connection with an issue of

securities of the company etc. The member concerned is to ensure personally that laudatory statements in such literature about his professional competence, while highlighting the Board's competence as a whole, are avoided; otherwise liability under clause (7) would attract.

The Council held a member guilty of professional misconduct for misusing the Institute's letter head, brochures, circulars, etc. mentioning his name with designation, description and the Practicing field other than as prescribed and thus misleading the readers by not mentioning his whole-time employment.

This clause also speaks of using the designation 'Company Secretary' on professional documents, visiting cards, letterheads, Sign-boards, etc. this requirement fortifies the provisions of Section 7 of the Act and in fact is an extension of the requirement in regard to the use of proper designation.

Designations like Company Law Consultant, Income Tax Consultant, Corporate Adviser, Investment Adviser, Management Consultant etc. are prohibited. The use of descriptions indicating membership of the Institute of Chartered Accountants of India, The Institute of Cost and Works Accountants of India and the Bar Councils is permitted provided members are not holding certificate of practice issued by the Institute or using the description 'Company Secretary'. The use of the designation "Practicing Company Secretary". "Company Secretary in whole-time practice", etc. is not violate of this clause.

Where a member in practice had described himself in visiting cards and letter heads as "Company Secretary &Advocate, High Court", the Council held the member guilty of professional misconduct under this clause.

Clause (8)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

"He accepts the position of a Company Secretary in Practice previously held by another Company Secretary in Practice without first communicating with him in writing."

The primary requirement under this clause is of prior communication with the previous incumbent. This is intended for reasons of professional courtesy. The clause is not intended to prevent a client from changing over to another Company Secretary for his own reasons. The client as of right, has full freedom to change over to another Company Secretary.

It would be desirable for the new incumbent to obtain a letter from the company letting him know the name of the earlier incumbent or that no other Company Secretary has been appointed for the same assignment.

It is expressly clarified that the communication mentioned in this clause does not mean that no-objection or consent of the previous incumbent is a prerequisite of accepting the Said assignment.

In regard to certification of Annual Return under Section 92 and for all exclusive attestation assignments, it is incumbent on the Company Secretary; to ascertain if any other Company Secretary had been appointed previously by the company concerned for certification of Annual Return or for issuance of compliance certificate, as the case may be. The appointee shall take positive steps to ascertain if anyone has been engaged earlier, for the same year, for the certification work. In such cases it is not only necessary for the Company Secretary to communicate with the earlier incumbent, but it is desirable to seek his consent in order to uphold the dignity and independence of the profession.

It would be necessary that the communication, in order to be effective, shall be by a registered letter or by hand with an acknowledgement so that there is positive evidence of the communication having been complete.

In a case under a Similar rule of conduct under the Chartered Accountants Act, 1949, the Rajasthan High Court in *J S Bhatti* v. *Council of ICAI* (S.B. Civil Misc. Appeal No. 136 of 1973) observed that mere obtaining a certificate of posting does not fulfill the requirements of clause (8) of Schedule I as the presumption under Section 114 of the Evidence Act that the letter in due course reached the addressee cannot replace that positive degree of proof of delivery of letter to the addressee which letters of the law in this case require.

With the advent of use of the technology, it would proper communication in this regard made by any other electronic medium viz., SMS, What's App and such other Messenger pap's is also permitted, provided the Sender (the PCS taking up the assignment) is able to establish that the message is delivered to the recipient before he or she takes up the assignment. Needless to mention, that a reasonable time should be given to the previous incumbent to offer his response, if any, and it is not just a kind of formality. For sake of better clarity, the new incumbent should express clearly in the communication the details of assignment being taken up by him.

Members have been held guilty of professional misconduct under this clause for having accepted and commenced the certification of Annual Return of a company without first communicating with the earlier incumbent in writing. It has been concluded that mere posting of the letter is not sufficient to comply with the requirements of clause (8) of Part I of First Schedule to the Act, but the delivery of the message to the addressee of the same is essential. Oral communication is no communication as far as this clause is concerned.

It has been observed that majority of the Disciplinary cases were in respect of this clause about not sending written intimation by the new incumbent (PCS).

Therefore, in respect of following it shall not be mandatory (though desirable) to Send a prior written communication to the earlier incumbent:

(a) Certifying e-forms for various companies.

(b) Giving Due Diligence Certificate for consortium borrowers.

(c) Holding assignment as retainer for a company or group of companies.

(d) Issuing Search reports.

(e) Issuing certificates as contemplated under SEBI (LODR) Regulation, 2015.

(f) Giving legal opinion.

In respect of the following, it shall be mandatory to send a prior written communication to the earlier incumbent:

(i) Signing / Certification of Annual Return

(ii) Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013

(iii) Issuance of Certificate of Securities Transfers.

(iv) Certificate of reconciliation of capital, updating of Register of Members, etc. as per the Securities & Exchange Board of India's Circular.

(v) Conduct of Internal Audit of Operations of the Depository Participants.

(vi) Certification of corporate governance under SEBI (LODR) Regulation, 2015.

Clause (9)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if:

"He charges or offers to charge, accepts or offers to accept, in respect of any professional employment, fees which are based on percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act."

Which determine remuneration based on results. For instance, if the Company Secretary in Practice were to quote remuneration in an Excise Refund case, as a percentage of the final amount of refund that may be ordered by an appellate authority, it would be hit by this clause. The fundamental is that the fee should be more related to the expertise required and the time spent on a particular case without in any way linking the fee with the final results.

Clause (10)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if:

"He engages in any business or occupation other than the profession of Company Secretary unless permitted by the Council so to engage:

Provided that nothing contained herein shall disentitle a Company Secretary from being a director of a company except as provided in the Companies Act."

This clause is intended to ensure that a PCS does not engage in vocations which are not compatible with the profession of Company Secretary. This has been provided with a view to ensure the profession develops in its true Sense. Pursuant to the Company Secretaries Regulations, 1982, the Council has decided not to issue certificate of

practice to members engaged in other professions such as Chartered Accountants, Cost Accountants and Advocates and also to members in employment. The Said decision was taken by the Council to give an independent identity and status to the profession and a thrust to the concept of Company Secretary in whole-time practice.

The Council held a member guilty of professional misconduct under this clause for engaging himself in employment while holding a certificate of practice from the Institute.

The Council in an another case held a member guilty of professional misconduct under this clause for holding the certificate of practice of both the Institutes, i.e., ICAI & ICSI without the permission of the Council of the latter and also Practicing both the professions on whole-time bass simultaneously.

Regulation 168(2) of the Regulations provides that a Company Secretary may act as a Secretary, trustee, executor, administrator, arbitrator, receiver, appraiser, value, internal auditor, management consultant or as a representative of financial matters including taxation and may take up appointment that may be made by the Central or any State Government, Courts of Law, labor tribunals, or any authority. From the reading of Regulation 168, it is clear that the various occupations provided in Sub-regulation (2) thereof do not require a specific resolution to be passed by the Council.

It is pertinent to refer to Regulation 168(1) which provides that the prior permission of the Council by a resolution is required for a Company Secretary to engage in any business or occupation other than the profession of Company Secretary. The Council has expressly permitted a PCS to take up following vocations:

(i) Authoring Books and Articles.

(ii) Holding of Life Insurance Agency License for the limited purpose of getting renewal commission.

(iii) Holding of public elective offices Such as M.P., M.L.A., M.L.C. and others.

(iv) Honorary office-bearer Ship of charitable, educational or other non-commercial organizations.

(v) Acting as Justice of Peace, Special Executive Magistrate and the like.

(vi) Teaching assignment under the Coaching Organization of the Institute and other Institutes Such as the Institute of Cost & Works Accountants of India, the Institute of Chartered Accountants of India, Management Institutes, Universities and any college affiliated to a University, and such other organization as may be recognized by the Council of the Institute from time to time, so long as the hours during which a member in practice is so engaged in teaching do not exceed average three hours in a day irrespective of the manner in which such assignment is described or the remuneration receivable (whether by way of fixed amount or on the basis of any time Scale of pay or in any other manner) by the member in practice for such assignment.

(vii) Carrying out valuation of papers, acting as a paper-Setter, head examiner or a moderator, for any examination.

(viii)Acting as editor of professional journals.

Permission to be granted specifically

Members of the Institute in practice may engage in the following categories of business or occupation, after obtaining the Specific and prior approval of the Executive Committee of the Council in each case:

1. Interest or association in family business enterprises even when he does not hold substantial interest in such enterprises.
2. Office of Managing Director or whole-time Director of a body corporate within the meaning of the Companies Act, 2013. The Council may refuse permission in individual cases though covered under any of the above categories.

For the purpose of the above, a member shall be deemed to have a "Substantial interest" in a concern:

(i) in a case where the concern is a company, if it's shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than 25% of voting power at any time during the previous year, are owned beneficially by such member.

(ii) in the case of any other concern, if such member is entitled at any time during the previous year, to not less than 25% of the profits of such concern.

A PCS can function as a non-executive director of a company. This does not require any prior approval.

Clause (11)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if he—

"allows a person not being a member of the Institute in practice or a member not being his partner to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary, or any other statements related thereto."

This clause further fortifies clause (1) discussed already. It is not permissible for a Company Secretary in Practice to allow any person to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary or any other statement related thereto. The purpose is not to allow a member to have his judgment and expertise substituted by the judgment of any other person who is not a member in practice or his partner in the firm.

To take an instance, the annual return under Section 92 of the Companies Act, 2013 has to be certified by a Company Secretary in Practice himself. It is not possible to have the certification done by a Company Secretary, say, through a power of attorney holder, even though the holder of the power of attorney is an employee (of the Company Secretary) who has been associated with the checking up of various details furnished in the Annual Return.

PCS who is not a partner of another PCS cannot sign on behalf of such other PCS on

Annual Returns or Secretarial Audit Report or any other certificates.

In e-governance era, a PCS on many occasions attaches his Digital Signature to various forms / Statements. Due care has to be taken that such digital Signature is attached only by the PCS himself. It would be the exclusive duty and obligation of PCS to prevent any unauthorized use of his Digital Signature. PCS is not expected to part with the password of his Digital Signature.

(b) Professional misconduct in relation to members in service (Part II of the first schedule)

Part II of First Schedule to the Act deals with professional misconduct of a member of the Institute (other than a member in practice) if he is an employee of any company, firm or person.

Part II of the First Schedule recognizes the need for a member in employment also to observe a certain code of conduct. To be in 'employment' connotes to be in a 'contract of Service' and not 'contract for Service'. There are four indicia of a contract of Service, namely:

(a) master's power of selection of his Servant;

(b) payment of wages or other remuneration;

(c) master's right to control the method of doing the work; and

(d) The master's right of suspension or dismissal.

Lord Denning pointedly observed, "Under a contract of Service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract for Services, his work although done for the business is not integrated into it but is only accessory to it."

One important issue which very frequently comes up is, the conflict that may arise between the employer's interest and the interest of the member to uphold professional values and broader public interest. The code of conduct formulated by the Institute originally in 1977 emphasized the importance of a member in employment exercising professional independence in relation to his work as well as his endeavor to provide the highest quality of Service attainable by him, without reference to the monetary compensation.

Part II and Part III of the First Schedule to the Act specify certain instances of misconduct to which a Company Secretary in employment may stand attracted. It has been mentioned earlier that under Section 21 of the Act, the Council's power to direct enquiry is not limited only to those contained in the Schedule to the Act, in view of the fact that the phrase 'other misconduct' used in Section 21 is sufficiently broad enough to cover instances not enumerated in the Schedule.

Clause (1) of Part II of the First Schedule provides that a member of the Institute (other than member in practice) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person—

"Pays or allows or agrees to pay, directly or indirectly, to any person any Share in the emoluments of the employment undertaken by him."

This clause is analogous to clause (2) of Part I of the First Schedule in some respects. A member in employment shall not share emoluments of the employment with any other person, not even a member. Both direct and indirect Sharing of the emoluments is prohibited. However, it may be noted that under Part I of the First Schedule, a member in

practice can Share the fee, commission or brokerage or profits with any other member of the Institute who is his partner.

Clause (2) of Part II of the First Schedule provides that a member of the Institute (who is in Service) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person—

"accepts or agrees to accept any part of fees, profits or gains from a lawyer, a Company Secretary or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification."

This clause vindicates the confidence and trust that an employer reposes in an employee while the latter deals with any outsider on matters relating to business. It is an implied term of any employment that the employee concerned shall not secretly benefit from the employment.

(c) Professional misconduct in relation to members of the institute generally (Part III of the First schedule to the Act)

This clause is also analogous in some respects to clause (3) of Part I of First Schedule.

Part III of the First Schedule to the Act covers cases of professional misconduct in relation to members of the Institute generally. Under this Part, three Specific instances have been categories as professional misconduct.

Clause (1) of Part III of the First Schedule provides that a member of the Institute whether in practice or not shall be deemed to be guilty of professional misconduct, if he—

"Not being a Fellow of the Institute, acts as a Fellow of the Institute."

This clause prohibits the practice of styling oneself as a Fellow, while in fact he is not a Fellow member. A person is entitled to have his name entered in the Register as a Fellow as per regulation 4(2) of the Regulations. The Fellowship of the Institute suggests a certain degree of Status and Seniority and obviously any wrongful representation of such seniority amounts to breach of code of conduct.

Clause (2) of Part III of the First Schedule provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

"Does not supply the information called for or does not comply with the requirements asked for by the Institute, Council or any of its Committees, Director (Discipline) Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority."

It is the duty of a member to supply information called for or to supply the requirement's asked for by the Council or any of its Committees and other authorities. Non-compliance with this clause would tantamount to breach of code of conduct.

The Council of the Institute in a case of professional misconduct, held a member guilty of professional misconduct under this clause for failure to disclose the fact of holding

of the certificate practice of the Institute of Chartered Accountants of India to the Council of ICSI which was required to be made at the time of renewal of Certificate of Practice.

A member of ICSI bound to give any and every kind of information called from him since not providing information is a misconduct under clause (2) of Part III of the First Schedule. It is presumed that the concerned authorities would call only relevant information.

Clause (3) of Part III of the First Schedule provides that a member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

"while inviting professional work from another Company Secretary or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false."

(d) Other Misconduct in relation to members of the institute generally (Part IV of the First schedule)

Clause 1 of Part IV

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding 6 months.

Clause 2 of Part IV

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if in the opinion of the Council, he brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work.

Clause 2 of Part IV of the First Schedule provides that it shall be misconduct if in the opinion of the Council, a member of ICSI brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work. Making an exhaustive list of such misconduct may not be possible.

Following may amount to misconduct under Clause 2 of Part IV of the First Schedule;

- Sending an e-mail to number of members (e-groups) criticizing the decisions of the Council in derogatory and filthy language.
- Discussing through e-forums failures of the Council/ President/ Secretary by using derogatory and filthy language.
- Writing letter(s) in an aggressive, loud and filthy language to the Ministry of Corporate Affairs, about working of ROC offices/ MCA Site, inability to upload forms etc.
- Arranging DHARANA/ agitations at the gates of the Govt. Offices/Institute's offices in a manner not befitting a professional.
- Instigating Students or other members by creating a pandemonium in or around Institute's offices by raising issues pertaining to Syllabus, training, examination or any

other reason what so ever.

- Misusing the confidential data available with the offices of the Institute for persona purposes.
- Inviting Govt. Officers for Chapter's / Regional Council's Programs by Spending heavily on their travel & Stay arrangements, with an intention to get personal mileage.
- Tampering with the Books of Accounts/ Minutes of the meetings of the Managing Committees of Chapter/ Regional Councils.

(e) Part I of the Second Schedule to the Act Section 21(3), 21(B)(3) and 22) where the matters are to be dealt with by the disciplinary committee constituted by the Council

Part I of the Second Schedule to the Act deals with ten instances of professional misconduct in relation to members in practice, which require action by a Disciplinary Committee. The implications of various clauses in Part I of the Second Schedule are briefly explained herein below:

Clause (1)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"Discloses information acquired in the course of his professional engagement to any person other than the client so engaging him, without the consent of such client, or otherwise than as required by any law for the time being in force."

This clause indicates the position of trust and confidence reposed by the client in a Company Secretary in practice. A Company Secretary in Practice in the course of his professional engagement may come into possession of vital information. Such information has to be kept confidential unless consent of the client has been obtained to disclose the same or the disclosure is required by any law. In the case of a Sole proprietor client, consent must be from the Sole proprietor. In case the client is a partnership firm, consent has to be given by all partners if the partnership deed so provides; if the deed is silent, any partner can give the consent on behalf of the firm in view of his implied authority. In the case of Board-managed companies, the Board has to give the consent unless it has specifically resolved to delegate the power to any executive. Where the company is managed by a managing director, he may give consent.

It is necessary to bear in mind that any communication acquired by a Company Secretary in Practice in the course of his professional engagement on behalf of his client, any communication or any advice given by him to his client in the course and for the purpose of his engagement is a privileged communication and should not be disclosed by him without the express consent of his client. Similarly, the Company Secretary in Practice should not disclose, without written consent of his client, the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional engagement.

It is observed these days that PCS retains the digital Signature of his client along with the password for the administrative convenience of uploading the forms from the office of PCS. It is suggested that in such a situation PCS should retain a formal letter signed by his client authorizing PCS to make use of his Digital Signature. The reason being once the forms are uploaded they appear on MCA portal and come to public domain. In order to avoid any future possible controversy, such authority letter would come handy for PCS.

Clause (2)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he-

"certifies or submits in his name or in the name of his firm a report of an examination of the matters relating to Company Secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or any employee in his firm or by another Company Secretary in practice."

This clause is intended to imbibe in a member in practice, a higher degree of responsibility and care while certifying any fact or a statement. Either he himself or his partner or any employee of his firm should have examined what is being certified. The words "or by another Company Secretary in Practice" used in this clause envisage a situation where the responsibility for the certification is undertaken by a Company Secretary in Practice, who is neither a partner nor an employee of the Company Secretary concerned, for an examination done by another member in Practice.

This clause prohibits PCS from certifying or submitting in his name a report of an examination of the matters relating to company secretarial practice unless the examination of such statements has been made by him or by a partner or an employee in his firm or by another Company Secretary in Practice. Trainees working in the office of PCS are not to be considered as his employees for the purpose of this item. Thus, a PCS would be justified in relying on the search report / examination done by another PCS and such reliance would not violate Clause 1 of the First Schedule.

Clause (3)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"Permits his name or the name of his firm to be used in connection with any report or statement contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast."

This clause underlines the duty of a Company Secretary in Practice to exercise utmost care in associating his name with any report or Statement about future happenings or contingencies. A Company Secretary in Practice has to clearly disclose in the report or statement, as the case may be, the sources of his information and the premises on which the forecast is based. He shall further take care that he does not vouch for the

accuracy of the forecast. Restraint is therefore required in subscribing to reports/Statements, the contents of which may or may not turn out to be true.

The future is always uncertain and there is always an element of contingency. PCS cannot become a fortune teller. PCS Should not certify any possible happening or non-happening or give a report about the future e.g. it would be improper for a PCS to certify the future earning capacity, future shareholding pattern, future profitability or similar future figures and numbers. If at all there is any occasion for a PCS to Sign such document, he should clearly insert appropriate disclaimer clause.

Clause (4)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"Expresses his opinion on any report or statement given to any business enterprise in which he, his firm or a partner in his firm has a substantial interest;"

This clause ensures that a professional has to be independent while expressing any opinion. He should not have any substantial interest in the business enterprise to which the report or statement pertains. That would create a conflict with his duty. Expressing opinion or giving any report with appropriate disclosers about his interest in the report was permitted earlier. However, under the new clause there is a total ban on expressing opinion or giving any report about any business enterprise in which he, his firm or a partner in his firm has a substantial interest. 'substantial interest' used in this clause is not limited to financial interest only.

In this connection it may be Stated that the Council has, pursuant to Regulation 168 of the Regulations passed a resolution in which 'substantial interest' has been defined to mean an interest to the extent of 25%. The same guideline is relevant under the above clause also. If the business enterprise does not have a share capital, say a Sports club, which may be a company limited by guarantee without Capital, the question whether PCS has substantial interest in such Club would be a question of fact.

Clause (5)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"Fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity."

This clause deals with the paramount duty of a member in practice towards the user of any statement or report. The clause underlines the need for full and complete disclosure as to make any statement or report with which he is associated, true in every possible respect. The aiding or abetting must be with reference to a material fact known to him. If the member in practice does not know a material fact, or he has no reason to come to know a material fact by any means, there cannot arise any liability under this clause; also where a material fact is known to him but in his considered opinion, there is no reason to

disclose them, the onus of defense would be on him to prove that the non-disclosure of the material fact has not made the statement misleading.

The expectation provided in this clause is something similar to the golden rule in respect of prospectus. The report/ statement signed by PCS should contain truth, whole truth and nothing but the truth. Half-truth at times is more disastrous.

For example: Making a statement that company has continuous track record of dividend declaration since incorporation, when the facts are that for last 3 years dividend was being declared from accumulated profits and not from current year's profit. Making a statement that company has continuous track record of dividend declaration since incorporation would be half-truth. The reader would be made to believe that the company has sound financial health. Thus, the full facts should be disclosed by PCS by mentioning the fact that company has continuous track record of dividend declaration since incorporation, however since last three years dividend is being declared out of reserves.

Clause (6)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"fails to report a material misstatement known to him and with which he is concerned in a professional capacity."

This clause deals with non-disclosure by a member in practice of a material misstatement known to him in any report with which he is concerned.

Clause (7)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if he –

"does not exercise due diligence, or is grossly negligent in the conduct of his professional duties."

This clause deals with due care that a member in practice has to exercise in the discharge of his professional duties. The words used in this clause "grossly negligent" imply that purely clerical errors or an omission to give more details in any recommended course of action will not fall within the sweep of this clause. What constitutes gross negligence would depend upon the facts and circumstances of each case.

Where, for instance, a Company Secretary who is not in whole time practice under Companies Act, 2013, certifies Annual Return pursuant to Section 92 of Companies Act, he would be guilty of being grossly negligent under this clause. Similarly, where a member in practice give's a certificate to a financial institution regarding necessary powers of a company and its directors to enter into an agreement without thoroughly verifying the Memorandum and Articles of Association of the Company, he would be guilty of misconduct under this clause. So also failure to check the resolutions as contained in the minute's book while certifying copies' of resolutions would attract liability under this clause.

The difference in between the two expressions "not exercising due diligence" and "being grossly negligent"- is of degree. In both the situations it would amount to professional misconduct.

Clause (8)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"Fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion."

The first limb of this clause deals with the duty of a member in practice to obtain sufficient information to warrant expression of an opinion. Issuing of a wrong consumption certificate under the Import Export Regulations for instance, without obtaining all necessary information required for the purposes, would get attracted to this clause.

The second limb of this clause requires that any opinion expressed by a Company Secretary in Practice may be subject to certain exceptions. But, where the exceptions are sufficiently material, he should refrain from expressing an opinion, in other words, the second limb of this clause gives scope for making minor exceptions which are not important /material as to negate the very expression of opinion itself.

Clause (9)

Provides that a Company Secretary in Practice Shall be deemed to be guilty of professional misconduct, if he—

"Fails to invite attention to any material departure from the generally accepted procedure relating to the secretarial practice."

This clause deals with the duty of a member in practice to invite attention to material departure from generally accepted secretarial practice. As of now, there have evolved certain widely accepted sound practices in regard to, say, share issue and transfers, share transmission, servicing of corporate securities, meetings procedure and other approvals, which are generally accepted as good secretarial practices. Until the time the standard secretarial practices in respect to any matter are recommended by the Institute for adoption are made mandatory, a member in practice has to, by and large, conform to existing well- recognized secretarial practices and invite attention to departures which are material.

Clause (10)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"Fails to keep moneys of his client other than fees or remuneration or money meant to be expended in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time."

The purposes of this clause is firstly to ensure that the clients' money is separately accounted for and Secondly Such money is specifically used only for the purposes for which it is paid by the client.

Advance received from clients for expenses like traveling, conveyance to be incurred by PCS need not be kept in a Separate account, however advance received from a client for payment of Statutory / filing fees, Stamp duty to be paid by PCS on Client's behalf , must be kept in a Separate account, in case client has paid advance for certain Specific purposes, Say for payment of fees and Stamp duty for incorporation of the company or for increase in authorized capital such amount should be used in reasonable time. If the decision to incorporate a company or increase in capital is postponed/ cancelled, PCS

Should promptly return Such advance and Should not adjust his fees from the amount so received for services rendered, if any, by him, unless such adjustment is authorized by the client.

(f) Professional misconduct in relation to members of the institute generally (Part II of the second schedule to the Act)

Part II of Second Schedule to the Act covers professional misconduct in relation to members of the institute generally. The implications of the four clauses included in this Part are explained herein, below:

Clause (1) of Part II of Second Schedule

Provides that a member of the institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

"Contravenes any of the provisions of this Act or the regulations made there under or any guidelines issued by the Council."

This clause requires every member to pay due obedience to the Act, the Regulations and Guidelines issued by the council from time to time. For instance, a member of the institute not having a certificate of practice representing that he is in practice (under Section 24) or any violation of the rules relating to the conduct of elections (under Rule 42 of the Rules) would become guilty under this Clause; besides becoming liable for prosecution under Section 24 of the Act.

The Council of the institute, found a member guilty of professional misconduct under this clause for contravention of Section 6 of the Act as he certified an Annual Return of a company without holding a certificate of practice.

Following guidelines have been issued by the council So far:

1. Display of particulars on website
2. Approving firm's name
3. Compulsory attendance at PDP
4. Dress Code
5. Issuing Compliance Certificate
6. Maintenance of Register of attestation Services
7. Issue of advertisement by PCS
8. Change of Name of a Concern/Firm
9. Guideline for use of own Logo by PCS.

It is necessary for all the members to understand the guidelines and follow the same in Spirit and letter. It is also necessary to mention here that contravention of any of the provisions of the Company Secretaries Act, 1980 or the Company Secretaries Regulations, 1982 made there under or any guidelines issued by the council falls within the ambit of clause (1), part II of the Second Schedule to the Company Secretaries Act, 1980 and invites sterner actions.

Clause (2) of Part II of Second Schedule

Provides that a member of the institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

"Being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment, except as and when required by any law for the time being in force or except as permitted by the employer."

The employer and employee relationship is of trust and confidence. This principle is embodied in this clause. The confidential information may pertain to technical Secrets, important policy decisions, business Strategies or any matter having a bearing on the interest of the employer.

Confidential information is a valuable asset for any employer. Confidentiality has be maintained about members, customers, employees, Suppliers, product mix , future plans, proposals, list of associates, affiliates, Stake holders, dealers and financial information. All confidential information must be used for the benefit and best interest of the employer. Employee member must maintain the confidentiality of the information which comes to his knowledge / custody except when disclosure is authorized or legally required. Confidential information includes all non-public information that might be harmful or may have potential to cause harm to the employer, if disclosed.

The confidential information, discussions, documents and data should be dealt with utmost care and should not be Shared or passed on to undesirable persons / outsiders under any circumstances, directly or indirectly.

Clause (3) of Part II of Second Schedule

Provides that a member of the institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

"includes in any information, Statement, return or form to be Submitted to the institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority any particulars knowing them to be false."

This clause covers situation where a member includes in any statement, return or form to be submitted to the Council any particulars knowing them to be false. The purposes of this clause is to ensure that a member submits accurate particulars, as are required to be furnished by him to the Council. It is pertinent to know that the clause is attracted only when the particulars furnished are known to the member to be false.

Metropolitan Life Insurance Co. vs. S. Adam that the word 'false' has two distinct and well recognized meanings—

(i) intentionally or knowingly or negligently untrue;

(ii) Untrue by mistake or accident after the exercise of reasonable care.

(iii) It is in the former Sense that the term 'false' is to be understood in this clause. This is abundantly made clear by the qualifying words, 'knowing them to be false'. The word false

itself implies something more than mere untruth; it would even connote an intention to deceive.

Where for instance, while Submitting the application for the issue/ restoration of certificate of practice under Regulation 10(1) of the Regulations, a member does not disclose that he is engaged in any business/occupation other than the profession of company Secretaries when in fact he was so engaged, this clause would be attracted.

Clause (4) of Part II of Second Schedule

Provides that:

"A member of the institute whether in practice or not, Shall be deemed to be guilty of professional misconduct, if he defalcate or embezzles moneys received in his professional capacity."

This clause covers defalcation and embezzlement of moneys received in professional capacity by a member and not in any other capacity. The professional capacity referred to here would cover situations contemplated under Section 2(2) of the Act and those specifically covered under Regulation 168 of the Regulations. In as much as the Act deals with professional misconduct, logically the misconduct must be something having a nexus, direct in that, with the discharge of professional duties. However, this does not mean that other cases of embezzlement are not misconduct. Section 21 of the Act is wide enough to cover other acts not befitting to the member of the institute.

(g) Part III of the Second Schedule

This part is about other misconduct in relation to members of the institute generally if a member of the institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding Six months.

Part III does not get attracted at the very first instance of being held guilty but it is attracted only after the final appeal, as it may be, is disposed of and the member is held guilty.

It may be observed that this clause does not provide that the offence for which a member is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding 6 months involves moral turpitude. Therefore, even for an imprisonment for a term exceeding 6 months in an offense which does not involve moral turpitude would attract the consequences.

Complaints and Enquiries Relating to Professional or Other Misconduct of Members

(1) Subject to the provisions of this regulation, any complaint received against a member of the institute under Section 21 shall be investigated, and any enquiry relating to misconduct of such member shall be held, by the Disciplinary Committee.

Provided that if the subject matter of a complaint is, in the opinion of the President, substantially the same as or has been covered in any previous information of complaint

received, the Secretary may file the complaint without any further action or inform the complainant, accordingly, as the case may be.

(2) A complaint under Section 21 Shall be made to the Council in the appropriate from, duly verified as required therein.

(3) Every complaint Shall contain the following particulars, namely-

(a) The acts or omissions which, if proved, would render the member complained against guilty of any professional or other misconduct;

(b) The oral and/or documentary evidence relied upon in support of the allegations made in the complaint.

(4) Every complaint other than a complaint made by or on behalf of the Central or any State Government, shall be accompanied by a deposit of Rs. 50 which shall be forfeited, if the Council, after considering the complaint, comes to the conclusion that no prima facie case is made out and, moreover, that the complaint is either frivolous or has been made with mala fide intention.

(5) The Secretary shall return a complaint which is not in the proper form or which does not contain the aforesaid particulars or which is not accompanied by the deposit of rupees fifty to the complainant for resubmission after compliance with Such requirements and within Such time as the Secretary may Specify.

(6) Ordinarily within 60 days of the receipt of a complaint under Section 21 the Secretary shall-

(a) if it is against an individual member send particulars of the acts of omissions alleged or a copy of the complaint, as the case may be, to such member at his address as entered in the Register;

(b) if it is against a firm, send particulars of the acts or omissions or a copy of the complaint, as the case may be, to the firm concerned at the address of the head office of the firm as entered in the Register of offices and firms which a notice calling upon the firm of disclose the name(s) of the member(s) concerned and to send particulars of acts or omissions or a copy of the complaint, as the case may be to member(s).

Explanation- A notice shall be deemed to be a notice to all the members who are partner or employees of that firm.

(7) A member who has been intimated of the complaint made against him under Sub-regulation (6) (hereinafter referred to as the respondent) shall, within 14 days of issue of such intimation or within such further time as the Secretary may allow, forward to the Secretary a written statement in his defense verified in the same manner as the complaint.

(8) On a perusal of the complaint and written statement in any, the Secretary may call for such additional particulars or documents connected there with either from the complainant or the respondent, as he may consider necessary or as may be directed by the President, for perusal of the Council.

(9) Where on a perusal of the complaint, the written statement, if any, of the respondent and other relevant documents and papers, the Council is prima facie of opinion that any member has been guilty of professional or other misconduct, the Council shall cause an enquiry to be made in the matter by the disciplinary Committee and where the Council is prima facie of opinion that there is no case against the respondent, the case shall be dismissed and the complainant, if any, and the respondent shall be informed accordingly. Provided that the Council may, if deemed necessary, call for any additional particulars or documents connected therewith from the complainant, if any, or the respondent.

(10)

i. Every notice issued by the Secretary or by the disciplinary Committee under this Regulation shall be sent to the member or the firm concerned by registered post with acknowledgement due.
ii. If the notice is returned unserved with an endorsement to the effect that the addressee had refused to accept the notice, it shall be deemed to have been served.
iii. If the notice is returned with an endorsement indicating that the addressee cannot be found at the address given, the Secretary shall ask the complainant to supply to him the correct address to the member or firm concerned and send a fresh notice to the member or firm at the address so supplied.

(11) The provision relating to a notice shall apply *mutatis mutandis* to a letter.

Procedure in enquiry before the Disciplinary committee

Applicable to the complaint or information pending before the Council or any inquiry initiated by the disciplinary Committee or any reference or appeal made to a High Court prior to 17.11.2006.

(1) It shall be the duty of the Secretary to place before the disciplinary Committee all facts brought to his knowledge which are relevant for the purposes of any enquiry by the disciplinary Committee.

(2) The disciplinary Committee Shall have the power to regulate its procedure in Such manner as it considers necessary and during the course of enquiry, may examine witnesses on oath and receive evidences on affidavits and any other oral or documentary evidence, exercising its powers as provided in Sub-Section (8) of Section 21.

(3) The disciplinary Committee shall give the complainant and respondent a notice of the meeting at which the case shall be considered by the Committee.

(4) Such complainant and respondent may be allowed to defend themselves before the disciplinary Committee either in person or through a legal practitioner or any other member of the institute.

(5) Where, in the course of a disciplinary enquiry, a change occurs in the composition of the disciplinary Committee, unless any of the parties to Such enquiry makes a demand within fifteen days of receipt of a notice of a meeting of Such disciplinary Committee, that the enquiry be made de novo report of the disciplinary Committee Shall be called in question on the ground that any member of the disciplinary Committee did not possess Sufficient

knowledge of the facts relating to Such inquiry.

(6) The Disciplinary Committee shall after investigation report the result of its enquiry to the Council for its consideration.

Procedure in a hearing before the Council

(1) The Council shall consider the report of the Disciplinary Committee and if in its opinion, a further enquiry is necessary, may cause such further enquiry to be made and a further report submitted by the Disciplinary Committee.

(2) After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent is not guilty of any professional or other misconduct, it shall record its findings accordingly and direct that the proceedings Shall be filed or the complaint shall be dismissed as the case may be.

(3) After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent has been guilty of a professional or other misconduct, it shall record its findings accordingly and shall proceed in the manner as laid down in the succeeding sub- regulations.

(4) Where the finding is that the member of the institute has been guilty of a professional or other misconduct, the Council shall afford to the member an opportunity of being heard before orders are passed against him in the case. The Council after hearing the respondent, if he appears in person or after considering the representations, if any, made by him, pass such orders as it may think fit, as provided under subsection (4) of Section 21.

(5) The orders passed by the Council shall be communicated to the complainant and the respondent.

RECENT UPDATES

Multidisciplinary Firm - According to Regulation 165A of The Company Secretaries Regulations, 1982 inserted by the Company Secretaries (Amendment) Regulations, 2020- A member in practice 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 168A: Other Professional bodies

(1) For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, a person has to be member of any of the following, namely: -

(a) The institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;

(b) The Institute of Cost and Works Accountants of India 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 under Sub-Section (2) of Section 38 of the Act.

(2) For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, the following shall be the persons qualified in India, namely: -

(a) Chartered Accountant within the meaning of the Chartered Accountants Act, 1949;

(b) Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959;

(c) Actuary within the meaning of the Actuaries Act, 2006;

(d) Bachelor in Engineering from a University established by law or an institution recognized by law;

(e) Bachelor in Technology from a University established by law or an institution recognized by law;

(f) Bachelor in Architecture from a University established by law or an institution recognized by law;

(g) Bachelor of Law from a University established by law or an institution recognized by law;

(h) Master in Business Administration from Universities established by Law or Technical Institutions recognized by All India Council for Technical Education.

Regulation 168 B: Membership of Professional body for Partnership

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: -

(a) The institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;

(b) The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959;

(c) Bar Council of India established under the Advocates Act, 1961;

(d) The Institute of Engineers or Engineering from a University established by law or an institution recognized by law;

(e) The Indian Institute of Architects established under the Architects Act, 1972;

(f) The institute of Actuaries of India established, under the Actuaries Act, 2006;

(g) Professional bodies or institutions outside India whose qualifications relating to Company Secretary recognized by the Council under Sub-Section (2) of Section 38 of the Act.

UDIN: The Unique Document Identification Number as governed by the UDIN Guidelines shall verify the authenticity of various documents signed or certified by Company Secretaries in Practice. As per the UDIN Guidelines, a unique number for the identification of documents attested by Company Secretaries in Practice shall be generated at the time of signing the Certificate/ Report which shall mandatorily be mentioned in the Certificate / Report along with the CoP number.

ECSIN: The Employee Company Secretary Identification Number as governed by the ECSIN Guidelines shall enable the institute to identify the appointments and cessations of Company Secretaries ensign is a system- generated unique number for identification of the Company Secretaries employed in a particular company which Shall be generated by the Company Secretary at the time of employment as a Company Secretary (KMP or

otherwise), as well as at the time of demitting office in any manner.

ANNEXURE-I

THE INSTITUTE OF COMPANY SECRETARIES OF INDIA

(Constituted under the Company Secretaries Act, 1980)

ICSI Guideline No. of 2020

[*Pursuant to Clause (1) of Part II of the Second Schedule to the Company Secretaries Act, 1980 as amended*]

ICSI (GUIDELINES FOR ADVERTISEMENT BY COMPANY SECRETARIES), 2020

In terms of Clause (1) of Part II of the Second Schedule to the Company Secretaries Act, 1980 (56 of 1980), as amended by the Company Secretaries (Amendment) Act, 2006, the Council of the Institute of Company Secretaries of India hereby issue the following guidelines:

1. Introduction

The Institute of Company Secretaries of India, ("the Institute") constituted under the Company Secretaries Act, 1980 ("the Act") is a Statutory body, constitute under an Act of Parliament, to regulate and develop the profession of Company Secretaries in India. Members of the Institute who hold the valid Certificate of Practice issued by it are authorized to practice the profession of Company Secretaries.

The areas in which the Company Secretaries in Practice can and do render their services are defined under Section 2(2) of The Company Secretaries Act, 1980.

Members of the Institute are required, under the Act, to maintain high tandards of professional conduct.

Part I of the First Schedule of the Company Secretaries Act, 1980, enumerates professional misconduct in relation to a member in practice and inter-alia includes if such a member:

(1) Solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means:

Provided that nothing herein contained shall be construed as preventing or prohibiting -

(i) Any Company Secretary from applying or requesting for or inviting or securing professional work from another Company Secretary in Practice; or

(ii) A member from responding to tenders or enquiries issued by various users of professional services or organization's from time to time and securing professional work as a consequence.

(2) Advertises his/hers professional attainments or services, or uses any designation or expressions other than Company Secretary on professional documents, visiting cards, letterheads or ign boards, unless it is a degree of a University established by law in India or recognized by the Central Government / State Government or a title indicating membership of the Institute of Company Secretaries of India or of any other institution that has been recognized by the Central Government / State Government or recognized by the Council:

Provided that a member in practice of the profession of company secretaries or otherwise may advertise through a write up setting out:

a. the Services provided by him/her or his/hers firm or LLP; and
b. particulars of his/hers firm / LLP Subject to such guidelines as may be issued by the Council.

The write-up should not be used for solicitation of clients, portrayal of supremacy or tall claims to undermine other members.

2. Short Title

These Guidelines Shall be called ICSI (Guidelines for Advertisement by Company Secretaries), 2020.

3. Applicability

These guidelines shall be applicable to all advertisements by members of the Institute rendering any advisory.

4. Definitions

For the purposes of these Guidelines, -

The **"Act"** means the Company Secretaries Act, 1980, as amended from time to time.

"Institute" means the Institute of Company Secretaries of India.

"Advertisement or advertising" means advertisement or advertising in any mode including written, recorded, displayed communication through print or electronic mode or otherwise including in newspapers, journals, internet, online, websites, banners, letters, circulars issued, circulated or published in accordance with these guidelines.

"Company Secretary in Practice" means a member of the Institute who holds a valid Certificate of Practice issued to him by the Council of the Institute.

"Firm of Company Secretaries" means sole proprietorship concern, the sole proprietor of which is a Company Secretary or a firm, wherein all partners are Company Secretaries and includes LLP having all Designated Partners, practicing as Company Secretaries or otherwise.

"Aggregators" shall mean person(s) who own and manage web-based applications, which enable potential customers to connect with service provider(s) providing service(s) under the aggregators' brands or trade names.

The terms not defined herein shall have the same meaning as assigned to them in the Company Secretaries Act, 1980 and the Rules and the Regulations made thereunder.

5. Permitted means of advertising

The following activities are permitted for a Company Secretary in Practice as means to advertise:

(i) Display the Scope of work on his/her's own website.

(ii) Creating a visual identity in compliance with the Guidelines for use of Individual Logo issued by the Council of ICSI.

(iii) Display of Location and décor of the workplace, meeting rooms, etc.

(iv) Display of Firm name, Logo or any other identity on Uniform, Office/s, and office stationary & equipment's/ material and providing Training to Staff.

(v) Professional Updates and Write ups in any mode.

(vi) Appearing on local radio or television.

(vii) Giving Speeches/lectures at any platform including Seminars, Conferences, training programmers, Workshop's, Conventions, etc. so organized by any forum.

(viii) Holding professional seminars, conferences and workshops.

(ix) Sponsoring any event (cultural, professional or otherwise) or helping with community programmers or doing voluntary work as a professional for charitable organizations.

(x) Use of Social media like Facebook, Integra, LinkedIn, Twitter, Tout be, We Chat, Telegram and What Sapp or and other media of similar nature.

6. Restrictions

The Advertisement shall:

(i) not be in violation of provisions of Company Secretaries Act, 1980;

(ii) not be false or misleading;

(iii) not claim superiority over any or all other Company Secretaries;

(iv) not be indecent, sensational or otherwise of such nature which may bring disrepute to the profession or the Institute (ICSI);

(v) not contain fabricated or false testimonials or endorsements concerning the Company Secretary;

(vi) not refer the Company Secretaries in the terms Such as "Specialists" or "experts";

Explanation: The advertisements shall not be Self-laudatory and not include the words Such as "best," "better" or "cheapest;"

(vii) Not represent that the quality of the professional services to be performed is greater than the quality of professional services performed by other professionals. tatements comparing one professional's services to that of another are not allowed;

(viii) not constitute a guarantee, warranty, or prediction regarding the outcome of any professional assignment;

(ix) in no way indicate that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of the desired outcome;

(x) Not contain any reference to past Successes or results which indicates a guarantee, warranty or prediction of result of future professional assignments. eg. We made M/S. xxx win the case, Meet the masters;

(xi) not be designed for "pleasing customers," which might mislead or eventually harm customers or third parties;

(xii) Not contain any humorous Slogans. E.g. Save RS. Xxxx Come to us, we will tell you how.

7. The Company Secretary or a firm of Company Secretaries shall not list his/hers Service(s) on any aggregator website Such as Sulekha, Olx, Urban clap, Just Dial, Quirk or any other aggregator of similar category.

8. The Company Secretary or a firm of Company Secretaries shall not join or project himself/herself/itself as a member of any networking association(s) or any Multi-Level Marketing Association(s)("MLM") or any other organization which require his/hers Company Secretary member to add other person as member of the organization or which require him / her to render such services which are not specifically approved.

9. Website Disclaimer

The Advertiser shall also include the following statement of Responsibility and Disclaimer on the Website:

Disclaimer: The contents or claims in the website issued by the advertiser are the sole and exclusive responsibility of the Advertiser. The Institute of Company Secretaries of India does not own any responsibility whatsoever for such contents or claims by the Advertiser.

10. Responsibility for the observance of these Guidelines

The responsibility for the observance of these guidelines lies with member(s) who commission, create, place or publish any advertisement or assist in the creation or publishing of any advertisement covered under these guidelines. Members are expected not to commission, create, place or publish any advertisement which is in contravention of these Guidelines. This is a Self-imposed discipline required to be observed by all those involved in the commissioning, creation, placement or publishing of advertisements.

11. Effective Date

These guidelines became effective on and from 1st April, 2020 and shall supersede the Guidelines for Advertisement by Company Secretaries in Practice issued by the Council in December 2007. Consequently, the extant Guidelines for Display of Particulars on Website by Company Secretaries in Practice stand repealed.

12. Consequences of Non-Compliance

Any noncompliance or violation of these Guidelines, as may be in force from time to time, in any manner whatsoever shall be deemed to be a professional misconduct and the concerned member shall be liable to disciplinary action under the Company Secretaries Act, 1980.

Phone No. 7703880232, 8882090148, 9318492718
Address:-D-223/1, Vikas Marg, Near Laxmi Nagar Metra Gate No. 5, Delhi - 110092

Chapter 11 : Secretarial Standard Board

INTRODUCTION

The Institute of Company Secretaries of India (ICSI), recognizing the need for integration, harmonization and standardization of diverse secretarial practices prevalent in the corporate sector, has constituted the Secretarial Standards Board (SSB) with the objective of formulating Secretarial Standards.

SSB was constituted in the year 2000. The formulation of SSB is a unique and pioneering step by the Institute of Company Secretaries of India (ICSI) since there was no such Board or body throughout the world. The purpose of constituting this Board was for long-term benefits for the growth and enhanced visibility of the profession and setting up international benchmarks.

The SSB comprises of representatives from major industry associations viz, The Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Indian Industry (CII), The Associated Chambers of Commerce & Industry of India (ASSOCHAM), PHD Chamber of Commerce and Industry, representatives of regulatory authorities, such as the Ministry of Corporate Affairs, Securities & Exchange Board of India, Reserve Bank of India, Bombay Stock Exchange, National Stock Exchange of India Ltd. and the sister professional bodies viz. the Institute of Chartered Accountants of India and the Institute of Cost Accountants of India and eminent members of the Institute of Company Secretaries of India in employment and in practice.

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. SSB also clarify issues, if any, arising out of such Standards and issue guidance notes for the benefit of members of ICSI, corporates and other Stakeholders.

Functions of the Secretarial Standards Board

The main functions of SSB are:

(i) Formulating Secretarial Standards;

(ii) Clarifying issues arising out of the Secretarial Standards;

(iii) Issuing Guidance Notes; and

(iv) Reviewing and updating the Secretarial Standards / Guidance Notes at periodic intervals.

Need of Secretarial Standards

Companies follow diverse secretarial practices and, therefore, there is a need to integrate, harmonies and standardize such practices so as to promote uniformity and consistency.

SSB formulates Secretarial Standards taking into consideration the applicable laws, business environment, practical applicability and the best secretarial practices prevalent.

Secretarial Standards are developed in a transparent manner after extensive deliberations, analysis, research and after considering the views of corporates, regulators and the public at large.

Scope of Secretarial Standards

Secretarial Standards do not seek to substitute or supplant any existing laws or rules and regulations framed thereunder but, in fact, seek to supplement such laws, rules and regulations.

Secretarial Standards are issued in conformity with the provisions of the applicable laws. 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.

Process of making Secretarial Standards

The following procedure is adopted for formulating and issuing Secretarial Standards:

(i) SSB, in consultation with the Council, determine the areas in which Secretarial Standards need to be formulated and the priority thereof.

(ii) In the preparation of Secretarial Standards, SSB may constitute Working Groups to formulate preliminary drafts of the proposed Standards

(iii) The preliminary draft of the Secretarial Standard prepared by the Working Group is circulated amongst the members of SSB for discussion and shall be modified appropriately, if So required.

(iv) The preliminary draft is then be circulated to the members of the Central Council, as well as to Regional Councils/ Chapters of ICSI, various professional bodies, Industry Association/Chambers of Commerce, regulatory authorities such as the Ministry of Corporate Affairs, the Securities and Exchange Board of India, Reserve Bank of India, Department of Public Enterprises and to such other bodies/organizations as may be decided by SSB, for ascertaining their views, specifying a time-frame within which such views, comments and suggestions are to be received.

(v) On the basis of suggestions received on the preliminary draft, an Exposure Draft of proposed Secretarial Standard will be prepared and published in the "Chartered Secretary", the journal of ICSI, and placed on the Website of ICSI for inviting suggestions/comments from public at large.

The exposure draft is also circulated to:

(a) All Council Members

(b) Regional Council/Chapters

(c) Professional Bodies (ICAI/ICOAI)

(d) Chambers of Commerce/Industry Associations

(e) MCA/SEBI/RBI and such other bodies/organizations as may be decided by SSB

(f) All members of the Institute through bulk e-mail/website link etc.

(vi) After taking into consideration the comments received, the draft of the proposed Secretarial Standard is finalized by SSB and Submitted to the Council of ICSI.

(vii) The Council considers the final draft of the proposed Secretarial Standard and finalize the same in consultation with SSB. The Secretarial Standard on the relevant subject is then be issued under the authority of the Council.

Section 118 (10) of Companies Act, 2013 provide that every company shall observe secretarial standards with respect to general and board meetings Specified by the Institute of Company Secretaries of India constitute under section 3 of the Company Secretaries Act, 1980 and approved as such by the Central Government.

Hence ICSI has so far issued the following Standards:

- Secretarial Standards on Meetings of Board of Directors (SS-1) (mandatory)
- Secretarial Standards on General Meetings (SS-2) (mandatory)
- Secretarial Standard on Dividend (SS-3) (recommendatory)
- Secretarial Standard on Report of Board of Directors (SS-4) (recommendatory)

MCA Vide Notification No. 710/1 (M)/1, dated 03rd February, 2020 notified the Company Secretaries (Amendment)

Regulations, 2020 in order to further amend the Company Secretaries Regulations,1982.

Newly inserted Regulation 105A provides **Constitution of the Secretarial Standards Committee and the Auditing Standards Committee**

(1) The Council may constitute (a) the Secretarial Standards Committee and (b) the Auditing Standards Committee as it may deem necessary for the purposes of carrying out the functions of the Institute.

(2) A Committee constituted under sub-regulation (1) shall function under the supervision, control and direction of the Council.

(3) A member who has any pecuniary interest or perceived to have pecuniary interest, direct or indirect, in any such matter which is brought up for consideration of the Committee, shall disclose the nature of his interest in such matter and such disclosure shall be recorded in the proceedings of the Committee.

(4) The member referred to in sub-regulation (3) shall not take part in any deliberation or decision of the Committee on such matter.

Explanation - For the purposes of this regulation, "pecuniary interest" means a reasonable likelihood or expectation of appreciable financial gain.

(5) Subject to the provisions of the Act and Regulations, the Committee shall have power to delegate by resolution passed at meeting, any of its duties and functions to the President or Vice-President or Council Member or Secretary or Chief Executive; or any other Officer of the Institute not below the rank of the Director, as may be deemed necessary.

(6) Except provided specifically, the provisions in respect of meetings of the Council and its Committees, notice, adjournment, rescheduling, quorum, consideration of resolution and minutes shall be *mutatis mutandis* applicable to the meetings of the Committee.

SS-1: MEETINGS OF BOARD OF DIRECTORS

This Standard prescribes a set of principles for convening and conducting Meetings of the Board of Directors and matters related thereto.

SCOPE

This Standard is applicable to the Meetings of Board of Directors of all companies incorporated under the Act except One Person Company (OPC) in which there is only one Director on its Board. The principles enunciated in this Standard for Meetings of the Board of Directors are also applicable to Meetings of Committee (s) of the Board, unless otherwise stated herein or stipulated by any other applicable Guidelines, Rules or Regulations.

This Standard is in conformity with the provisions of the Act. However, if, due to subsequent changes in the Act, a particular Standard or any part thereof becomes inconsistent with the Act, the provisions of the Act shall prevail.

SOME IMPORTANT DEFINITIONS

"Chairman" means the Chairman of the Board or its Committee, as the case may be, or the Chairman appointed or elected for a Meeting.

"Electronic Mode" in relation to Meetings means Meetings through video conferencing or other audio-visual means.

"Video conferencing or other audio-visual means" means audio-visual electronic communication facility employed which enables all the persons participating in a Meeting to communicate concurrently with each other without an intermediary and to participate effectively in the Meeting.

"Invitee" means a person, other than a Director and Company Secretary, who attends a particular Meeting by invitation.

"Maintenance" means keeping of registers and records either in physical or electronic form, as may be permitted under any law for the time being in force, and includes the making of appropriate entries therein, the authentication of such entries and the preservation of such physical or electronic records.

"Secured Computer System" means computer hardware, software, and procedure that –

(a) are reasonably secure from unauthorized access and misuse;
(b) provide a reasonable level of reliability and correct operation;
(c) are reasonably suited to performing the intended functions; and
(d) adhere to generally accepted security procedures.

"Timestamp" means the current time of an event that is recorded by a Secured Computer System and is used to describe the time that is printed to a file or other location to help keep track of when data is added, removed, sent or received.

Board Processes through Secretarial Standards

I. Convening a Meeting Authority

1. **Authority**

i. Any Director of a company may, at any time, summon a Meeting of the Board, and the Company Secretary or where there is no Company Secretary, any person authorised by the Board in this behalf, on the requisition of a Director, shall convene a Meeting of the Board, in consultation with the Chairman or in his absence, the Managing Director or in his absence, the Whole-time Director, where there is any, unless otherwise provided in the Articles.

ii. The Chairman may, unless dissented to or objected by the majority of Directors present at a Meeting at which a Quorum is present, adjourn the Meeting for any reason, at any stage of the Meeting.

Notes:

Upon consultation by the Company Secretary or the person authorised by the Board in this behalf, if the Chairman/Managing Director/Whole-time Director, as the case may be, refuses to convene the Meeting as requisitioned, the Company Secretary or the person authorised by the Board in this behalf, should act in accordance with the provisions of the Articles in this regard.

In case the Articles are silent, the Company Secretary or the person authorised by the Board in this behalf cannot convene a Meeting requisitioned by the Director and he should communicate the same to the Director concerned. In any case, the Director may, on his own, convene a Meeting.

The authority to summon a meeting of the Board vest with the directors only. The Company Secretary cannot summon a Meeting on his own, unless authorised by the Board of Directors or the Articles to do so.

Adjournment of a Meeting otherwise than for want of Quorum may be necessitated for paucity of time to complete the Agenda or for any other reason viz. curfew, earthquakes or other events of force majeure etc.

2. **Time, Place, Mode and Serial Number of Meeting**

i. Every Meeting shall have a serial number.

ii. A Meeting may be convened at any time and place, on any day excluding a National Holiday.

A Meeting adjourned for want of Quorum shall also not be held on a National Holiday.

iii. Any Director may participate through Electronic Mode in a Meeting, if the company provides such facility, unless the Act or any other law specifically does not allow such participation through Electronic Mode in respect of any item of business.

Notes:

Numbering of meetings: *While numbering serially, the company may choose to follow its existing system of numbering, if any, or any new system of numbering, which should be distinct and enable ease of reference and/ or cross reference. The company should follow a uniform and consistent system.*

For example: 1/ 2020, 2/2020 and so on… and in next year 1/2021, 2/2021 and so on. Alternatively, continuous serially numbering across years viz: 120th Meeting, 121st Meeting and

so on… Further the serial number of the original and adjourned meeting should be same, viz: Original meeting No. is 12th Meeting, the serial number of the adjourned Meeting should be 12th Meeting (Adjourned).

Board Meeting on Public Holiday: The Board Meeting may be convened on any day including the public holiday, unless the Articles provide otherwise. Sub-section (4) of Section 174 of the Act prohibits holding of Board Meetings adjourned for want of Quorum on National Holidays. However, law is not specifically prohibiting the original meeting to be held on a National Holiday.

Adjourned Meeting: Unless the Articles of the company provide otherwise, a Meeting adjourned for want of Quorum should be held on the same day at the same time and same place in the next week. If that day happens to be a National Holiday, then such adjourned Meeting should be held on the next succeeding day which is not a National Holiday at the same time and place, unless the Articles of the company provide otherwise. A notice in regard to the adjourned Meeting should be given to all the Directors.

Time of Meeting: A Meeting may be held at any time. However, this should be practically construed to mean a convenient time. As detailed deliberations are expected to take place in Board Meetings, it is desirable to have Meetings during working hours, though the Meeting may continue beyond working hours.

Venue of Meeting: A Meeting may be held at the Registered Office of the company or at any other place, including a remote place. A Meeting may be held in India or abroad. In case the Articles provide for a specific place or city in which the Meetings should be held, the Meetings should be held only at that place or city. If a Meeting of the Board is held elsewhere, contrary to such clause in the Articles, none of the decisions taken by the Board at such Meeting can be put into operation in any manner.

Meeting conducted through Electronic Mode: 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. [Rule 3(6) of the Companies (Meetings of Board and its Powers) Rules, 2014.

Participation of a Director in a Meeting via telephone or tele-conferencing or any other Mode which does not conform to the requirements of the relevant provisions of the Act cannot be considered as participation of a Director through Electronic Mode. If due to any technical issue emerged during the Meeting held through Electronic Mode, a Director chooses to participate through telephone or tele-conferencing for remaining Meeting, then such participation cannot be considered as participation of a Director through Electronic Mode and his presence should not be counted for the purpose of quorum.

Communication by a Director of his intention to participate through Electronic Mode: 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 arrangements in this behalf. [Rule 3(3)(d) of the Companies (Meetings of Board and its Powers) Rules, 2014].

A Director cannot participate in a Board Meeting through Electronic Mode from his end, since it is necessary for the company to take due and reasonable care to safeguard the integrity of

the Meeting held through Electronic Mode by ensuring sufficient security and identification procedures.

Participation by all Directors through Electronic Mode: *All the Directors may participate in a Meeting through Electronic Mode. In such a case, at least one person, who may either be the Chairman or the Company Secretary or in the absence of the Company Secretary, any other person duly authorised in this behalf by the Chairman, should be physically present at the scheduled venue of the Meeting given in the Notice to enable proper recording, to safeguard the integrity of the Meeting and to fulfil other requirements of law in this regard.*

Meetings of the Committee and the Board on the same day: *There are no restrictions on Meetings of Committees and of the Board being held on the same day, provided reasonable time gap is kept between the two Meetings.*

Meetings of Audit Committee of Board and Board of Directors to consider the Financial Statements: *In case of equity listed companies, the gap between clearance of accounts by audit committee and board meeting should be as narrow as possible and preferably on the same day to avoid leakage of material information. [Schedule B to SEBI (Prohibition of Insider Trading) Regulations, 2015.*

3. Notice

i. Notice in writing of every Meeting shall be given to every Director by hand or by speed post or by registered post or by courier or by facsimile or by e-mail or by any other electronic means.

ii. Notice shall be issued by the Company Secretary or where there is no Company Secretary, any Director or any other person authorised by the Board for the purpose.

iii. The Notice shall specify the serial number, day, date, time and full address of the venue of the Meeting.

iv. In case the facility of participation through Electronic Mode is being made available, the Notice shall inform the Directors about the availability of such facility, and provide them necessary information to avail such facility.

v. The Notice of a Meeting shall be given even if Meetings are held on pre-determined dates or at pre-determined intervals.

vi. Notice convening a Meeting shall be given at least seven days before the date of the Meeting, unless the Articles prescribe a longer period.

In case the company sends the Notice by speed post or by registered post or by courier, an additional two days shall be added for the service of Notice. Notice of an adjourned Meeting shall be given to all Directors including those who did not attend the Meeting on the originally convened date and unless the date of adjourned Meeting is decided at the Meeting, notice thereof shall also be given not less than seven days before the Meeting.

vii. The Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda shall be given to the Directors at least seven days before the date of the Meeting, unless the Articles prescribe a longer period.

Notes on items of business which are in the nature of Unpublished Price Sensitive Information may be given at a shorter period of time, with the consent of a majority of the Directors, which shall include at least one Independent Director, if any.

For this purpose,

"unpublished price sensitive information" means any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following: -

(i) financial results;
(ii) dividends;
(iii) change in capital structure;
(iv) mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions;
(v) changes in key managerial personnel; and
(vi) material events in accordance with the listing agreement

viii. Each item of business requiring approval at the Meeting shall be supported by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal and the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed.

ix. Each item of business to be taken up at the Meeting shall be serially numbered.

x. 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, which shall include at least one Independent Director, if any.

xi. To transact urgent business, the Notice, Agenda and Notes on Agenda may be given at shorter period of time than stated above, if at least one Independent Director, if any, shall be present at such Meeting. If no Independent Director is present, decisions taken at such a Meeting shall be circulated to all the Directors and shall be final only on ratification thereof by at least one Independent Director, if any. In case the company does not have an Independent Director, the decisions shall be final only on ratification thereof by a majority of the Directors of the company, unless such decisions were approved at the Meeting itself by a majority of Directors of the company.

Notes:

A Meeting of the Board should be called by giving a Notice in writing to every Director [Sub-section (3) of Section 173 read with Rule 3(3)(a) of the Companies (Meetings of Board and its Powers) Rules, 2014].

"Electronic mail" means the message sent, received or forwarded in digital form using any electronic communication mechanism that the message so sent, received or forwarded is storable and retrievable [Definition in Rule 2(1)(g) of Companies (Specification of Definitions Details) Rules, 2014].

Notice-where to send: *The Notice shall be sent to the postal address or e-mail address, registered by the Director with the company or in the absence of such details or any change thereto, any of such addresses appearing in the Director Identification Number (DIN) registration of the Director. Notice of the Meeting should be sent to the Directors at their address registered with the company [Sub-section (3) of Section 173 of the Act read with Rule 3(3) (a) of the Companies (Meetings of Board and its Powers) Rules, 2014].*

Notice Period: *In line with sub-section (3) of Section 173 of the Act, the requirement is to send seven days' Notice and not seven clear days' Notice. Thus, for the purpose of computing the period of seven days, the date of the Meeting should be excluded but the date of Notice need not be excluded.*

Section 173(3) of the provides that a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means:

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting:

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Notes:

Notes on items of business which are in the nature of Unpublished Price Sensitive Information may be given at a shorter period of time than stated above, with the consent of a majority of the Directors, which shall include atleast one Independent Director, if any.

If no Independent Director is present, decisions taken at such a Meeting shall be circulated to all the Directors and shall be final only on ratification thereof by at least one Independent Director, if any.

In case the company does not have an Independent Director, the decisions shall be final only on ratification thereof by a majority of the Directors of the company, unless such decisions were approved at the Meeting itself by a majority of Directors of the company.

Where approval by means of a Resolution is required, the draft of such Resolution shall be either set out in the note or placed at the Meeting. However, any other decision taken at the Meeting may also be recorded in the Minutes in the form of Resolution. The items of business that are required by the Act or any other applicable law to be considered at a Meeting of the Board shall be placed before the Board at its Meeting. An illustrative list of such items is given at Annexure 'A'.

There are certain items which shall be placed before the Board at its first Meeting. An illustrative list thereof is given at Annexure 'B'.

II. Frequency of Meetings

1. **Meetings of the Board**

The Board shall meet at least once in every calendar quarter, with a maximum interval of one hundred and twenty days between any two consecutive Meetings of the Board, such that at least four Meetings are held in each Calendar Year.

The Board shall hold its first Meeting within thirty days of the date of incorporation of the company. It shall be sufficient if one Meeting is held in each of the remaining calendar quarters, subject to a maximum interval of one hundred and twenty days between any two consecutive Meetings of the Board, after the first Meeting. Further, it shall be sufficient if a One Person Company, Small Company or Dormant Company holds one Meeting of the Board in each half of a calendar year and the gap between the two Meetings of the Board is not less than ninety days. 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.

2. **Meetings of Committees**

Committees shall meet as often as necessary subject to the minimum number and frequency stipulated by the Board or as prescribed by any law or authority.

3. **Meeting of 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.

Notes:

The Meeting shall be held to review the performance of Non-Independent Directors and the Board as a whole; to review the performance of the Chairman and to assess the quality, quantity and timeliness of flow of information between the company management and the Board and its members that is necessary for the Board to effectively and reasonably perform their duties.

The Company Secretary, wherever appointed, shall facilitate convening and holding of such Meeting, if so desired by the Independent Directors.

III. Quorum

1. **Quorum shall be present throughout the Meeting.**

Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business.

2. A Director shall not be reckoned for Quorum in respect of an item in which he is interested and he shall not be present, whether physically or through Electronic Mode, during discussions and voting on such item.

For this purpose, a Director shall be treated as interested in a contract or arrangement entered into or proposed to be entered into by the company:

(a) with the Director himself or his relative; or

(b) with anybody corporate, if such Director, along with other Directors holds more than two percent of the paid-up share capital of that body corporate, or he is a promoter, or manager or chief executive officer of that body corporate; or

(c) with a firm or other entity, if such Director or his relative is a partner, owner or Member, as the case may be, of that firm or other entity

3. Directors participating through Electronic Mode in a Meeting shall be counted for the purpose of Quorum, unless they are to be excluded for any items of business under the provisions of the Act or any other law.

4. **Meetings of the Board**

i. The Quorum for a Meeting of the Board shall be one-third of the total strength of the Board, or two Directors, whichever is higher.

Any fraction contained in the above one-third shall be rounded off to the next one.
Where the Quorum requirement provided in the Articles is higher than one-third of the total strength, the company shall conform to such higher requirement.
Total strength for this purpose, shall not include Directors whose places are vacant.
If the number of Interested Directors exceeds or is equal to two-thirds of the total strength, the remaining Directors present at the Meeting, being not less than two, shall be the Quorum during such item.
If a Meeting of the Board could not be held for want of Quorum, then, unless otherwise provided in the Articles, the Meeting shall automatically stand adjourned to the same day in the next week, at the same time and place or, if that day is a National Holiday, to the next succeeding day which is not a National Holiday, at the same time and place.
If there is no Quorum at the adjourned Meeting also, the Meeting shall stand cancelled.

ii. Where the number of Directors is reduced below the minimum fixed by the Articles, no business shall be transacted unless the number is first made up by the remaining Director(s) or through a General Meeting.

5. **Meetings of Committees**

The presence of all the members of any Committee constituted by the Board is necessary to form the Quorum for Meetings of such Committee unless otherwise stipulated in the Act or any other law or the Articles or by the Board.

IV. Attendance at Meetings

1. **Attendance Registers**

i. Every company shall maintain separate attendance registers for the Meetings of the Board and Meetings of the Committee.

ii. The attendance register shall contain the following particulars: serial number and date of the Meeting; in case of a Committee Meeting name of the Committee; place of the

Meeting; time of the Meeting; names of the Directors and signature of each Director present, name and signature of the Company Secretary who is in attendance and also of persons attending the Meeting by invitation

iii. Every Director, Company Secretary who is in attendance and every Invitee who attends a Meeting of the Board or Committee thereof shall sign the attendance register at that Meeting.

iv. The attendance register shall be maintained at the Registered Office of the company or such other place as may be approved by the Board.

v. The attendance register is open for inspection by the Directors.

vi. Entries in the attendance register shall be authenticated by the Company Secretary or where there is no Company Secretary, by the Chairman by appending his signature to each page.

vii. The attendance register shall be preserved for a period of at least eight financial years and may be destroyed thereafter with the approval of the Board.

viii. The attendance register shall be in the custody of the Company Secretary.

2. Leave of absence shall be granted to a Director only when a request for such leave has been received by the Company Secretary or by the Chairman.

Notes:

The pages of the attendance register shall be serially numbered.

If an attendance register is maintained in loose-leaf form, it shall be bound periodically, atleast once in every three years.

In case of Directors participating through Electronic Mode, the Chairman shall confirm the attendance of such Directors.

Where there is no Company Secretary, the attendance register shall be in the custody of any other person authorised by the Board for this purpose.

Notes:

The office of a Director shall become vacant in case the Director absents himself from all the Meetings of the Board held during a period of twelve months with or without seeking leave of absence of the Board.

V. Chairman

1. Meetings of the Board

i. The Chairman of the company shall be the Chairman of the Board. If the company does not have a Chairman, the Directors may elect one of themselves to be the Chairman of the Board.

ii. The Chairman of the Board shall conduct the Meetings of the Board. If no 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 Articles.

Notes:

If the Chairman is interested in an item of business, he shall 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.

If the item of business is a related party transaction, the Chairman shall not be present at the Meeting, whether physically or through Electronic Mode, during discussions and voting on such item.

2. Meetings of Committees

A member of the Committee appointed by the Board or elected by the Committee as Chairman of the Committee, in accordance with the Act or any other law or the Articles, shall conduct the Meetings of the Committee. If no Chairman has been so elected or if the elected Chairman is unable to attend the Meeting, the Committee shall elect one of its members present to chair and conduct the Meeting of the Committee, unless otherwise provided in the Articles.

VI. Passing of Resolution by Circulation

1. Authority

i. The Chairman of the Board or in his absence, the Managing Director or in his absence, the Whole-time Director 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.

ii. Where not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting, the Chairman shall put the Resolution for consideration at a Meeting of the Board.

2. Procedure

i. A Resolution proposed to be passed by circulation shall be sent in draft, together with the necessary papers, individually to all the Directors including Interested Directors on the same day.

ii. The draft of the Resolution to be passed and the necessary papers shall be circulated amongst the Directors by hand, or by speed post or by registered post or by courier, or by e-mail or by any other recognised electronic means.

iii. Each business proposed to be passed by way of Resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed and the draft of the Resolution proposed. The note shall also indicate how a Director shall signify assent or dissent to the Resolution proposed and the date by which the Director shall respond.

3. Approval

i. The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting.

ii. The Resolution, if passed, shall be deemed to have been passed on the last date specified for signifying assent or dissent by the Directors or the date on which assent from more than two-third of the Directors has been received, whichever is earlier, and shall be effective from that date, if no other effective date is specified in such Resolution.

4. Recording

Resolutions passed by circulation shall be noted at the next Meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the Minutes of such Meeting.

5. Validity

Passing of Resolution by circulation shall be considered valid as if it had been passed at a duly convened Meeting of the Board.

Notes:

An illustrative list of items which shall be placed before the Board at its Meeting and shall not be passed by circulation is given at Annexure A.

Interested Directors shall not be excluded for the purpose of determining the above one-third of the total number of Directors.

Notes:

The draft of the Resolution and the necessary papers shall be sent to the postal address or e-mail address registered by the Director with the company or in the absence of such details or any change thereto, any of the addresses appearing in the Director Identification Number (DIN) registration of the Director.

Notes:

An Interested Director shall not be entitled to vote. For this purpose, a Director shall be treated as interested in a contract or arrangement entered or proposed to be entered into by the company:

(a) with any body corporate, if such Director, along with other Directors holds more than two percent of the paid-up share capital of that body corporate, or he is a promoter, or manager or chief executive officer of that body corporate; or
(b) with a firm or other entity, if such Director is a partner, owner or Member, as the case may be, of that firm or other entity.

Directors shall signify their assent or dissent by signing the Resolution to be passed by circulation or by e-mail or any other electronic means.

In case the Director does not respond on or before the last date specified for signifying assent or dissent, it shall be presumed that the Director has abstained from voting.

If the approval of the majority of Directors entitled to vote is not received by the last date specified for receipt of such approval, the Resolution shall be considered as not passed.

VII. Minutes

1. Maintenance of Minutes

i. Minutes shall be recorded in books maintained for that purpose.
ii. A distinct Minutes Book shall be maintained for Meetings of the Board and each of its Committees.
iii. Minutes may be maintained in electronic form in such manner as prescribed under the Act and as may be decided by the Board. Minutes in electronic form shall be maintained with Timestamp.
iv. The pages of the Minutes Books shall be consecutively numbered.
v. Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.
vi. Minutes of the Board Meetings, if maintained in loose-leaf form, shall be bound periodically depending on the size and volume and coinciding with one or more financial years of the company.
vii. Minutes of the Board Meeting shall be kept at the Registered Office of the company or at such other place as may be approved by the Board.

2. Contents of Minutes

i. General Contents

(a) 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.

(b) Minutes shall record the names of the Directors present physically or through Electronic Mode, the Company Secretary who is in attendance at the Meeting and Invitees, if any, including Invitees for specific items.

(c) Minutes shall contain a record of all appointments made at the Meeting.

ii. Specific Contents

(a) Minutes shall inter-alia contain:

- Record of election, if any, of the Chairman of the Meeting.
- Record of presence of Quorum.
- The names of Directors who sought and were granted leave of absence.
- The mode of attendance of every Director whether physically or through Electronic Mode.
- In case of a Director participating through Electronic Mode, his particulars, the location from where and the Agenda items in which he participated.
- The name of Company Secretary who is in attendance and Invitees, if any, for specific items and mode of their attendance if through Electronic Mode.
- Noting of the Minutes of the preceding Meeting.
- Noting the Minutes of the Meetings of the Committees.
- The text of the Resolution(s) passed by circulation since the last Meeting, including dissent or abstention, if any.
- The fact that an Interested Director was not present during the discussion and did not vote.
- The views of the Directors particularly the Independent Director, if specifically insisted upon by such Directors, provided these, in the opinion of the Chairman, are not defamatory of any person, not irrelevant or immaterial to the proceedings or not detrimental to the interests of the company.
- If any Director has participated only for a part of the Meeting, the Agenda items in which he did not participate.
- The fact of the dissent and the name of the Director who dissented from the Resolution or abstained from voting thereon.
- Ratification by Independent Director or majority of Directors, as the case may be, in case of Meetings held at a shorter Notice and the transacting of any item other than those included in the Agenda.
- The time of commencement and conclusion of the Meeting Recording of Minutes

(b) Apart from the Resolution or the decision, Minutes shall mention the brief background of all proposals and summarise the deliberations thereof. In case of major decisions, the rationale thereof shall also be mentioned.

3. Recording of Minutes

i. Minutes shall contain a fair and correct summary of the proceedings of the Meeting.
ii. Minutes shall be written in clear, concise and plain language.
iii. Any document, report or notes placed before the Board and referred to in the Minutes shall be identified by initialing of such document, report or notes by the Company Secretary or the Chairman.
iv. Where any earlier Resolution(s) or decision is superseded or modified, Minutes shall contain a reference to such earlier Resolution(s) or decision.
v. Minutes of the preceding Meeting shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

4. Finalisation of Minutes

Within fifteen days from the date of the conclusion of the Meeting of the Board or the Committee, the draft Minutes thereof shall be circulated by hand or by speed post or by registered post or by courier or by e-mail or by any other recognised electronic means to all the members of the Board or the Committee for their comments.

5. Entry in the Minutes Book

i. Minutes shall be entered in the Minutes Book within 30 days from the date of conclusion of the Meeting.
ii. The date of entry of the Minutes in the Minutes Book shall be recorded by the Company Secretary.
iii. Minutes, once entered in the Minutes Book, shall not be altered. Any alteration in the Minutes as entered shall be made only by way of express approval of the Board at its subsequent Meeting in which such Minutes are sought to be altered.

6. Signing and Dating of Minutes

i. Minutes of the Meeting of the Board shall be signed and dated by the Chairman of the Meeting or by the Chairman of the next Meeting.
ii. The Chairman shall initial each page of the Minutes, sign the last page and append to such signature the date on which and the place where he has signed the Minutes.
iii. Minutes, once signed by the Chairman, shall not be altered, save as mentioned in this Standard.
iv. A copy of the signed Minutes certified by the Company Secretary or where there is no Company Secretary, by any Director authorised by the Board shall be circulated to all Directors within fifteen days after these are signed.

7. Inspection and Extracts of Minutes

i. The Minutes of Meetings of the Board and any Committee thereof can be inspected by the Directors.
ii. Extracts of the Minutes shall be given only after the Minutes have been duly entered in the Minutes Book. However, certified copies of any Resolution passed at a Meeting may be issued even earlier, if the text of that Resolution had been placed at the Meeting.

8. Preservation of Minutes and other Records

i. Minutes of all Meetings shall be preserved permanently in physical or in electronic form with Timestamp.

ii. Office copies of Notices, Agenda, Notes on Agenda and other related papers shall be preserved in good order in physical or in electronic form for as long as they remain current or for eight financial years, whichever is later and may be destroyed thereafter with the approval of the Board.

iii. Minutes Books shall be kept in the custody of the Company Secretary.

9. **Disclosures:**

The Annual Report and Annual Return of a company shall disclose the number and dates of Meetings of the Board and Committees held during the financial year indicating the number of Meetings attended by each Director.

Annexure B: Illustrative list of items of business for the Agenda for the First Meeting of the Board of the company

1. To appoint the Chairman of the Meeting.
2. To note 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 note the situation of the Registered Office of the company and ratify the registered document of the title of the premises of the registered office in the name of the company or a Notarised copy of lease / rent agreement in the name of the company.
5. To note the first Directors of the company.
6. To read and record the Notices of disclosure of interest given by the Directors.
7. To consider appointment of Additional Directors.
8. To consider appointment of the Chairman of the Board.
9. To consider appointment of the first Auditors.
10. To adopt the Common Seal of the company, if any.
11. To appoint Bankers and to open bank accounts of the company.
12. To authorise printing of share certificates and correspondence with the depositories, if any.
13. To authorise the issue of share certificates to the subscribers to the Memorandum and Articles of Association of the company.
14. To approve and ratify preliminary expenses and preliminary agreements.
15. To approve the appointment of the Key Managerial Personnel, if applicable and other senior officers
16. To authorise Director(s) of the company to file a declaration with the ROC for commencement of business

MEETING THROUGH VIDEO CONFERENCING

Section 173(2) of Companies Act, 2013 read with Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, provides that the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means as may be prescribed, which are capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

Provided that the Central Government may, by notification, specify such matters which shall not be dealt with in 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.

The Complete process for conducting of Board Meeting through video conferencing is prescribed under Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 read with Secretarial Standard – 1.

Rule 3 of The Companies (Meetings of Board and its Powers) Rules, 2014

Meetings of Board Through Video Conferencing or Other Audio-Visual Means

A company shall comply with the following procedure, for convening and conducting the Board meetings through video conferencing or other audio-visual means.

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 –

(a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(b) to ensure availability of proper video conferencing or other audio-visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

(c) to record proceedings and prepare the minutes of the meeting;

(d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;

(e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio-visual means; and

(f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting.

Provided that the persons, who are differently abled, may make request to the Board to allow a person to accompany him.

3.

(a) The notice of the meeting shall be sent to all the directors in accordance with the provisions of subsection (3) of section 173 of the Act.

(b) 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.

(c) A director intending to participate through video conferencing or audio-visual means shall communicate his intention to the Chairperson or the company secretary of the company.

(d) 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 arrangements in this behalf.

(e) Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the calendar year and such declaration shall be valid for one year.

Provided that such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person."

(f) In the absence of any intimation under clause (c), it shall be assumed that the director shall attend the meeting in person.

4. 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: -

(a) name;

(b) the location from where he is participating;

(c) that he has received the agenda and all the relevant material for the meeting; and

(d) that no one other than the concerned director is attending or having access to the proceedings of the meeting at the location mentioned in clause (b).

5.

(a) After the roll call, the Chairperson or the Company 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 Chairperson and confirm that the required quorum is complete.

Explanation - A director participating in a meeting through video conferencing or other audio-visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.

(b) The Chairperson shall ensure that the required quorum is present throughout the meeting.

6.

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.

7. 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.

8.

(a) Every participant shall identify himself for the record before speaking on any item of business on the agenda.

(b) If a statement of a director in the meeting through video conferencing or other audio visual means is interrupted or garbled, the Chairperson or Company Secretary shall request for a repeat or reiteration by the Director.

9. 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.

10. From the commencement of the meeting and until the conclusion of such meeting, no person other than the Chairperson, Directors, Company 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.

11.

(a) 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, who dissented from the decision taken by majority "and the draft minutes so recorded shall be preserved by the company till the confirmation of the draft minutes in accordance with sub-rule (12)".

(b) The minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio visual means.

12.

(a) The draft minutes of the meeting shall be circulated among all the directors within fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board.

(b) Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed.

(c) After completion of the meeting, the minutes shall be entered in the minute book as specified under section 118 of the Act and signed by the Chairperson.

Explanation - For the purposes of this rule, "video conferencing or other audio visual means" means audiovisual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

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Annexure A: Illustrative list of items of business which shall not be passed by circulation and shall be placed before the Board at its Meeting:

General Business Items:

- Noting Minutes of Meetings of Audit Committee and other Committees.
- Approving financial statements and the Board's Report.
- Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company.
- Specifying list of laws applicable specifically to the company.
- Appointment of Secretarial Auditors and Internal Auditors.

Specific Items:

- Borrowing money otherwise than by issue of debentures.
- Investing the funds of the company.
- Granting loans or giving guarantee or providing security in respect of loans.
- Making political contributions.
- Making calls on shareholders in respect of money unpaid on their shares.
- Approving Remuneration of Managing Director, Whole-time Director and Manager.
- Appointment or Removal of Key Managerial Personnel.
- Appointment of a person as a Managing Director / Manager in more than one company.
- In case of a public company, the appointment of Director(s) in casual vacancy subject to the provisions in the Articles of the company.
- Sanction for related party transactions which are not in the ordinary course of business or which are not on arm's length basis.
- Sale of subsidiaries.
- Purchase and Sale of material tangible/intangible assets not in the ordinary course of business.
- Approve Payment to Director for loss of office.
- Items arising out of separate Meeting of the Independent Directors if so, decided by the Independent Directors.

Corporate Actions:

- Authorise Buy-Back of securities.
- Issue of securities, including debentures, whether in or outside India.
- Approving amalgamation, merger or reconstruction.
- Diversify the business.
- Takeover another company or acquiring controlling or substantial stake in another company.

Additional list of items in case of listed companies:

- Approving Annual operating plans and budgets.

- Capital budgets and any updates.
- Information on remuneration of Key Managerial Personnel.
- Show cause, demand, prosecution notices and penalty notices which are materially important.
- Fatal or serious accidents, dangerous occurrences, any material effluent or pollution problems.
- Any material default in financial obligations to and by the company, or substantial non-payment for goods sold by the company.
- Any issue, which involves possible public or product liability claims of substantial nature, including any judgement or order which, may have passed strictures on the conduct of the company or taken an adverse view regarding another enterprise that can have negative implications on the company.
- Details of any joint venture or collaboration agreement.
- Transactions that involve substantial payment towards goodwill, brand equity, or intellectual property.
- Significant labour problems and their proposed solutions. Any significant development in Human Resources/ Industrial Relations front like signing of wage agreement, implementation of Voluntary Retirement Scheme etc.
- Quarterly details of foreign exchange exposures and the steps taken by management to limit the risks of adverse exchange rate movement, if material.

  Non-compliance of any regulatory, statutory or listing requirements and shareholder services such as non-payment of dividend, delay in share transfer etc.

SECRETARIAL STANDARD ON GENERAL MEETINGS

Following is the text of the Secretarial Standard-2 (SS-2) on "General Meetings", issued by the Council of the Institute of Company Secretaries of India and approved by the Central Government.

Adherence by a company to this Secretarial Standard is mandatory, as per the provisions of the Companies Act, 2013.

INTRODUCTION

This Standard seeks to prescribe a set of principles for the convening and conducting of General Meetings and matters related thereto.

This Standard also deals with conduct of e-voting and postal ballot.

SCOPE

In terms of sub-section (10) of Section 118 of the Act, every company is required to observe SS-2.

SS-2 is thus applicable to General Meetings of all companies incorporated under the Act including private and small companies, except One Person Companies (OPC) and companies licensed under Section 8 of the Companies Act, 2013 or corresponding provisions of any previous enactment thereof.

MCA Notification No. G.S.R. 466(E) dated 5th June, 2015 exempts companies licensed under Section 8 of the Companies Act, 2013 from the applicability of Section 118 of the Act as a whole except that Minutes of Meetings of such a company may be recorded within thirty days of the conclusion of every Meeting in case of companies where the Articles of Association provide for confirmation of Minutes by circulation. Consequently, SS-2 is not applicable to companies licensed under Section 8 of the Companies Act, 2013 or corresponding provisions of any previous enactment thereof. Such companies may voluntarily comply with SS-2. However, Section 8 companies need to comply with the applicable provisions of the Act relating to General Meetings.

Further, MCA vide its Notifications No. G.S.R. 584(E) dated 13th June, 2017 modified the above cited Notification dated 5th June, 2015 to place a restriction that Such exemptions Shall be applicable to a Section 8 company which have not committed a default in filing its Financial Statements or Annual Return with the Registrar of Companies.

In addition, by virtue of MCA Exemption Notifications No. G.S.R. 08(E) & G.S.R. 9(E), dated 4th January, 2017, following class of companies are exempted from the applicability of Section 118(10) of Companies Act, 2013 i.e. the compliance of Secretarial Standards:

- **Specified IFSC public company:** An unlisted public company which is licensed to operate by the Reserve Bank of India or the Securities and Exchange Board of India or the Insurance Regulatory and Development Authority of India from the International Financial Services Centre located in an approved multi services Special Economic Zone set-up under the Special Economic Zones Act, 2005 read with the Special Economic

Zones Rules, 2006.

- **Specified IFSC private company:** A private company which is licensed to operate by the Reserve Bank of India or the Securities and Exchange Board of India or the Insurance Regulatory and Development Authority of India from the International Financial Services Centre located in an approved multi services Special Economic Zone set-up under the Special Economic Zones Act, 2005 read with the Special Economic Zones Rules, 2006.

Applicability to companies governed under Special Acts

SS-2 is also applicable to Banking companies, Insurance companies, companies engaged in generation or supply of electricity, companies governed by any special Acts, if incorporated under the Act. However, if the provisions of these special Acts such as the Banking Regulation Act, 1949, the Insurance Act, 1938, etc. applicable to these companies are inconsistent with SS-2, then the provisions of such special Acts shall prevail.

Applicability to the Meetings of class of Members, debenture holders and creditors

The principles enunciated in SS-2 for General Meetings of Members are applicable *mutatis mutandis* to Meetings of class of Members, debenture holders and creditors.

A Meeting of Members or class of Members or debenture holders or creditors of a company under the directions of the Court, Tribunal or any other prescribed authority shall be governed by SS-2 without prejudice to any rules, regulations and directions prescribed for and orders of, such Courts, Tribunals and other authorities with respect to the conduct of such Meetings.

This Standard is in conformity with the provisions of the Act. However, if, due to subsequent changes in the Act, a particular Standard or any part thereof becomes inconsistent with the Act, the provisions of the Act shall prevail.

DEFINITIONS

The following terms are used in this Standard with the meaning Specified:

"*Act*" means the Companies Act, 2013 (Act No. 18 of 2013) or any previous enactment thereof, or any Statutory modification thereto, or re-enactment thereof and includes any Rules and Regulations framed thereunder.

"*Agency*" means agency approved or recognized by the Ministry of Corporate Affairs and appointed by the Board for providing and supervising electronic platform for voting.

"*Articles*" means the Articles of Association of a company, as originally framed or as altered from time to time or applied in pursuance of any previous company law or the Companies Act, 2013.

"*Calendar Year*" means calendar year as per Gregorian calendar, i.e., a period of one year which begins on 1st January and ends on 31st December.

"*Chairman*" means the Chairman of the Board or the Chairman appointed or elected for a Meeting.

"*Maintenance*" means keeping registers and records either in physical or electronic form,

as may be permitted under any law for the time being in force, and includes the making of necessary entries therein, the authentication of such entries and the preservation of such physical or electronic records.

"Meeting" or *"General Meeting"* or *"Annual General Meeting"* or *"Extra-Ordinary General Meeting"* means a duly convened, held and conducted Meeting of Members.

"Minutes" means a formal written record, in physical or electronic form, of the proceedings of a Meeting.

"Minutes Book" means a Book maintained in physical or in electronic form for the purpose of recording of Minutes.

"National Holiday" means Republic Day i.e. 26th January, Independence Day i.e. 15th August, Gandhi Ajanta i.e. 2nd October and such other day as may be declared as National Holiday by the Central Government.

"Ordinary Business" means business to be transacted at an Annual General Meeting relating to (i) the consideration of financial Statements, consolidated financial Statements, if any, and the reports of the Board of Directors and Auditors;

(ii) the declaration of any dividend;

(iv) the appointment of Directors in the place of those retiring; and

(v) (iv) The appointment or ratification thereof and fixing of remuneration of the Auditors.

"Proxy" means an instrument in writing signed by a Member, authorizing another person, whether a Member or not, to attend and vote on his behalf at a Meeting and also where the context so requires, the person so appointed by a Member.

"Quorum" means the minimum number of Members whose presence is necessary for holding of a Meeting.

"Remote e-rating" means the facility of casting votes by a member using an electronic voting system from a place other than venue of a general meeting.

"Secretarial Auditor" means a Company Secretary in Practice or a firm of Company Secretary (ieS) in Practice appointed in pursuance of the Act to conduct the secretarial audit of the company.

"Secured Computer System" means computer hardware, software, and procedure that –

(a) are reasonably secure from unauthorized access and misuse;
(b) provide a reasonable level of reliability and correct operation;
(c) are reasonably suited to performing the intended functions; and
(d) adhere to generally accepted security procedures.

"Special Business" means business other than the Ordinary Business to be transacted at an Annual General Meeting and all business to be transacted at any other General Meeting.

"Timestamp" means the current time of an event that is recorded by a Secured Computer System and is used to describe the time that is printed to a file or other

location to help keep track of when data is added, removed, sent or received.

"*Voting by electronic means*" includes "remote e-voting" and voting at the general meeting through an electronic voting system which may be the same as used for remote e-voting.

"*Voting by postal ballot*" means voting by ballot, by post or by electronic means.

"*Voting Right*" means the right of a Member to vote on any matter at a Meeting of Members or by means of e-voting or postal or physical ballot.

Secretarial Standard -II

1. Convening a Meeting

1.1 Authority

A General Meeting shall be convened by or on the authority of the Board.

The Board shall, every year, convene or authorize convening of a Meeting of its Members called the Annual General Meeting to transact items of Ordinary Business Specifically required to be transacted at an Annual General Meeting as well as Special Business, if any. If the Board fails to convene its Annual General Meeting in any year, any Member of the company may approach the prescribed authority, which may then direct the calling of the Annual General Meeting of the company.

The Board may also, whenever it deems fit, call an Extra-Ordinary General Meeting of the company.

The Board shall, on the requisition of Members who hold, as on the date of the receipt of a valid requisition,

(a) in the case of company having a share capital, not less than one-tenth of the paid-up share capital carrying Voting Rights or

(b) in the case of a company not having share capital, not less than one-tenth of total voting power of the company,

Call an Extra-Ordinary General Meeting of the company

If, on receipt of a valid requisition having been made in this behalf, the Board, within twenty-one days from the date of Such receipt, fails to call a Meeting on any day within forty-five days from the date of receipt of such requisition, the requisitionists may themselves call and hold the Meeting within three months from the date of requisition, in the same manner in which the Board should have called and held the Meeting.

Explanatory statement need not be annexed to the Notice of an Extra-Ordinary General Meeting convened by the requisitionists and the requisitionists may disclose the reasons for the Resolution(s) which they propose to move at the Meeting.

Such requisition shall not pertain to any item of business that is required to be transacted mandatorily through postal ballot.

1.2 Notice

1.2.1 Notice in writing of every Meeting shall be given to every Member of the company. Such Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified persons.

In case of a Niche, Notice may be served individually only on Members who hold shares of more than one thousand rupees in face value or more than one percent of the total paid-up share capital of the company, whichever is less. For other Members, Notice may be served by a public notice in newspaper circulated in the district where the Registered Office of the company is situated and by displaying the same on the Notice Board of the

company.

In the case of Members, Notice shall be given at the address registered with the company or depository. In the case of shares or other securities held jointly by two or more persons, the Notice Shall be given to the person whose name appears first as per records of the company or the depository, as the case may be. In the case of any other person who is entitled to receive Notice, the same shall be given to such person at the address provided by him.

Where the company has received intimation of death of a Member, the Notice of Meeting shall be sent as under:

(a) where securities are held singly, to the Nominee of the single holder;

(b) where securities are held by more than one person jointly and any joint holder dies,

(c) to the Surviving first joint holder;

Where securities are held by more than one person jointly and all the joint holders die, to the Nominee appointed by all the joint holders;

In the absence of a Nominee, the Notice shall be sent to the legal representative of the deceased Member.

In case of insolvency of a Member, the Notice shall be sent to the assignee of the insolvent Member.

In case the Member is a company or body corporate which is being wound up, Notice shall be sent to the liquidator.

1.2.2 **Notice shall be sent by hand or by ordinary post or by speed post or by registered post or by courier or by facsimile or by e-mail or by any other electronic means. 'Electronic means' means any communication sent by a company through its authorized and secured computer programmer which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the Member.**

In case the Notice and accompanying documents are given by e-mail, these shall be sent at the Members' e-mail addresses, registered with the company or provided by the depository, in the manner prescribed under the Act.

The company shall ensure that it uses a System which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the Notice has been sent and copy of such record and any Notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as "proof of sending" for such period as decided by the Board, which shall not be less than three years from the date of the Meeting.

In case of the Directors, Auditors, Secretarial Auditors and others, if any, the Notice and accompanying documents shall be sent at the e-mail addresses provided by them to the company, if being sent by electronic means.

Notice shall be sent to Members by registered post or speed post or courier or e-mail and not by ordinary post in the following cases:

(a) if the company provides the facility of e-voting ;

(b) if the item of business is being transacted through postal ballot.

If a Member requests for delivery of Notice through a particular mode, other than the one followed by the company, he shall pay such fees as may be determined by the company in its Annual General Meeting and the Notice shall be sent to him in such mode.

Notice shall be sent to Members by registered post or speed post or e-mail if the Meeting is called by the requisitionists themselves where the Board had not proceeded to call the Meeting.

1.2.3 In case of companies having a website, the Notice shall simultaneously be hosted on the website till the conclusion of the Meeting.

In case of a private company, the Notice shall be hosted on the website of the company, if any, unless otherwise provided in the Articles.

1.2.4 Notice shall specify the day, date, time and full address of the venue of the Meeting.

Notice of Annual General Meeting shall also specify the serial number of the Meeting.

Notice shall contain complete particulars of the venue of the Meeting including route map and prominent land mark, if any, for easy location, except in case of –

i) a company in which only its directors and their relatives are members;

ii) a wholly owned subsidiary.

An Annual General Meeting and a Meeting called by the requisitionists shall be called during business hours, i.e., between 9 a.m. and 6 p.m., on a day that is not a National Holiday.

Annual General Meetings Shall be held either at the registered office of the company or at Some other place within the city, town or village in which the registered office of the company is situated, whereas other General Meetings may be held at any place within India. A Meeting called by the requisitionists Shall be held either at the registered office of the company or at Some other place within the city, town or village in which the registered office of the company is Situated

In case of a Government company, take Annual General Meeting skill be kelp at its registered office or any other place with the approval of the Central Government, as may be required in this behalf. [In line with MCA Notification No. G.S.R. 463JE) dated June 5, 2015.]

However, MCA ride its Notifications No. G.S.R. 582JE) dated 13tk June, 2017 modified the abode cited Notification dated 5tk June, 2015 to provide that in case of a Government company, the Annual General Meeting JAGM) shall be held at its registered office or some other place within the city, town or village in which the registered office of the company is situated or at any other place with the approval of the Central Government.

Accordingly, now there is no need of Central Government approval, if a Government Company is molding its AGM within the city, town or village in which registered office of the company is situated.

Notice of a company which has a share capital or the Articles of which provide for voting at a Meeting by Proxy, shall prominently contain 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.

In case of a private company, the Notice shall specify the entitlement of a member to appoint proxy in accordance with this para, unless otherwise provided in the Articles.

In case of a private company, the Articles may contain a provision as to the entitlement of members to appoint proxy. In such a case, the Notice of General Meetings should contain matters in accordance with the Articles [In line with MCA Notification No. G.S.R. 464JE) dated June 5, 2015].

1.2.5 Notice shall clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon. In respect of items of Ordinary Business, Resolutions are not required to be stated in the Notice.

The nature of the concern or interest (financial or otherwise), if any, of the following persons, in any special item of business or in a proposed Resolution, shall be disclosed in the explanatory statement:

(a) Directors and Manager;

(b) Other Key Managerial Personnel; and

(c) Relatives of the persons mentioned above.

In case 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 and of every other Key Managerial Personnel of the first mentioned company shall, if the extent of such shareholding is not less than two percent of the paid-up share capital of that company, also be stated in the explanatory statement.

Where reference is made to any document, contract, agreement, the Memorandum of Association or Articles of Association, the relevant explanatory statement shall state that such documents are available for inspection and such documents shall be so made available for inspection in physical or in electronic form during Specified business hours at the Registered Office of the company and copies thereof shall also be made available for inspection in physical or electronic form at the Head Office as well as Corporate Office of the company, if any, if Such office is Situated elsewhere, and also at the Meeting.

Illustration:

XYZ Ltd. proposes to enter into a contract with PQR Ltd. Mr. X and Mr. Y, who are promoters of XYZ Ltd. hold 1.5% and 0.5% of the total paid-up share capital of PQR Ltd. respectively. In this case, the shareholding of both, Mr. X and Mr. Y should be disclosed in the explanatory statement of the Notice of General Meeting of XYZ Ltd., since the extent of their shareholding collectively is not less than two percent of the paid-up share capital of PQR Ltd

In case of a private company, explanatory statement shall comply with the above requirements, unless otherwise provided in the Articles.

In case of a private company, take Articles may contain a provision as to the contents of explanatory statement to the Notice of General Meetings. In such a case, the Notice of General Meetings should contain such matters as provided in the Articles [In line with MCA Notification No. G.S.R. 464JE) dated June 5, 2015]

In all cases relating to the appointment or re-appointment and/or fixation of remuneration of Directors including Managing Director or Executive Director or Whole - time Director or of Manager or variation of the terms of remuneration, details of each such Director or Manager, including age, qualifications, experience, terms and conditions of appointment or reappointment along with details of remuneration sought to be paid and the remuneration last drawn by Such person, if applicable, date of first appointment on the Board, Shareholding in the company, relationship with other Directors, Manager and other Key Managerial Personnel of the company, the number of Meetings of the Board attended during the year and other Directorships, Membership/ Chairmanship of Committees of other Boards shall be given in the explanatory statement.

In case of appointment of Independent Directors, the justification for choosing the appointees for appointment as Independent Directors shall be disclosed and in case of re-appointment of Independent Directors, performance evaluation report of such Director or summary thereof shall be included in the explanatory statement.

1.2.6 Notice and accompanying documents shall be given at least twenty-one clear days in advance of the Meeting.

For the purpose of reckoning twenty-one days clear Notice, the day of sending the Notice and the day of Meeting shall not be counted. Further in case the company sends the Notice by post or courier, an additional two days shall be provided for the service of Notice.

In case of a private company, the period of sending Notice including accompanying documents shall be as stated above, unless otherwise provided in the Articles.

In case of a private company, the Articles may contain a provision as to the Notice period of General Meetings. In such a case, the Notice of General Meetings should be issued in accordance with the Articles [In line with MCA Notification No. G.S.R. 464JE) dated June 5, 2015].

In case of Nidkis, in respect of Members who do not individually or jointly hold shares of more taken one thousand rupees in face value or more taken one percent of the total paid-up share capital whickerer is less, it shall be sufficient compliance with the provisions of Section 136, if an intimation is sent by public notice in newspaper circulated in the district in which the Registered Office of the Nidki is situated stating –

i. the date, time and revue of Annual General Meeting;
ii. that the financial statement with its enclosures can be inspected at the Registered Office of the Company;
iii. that the financial statement with enclosures are affixed at the Notice Board of the company; and
iv. a Member is entitled to rote either in person or through Proxy.

In case a valid special Notice under the Act has been received from Member(s), the company shall give Notice of the Resolution to all its Members at least seven days before the Meeting, exclusive of the day of dispatch of Notice and day of the Meeting, in the same manner as a Notice of any General Meeting is to be given.

Where this is not practicable, the Notice shall be published in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district, at least seven days before the Meeting, exclusive of the day of publication of the Notice and day of the Meeting. In case of companies having a website, such Notice shall simultaneously be hosted on the website

1.2.7 **Notice and accompanying documents may be given at a shorter period of time if consent in writing is given thereto, by physical or electronic means, by not less than ninety-five percent of the Members entitled to vote at such Meeting.**

The request for consenting to shorter Notice and accompanying documents shall be sent together with the Notice and the Meeting shall be held only if the consent is received prior to the time fixed for the Meeting from not less than ninety-five percent of the Members entitled to vote at such Meeting.

The company shall ensure compliance of provisions relating to appointment of Proxy unless all the Members entitled to vote at such Meeting, consent to holding of the General Meeting at shorter Notice.

In case of a private company, consent for shorter Notice shall be obtained from such number of members as Specified in this para, unless otherwise provided in the Articles.

1.2.8 **No business shall be transacted at a Meeting if Notice in accordance with this Standard has not been given.**

However, any accidental omission to give Notice to, or the non-receipt of such Notice by any Member or other person who is entitled to such Notice for any Meeting shall not invalidate the proceedings of the Meeting.

1.2.9 **No items of business other than those specified in the Notice and those specifically permitted under the Act shall be taken up at the Meeting.**

A Resolution shall be valid only if it is passed in respect of an item of business contained in the Notice convening the Meeting or it is specifically permitted under the Act.

Items specifically permitted under the Act which may be taken up for consideration at the Meeting are:

(a) Proposed Resolutions, the Notice of which has been given by Members;

(b) Resolutions requiring special Notice, if received with the intention to move;

(c) Candidature for Directorship, if any such Notice has been received.

Where Special Notice is required of any Resolution and Notice of the intention to move such Resolution is received by the company from the prescribed number of Members, such item of business shall be placed for consideration at the Meeting after giving Notice of the Resolution to Members in the manner prescribed under the Act.

Any amendment to the Notice, including the addition of any item of business, can be made provided the Notice of amendment is given to all persons entitled to receive the Notice of the Meeting at least twenty-one clear days before the Meeting.

1.2.10 Notice shall be accompanied, by an attendance slip and a Proxy form with clear instructions for filling, stamping, signing and/or depositing the Proxy form.

1.2.11 *A* Meeting convened upon due Notice shall not be postponed or cancelled.

If, for reasons beyond the control of the Board, a Meeting cannot be held on the date originally fixed, the Board may reconvene the Meeting, to transact the same business as Specified in the original Notice, after giving not less than three days intimation to the Members. The intimation shall be either sent individually in the manner stated in this Standard or published in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is Situated, and in an English newspaper in English language, both having a wide circulation in that district

2. Frequency of Meetings

2.2 Annual General Meeting

Every company shall, in each Calendar Year, hold a General Meeting called the Annual General Meeting.

Every company shall hold its first Annual General Meeting within nine months from the date of closing of the first financial year of the company and thereafter in each Calendar Tear within Six months of the close of the financial year, with an interval of not more than fifteen months between two Successive Annual General Meetings. The aforesaid period of Six months or interval of fifteen months may be extended by a period not exceeding three months with the prior approval of the Registrar of Companies, in case of any Annual General Meeting other than the first Annual General Meeting. If a company holds its first Annual General Meeting, as aforesaid, it shall not be necessary for the company to hold any Annual General Meeting in the Calendar Year of its incorporation.

2.3 Extra-Ordinary General Meeting

Items of business other than Ordinary Business may be considered at an Extra-Ordinary General Meeting or by means of a postal ballot, if thought fit by the Board.

3. Quorum

3.2 Quorum shall be present throughout the Meeting.

Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business.

Unless the Articles provide for a larger number, the Quorum for a General Meeting shall be:

(a) in case of a public company, –

(i) five Members personally present if the number of Members as on the date of Meeting is not more than one thousand;

(ii) fifteen Members personally present if the number of Members as on the date of Meeting is more than one thousand but up to five thousand;

(iii) thirty Members personally present if the number of Members as on the date of the Meeting exceeds five thousand;

(b) In the case of a private company, two Members personally present.

Where the Quorum provided in the Articles is higher than that provided under the Act, the Quorum shall conform to such higher requirement.

Members need to be personally present at a Meeting to constitute the Quorum. Proxies shall be excluded for determining the Quorum.

3.3 A duly authorized representative of a body corporate or the representative of the President of India or the Governor of a State is deemed to be a Member personally present and enjoys all the rights of a Member present in person.

One person can be an authorized representative of more than one body corporate. In such a case, he is treated as more than one Member present in person for the purpose of Quorum. However, to constitute a Meeting, at least two individuals shall be present in person. Thus, in case of a public company having not more than 1000 members with a Quorum requirement of five Members, an authorized representative of five bodies corporate cannot form a Quorum by himself but can do So if at least one more Member is personally present.

Members who have voted by Remote e-voting have the right to attend the General Meeting and accordingly their presence shall be counted for the purpose of Quorum.

A Member who is not entitled to vote on any particular item of business being a related party, if present, shall be counted for the purpose of Quorum.

The stipulation regarding the presence of a Quorum does not apply with respect to items of business transacted through postal ballot.

4. Presence of Directors and Auditors

4.1 Directors

If any Director is unable to attend the Meeting, the Chairman shall explain such absence at the Meeting.

The Chairman of the Audit Committee, Nomination and Remuneration Committee and the Stakeholders Relationship Committee, or any other Member of any such Committee authorized by the Chairman of the respective Committee to attend on his behalf, shall attend the General Meeting.

Directors who attend General Meetings of the company and the Company Secretary shall be seated with the Chairman.

The Company Secretary shall assist the Chairman in conducting the Meeting.

4.2 Auditors

The Auditors, unless exempted by the company, shall, either by themselves or through their authorized representative, attend the General Meetings of the company and shall have the right to be heard at such Meetings on that part of the business which concerns them as Auditors.

The authorized representative who attends the General Meeting of the company shall also be qualified to be an Auditor.

4.3 Secretarial Auditor

The Secretarial Auditor, unless exempted by the company shall, either by himself or through his authorized representative, attend the Annual General Meeting and shall have the right to be heard at such Meeting on that part of the business which concerns him as Secretarial Auditor.

The Chairman may invite the Secretarial Auditor or his authorized representative to attend any other General Meeting, if he considers it necessary.

The authorized representative who attends the General Meeting of the company Shall also be qualified to be a Secretarial Auditor.

5. Chairman

5.1 Appointment

The Chairman of the Board shall take the Chair and conduct the Meeting. If the Chairman is not present within fifteen minutes after the time appointed for holding the Meeting, or if he is unwilling to act as Chairman of the Meeting, or if no Director has been so designated, the Directors present at the Meeting shall elect one of themselves to be the Chairman of the Meeting. If no Director is present within fifteen Minutes after the time appointed for holding the Meeting, or if no Director is willing to take the Chair, the Members present shall elect, on a show of hands, one of themselves to be the Chairman of the Meeting, unless otherwise provided in the Articles.

If a poll is demanded on the election of the Chairman, it shall be taken forthwith in

accordance with the provisions of the Act and the Chairman elected on a show of hands shall continue to be the Chairman of the Meeting until some other person is elected as Chairman as a result of the poll, and such other person shall be the Chairman for the rest of the Meeting

The Chairman shall ensure that the Meeting is duly constituted in accordance with the Act and the Articles or any other applicable laws, before it proceeds to transact business. The Chairman shall then conduct the Meeting in a fair and impartial manner and ensure that only such business as has been set out in the Notice is transacted. The Chairman shall regulate the manner in which voting is conducted at the Meeting keeping in view the provisions of the Act.

5.2 The Chairman shall explain the objective and implications of the Resolutions before they are put to vote at the Meeting.

The Chairman Shall provide a fair opportunity to Members who are entitled to vote to Seek clarifications and/or offer comments related to any item of business and address the same, as warranted.

5.3 In case of public companies, the Chairman shall not propose any Resolution in which he is deemed to be concerned or interested nor shall he conduct the proceedings for that item of business.

If the Chairman is interested in any item of business, without prejudice to his Voting Rights on Resolutions, he shall entrust the conduct of the proceedings in respect of such item to any Non-Interested Director or to a Member, with the consent of the Members present, and resume the Chair after that item of business has been transacted.

6. Proxies

6.1 Right to Appoint

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 a Proxy need not be a Member.

A Proxy can act on behalf of Members not exceeding fifty and holding in the aggregate not more than ten percent of the total share capital of the company carrying Voting Rights.

However, a Member holding more than ten percent of the total share capital of the company carrying Voting Rights may appoint a single person as Proxy for his entire shareholding and such person shall not act as a Proxy for another person or shareholder.

If a Proxy is appointed for more than fifty Members, he shall choose any fifty Members and confirm the same to the company before the commencement of Specified period for inspection. In case, the Proxy fails to do So, the company Shall consider only the first fifty Proxies received as valid.

Members of certain class or classes of companies as may be specified by the Central Government shall not be entitled to appoint any other person as a proxy [Third Proviso to sub-section J1) of Section 105 of the Act].

Phone No. 7703880232, 8882090148, 9318492718
Address:-D-223/1, Vikas Marg, Near Laxmi Nagar Metra Gate No. 5, Delhi - 110092

6.2 Form of Proxy

6.2.1 An instrument appointing a Proxy shall be in the Form prescribed under the Act.

Such instrument shall not be questioned on the ground that it fails to comply with any special requirements Specified by the Articles of a company.

The instrument of Proxy shall be signed by the appointer or his attorney duly authorized in writing, or if the appointer is a body corporate, be under its Seal or be Signed by an officer or an attorney duly authorized by it.

6.2.2 An instrument of Proxy duly filled, stamped and signed, is valid only for the Meeting to which it relates including any adjournment thereof.

6.3 Stamping of Proxies

An instrument of Proxy is valid only if it is properly stamped as per the applicable law. Unstamped or inadequately stamped Proxies or Proxies upon which the stamps have not been cancelled are invalid.

6.4 Execution of Proxies

6.4.1 The Proxy-holder shall prove his identity at the time of attending the Meeting.

6.4.2 An authorized representative of a body corporate or of the President of India or of the Governor of a State, holding shares in a company, may appoint a Proxy under his signature.

6.5 Proxies in Blank and Incomplete Proxies

6.5.1 A Proxy form which does not state the name of the Proxy shall not be considered valid.

6.5.2 Undated Proxy shall not be considered valid.

6.5.3 If a company receives multiple Proxies for the same holdings of a Member, the Proxy which is dated last shall be considered valid; if they are not dated or bear the same date without specific mention of time, all such multiple Proxies shall be treated as invalid.

6.6 Deposit of Proxies and Authorizations

6.6.1 Proxies shall be deposited with the company either in person or through post not later than forty-eight hours before the commencement of the Meeting in relation to which they are deposited and a Proxy shall be accepted even on a holiday if the last date by which it could be accepted is a holiday.

Any provision in the Articles of a company which Specifies or requires a longer period for deposit of Proxy than forty-eight hours before a Meeting of the company shall have effect as if a period of forty-eight hours had been specified in or required for Such deposit.

In case of a private company, the Proxy shall be deposited with the company in accordance with this para, unless otherwise provided in the Articles

6.6.2 If the Articles so provide, a Member who has not appointed a Proxy to attend and

vote on his behalf at a Meeting may appoint a Proxy for any adjourned Meeting, not later than forty-eight hours before the time of such adjourned Meeting.

6.6.3 In case of remote e-voting:

(i) the letter of appointment of representative(s) of the President of India or the Governor of a State; or

(ii) The authorization in respect of representative(s) of the Corporations;

shall be received by the scrutinizer/company on or before close of e-voting.

In case of postal ballot such letter of appointment/ authorization shall be submitted to the scrutinizer along with physical ballot form.

If the representative attends the Meeting in person to vote thereat, the letter of appointment / authorization, as the case may be, shall be submitted before the commencement of Meeting.

6.7 Revocation of Proxies

6.7.1 If a Proxy had been appointed for the original Meeting and such Meeting is adjourned, any Proxy given for the adjourned Meeting revokes the Proxy given for the original Meeting.

6.7.2 A Proxy later in date revokes any Proxy/Proxies dated prior to such Proxy.

6.7.3 A Proxy is valid until written notice of revocation has been received by the company before the commencement of the Meeting or adjourned Meeting, as the case may be.

An undated notice of revocation of Proxy shall not be accepted. A notice of revocation shall be signed by the same Member (s) who had signed the Proxy, in the case of joint Membership.

6.7.4 When a Member appoints a Proxy and both the Member and Proxy attend the Meeting, the Proxy stands automatically revoked.

6.8 Inspection of Proxies

6.8.1 Requisitions, if any, for inspection of Proxies shall be received in writing from a Member entitled to vote on any Resolution at least three days before the commencement of the Meeting.

6.8.2 Proxies shall be made available for inspection during the period beginning twenty-four hours before the time fixed for the commencement of the Meeting and ending with the conclusion of the Meeting.

Inspection shall be allowed between 9 a.m. and 6 p.m. during such period.

In case of a private company, inspection of Proxies shall be as stated above, unless otherwise provided in the Articles.

6.8.3 A fresh requisition, conforming to the above requirements, shall be given for inspection of Proxies in case the original Meeting is adjourned.

6.9 Record of Proxies

6.9.1 All Proxies received by the company shall be recorded chronologically in a register kept for that purpose.

6.9.2 In case any Proxy entered in the register is rejected, the reasons therefor shall be entered in the remarks column.

7. Voting

7.1 Proposing a Resolution at a Meeting

Every Resolution, except a Resolution which has been put to vote through Remote e-Voting or on which a poll has been demanded, shall be proposed by a Member and seconded by another Member.

7.2 E-voting

7.2.1 Every company having its equity shares listed on a recognized stock exchange other than companies whose equity shares are listed on SME Exchange or on the Institutional Trading Platform and other companies as prescribed shall provide e-voting facility to their Members to exercise their Voting Rights.

Other companies presently prescribed are companies having not less than one thousand Members.

Nidhis are not required to provide e-voting facility to their Members.

The facility of Remote e-voting does not dispense with the requirement of holding a General Meeting by the company.

7.2.2 Voting at the Meeting

Every company, which has provided e-voting facility to its Members, shall also put every Resolution to vote through a ballot process at the Meeting.

Ballot process may be carried out by distributing ballot/poll slips or by making arrangement for voting through computer or secure electronic systems.

Any Member, who has already exercised his votes through Remote e-voting, may attend the Meeting but is prohibited to vote at the Meeting and his vote, if any, cast at the Meeting shall be treated as invalid.

A Proxy can vote in the ballot process.

7.3 Show of Hands

Every company shall, at the Meeting, put every Resolution, except a Resolution which has been put to Remote e-voting, to vote on a show of hands at the first instance, unless a poll is validly demanded.

A Proxy cannot vote on a show of hands.

In case of a private company, the voting by show of hands shall be in accordance with this para, unless otherwise provided in the Articles.

7.4 Poll

The Chairman shall order a poll upon receipt of a valid demand for poll either before or on the declaration of the result of the voting on any Resolution on show of hands.

Poll in such cases shall be through a Ballot process.

While a Proxy cannot speak at the Meeting, he has the right to demand or join in the demand for a poll. The poll may be taken by the Chairman, on his own motion also.

7.5 Voting Rights

Every Member holding equity shares and, in certain cases as prescribed in the Act, every Member holding preference shares, shall be entitled to vote on a Resolution

Every Member entitled to vote on a Resolution and present in person shall, on a show of hands, have only one vote irrespective of the number of shares held by him.

A Member present in person or by Proxy shall, on a poll or ballot, have votes in proportion to his share in the paid up equity share capital of the company, subject to differential rights as to voting, if any, attached to certain shares as stipulated in the Articles or by the terms of issue of such shares.

Preference shareholders have a right to vote only in certain cases as prescribed under the Act.

7.5.1 A Member who is a related party is not entitled to vote on a Resolution relating to approval of any contract or arrangement in which such Member is a related party.

In case of a private company, a member who is a related party is entitled to vote on such Resolution.

A member who is a related party is entitled to vote on a Resolution pertaining to approval of any contract or arrangement to be entered into by:

(a) A Government company with any other Government company; or

(b) An unlisted Government company with the prior approval of competent authority,

Other than those contract or arrangements referred in clause (a).

7.6 Second or Casting Vote

Unless otherwise provided in the Articles, in the event of equality of votes, whether on show of hands or electronically or on a poll, the Chairman of the Meeting shall have a second or casting vote.

Where the Chairman has entrusted the conduct of proceedings in respect of an item in which he is interested to any Non-Interested Director or to a Member, a person who so takes the Chair shall have a second or casting vote.

8. Conduct of e-voting

8.1 Every company that is required or opts to provide e-voting facility to its Members shall comply with the provisions in this regard.

8.2 Every company providing e-voting facility shall offer such facility to all Members, irrespective of whether they hold shares in physical form or in dematerialized form.

8.3 The facility for Remote e-voting shall remain open for not less than three days.

The voting period shall close at 5 p.m. on the day preceding the date of the General Meeting.

8.4 Board Approval

The Board shall:

(a) appoint one or more scrutinizers for e-voting or the ballot process;

The scrutinizer(s) may be a Company Secretary in Practice, a Chartered Accountant in Practice, a Cost Accountant in Practice, or an Advocate or any other person of repute who is not in the employment of the company and who can, in the opinion of the Board, scrutinize the e-voting process or the ballot process, as the case may be, in a fair and transparent manner.

The scrutinizer(s) 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.

Prior consent to act as a scrutinizer(s) shall be obtained from the scrutinizer(s) and placed before the Board for noting.

(b) appoint an Agency;

(c) decide the cut-off date for the purpose of reckoning the names of Members who are entitled to Voting Rights;

The cut-off date for determining the Members who are entitled to vote through Remote e-voting or voting at the meeting shall be a date not earlier than Seven days prior to the date fixed for the Meeting.

Only Members as on the cut-off date, who have not exercised their Voting Rights through Remote e-voting, shall be entitled to vote at the Meeting

8.5 Notice

1. **Notice of the Meeting, wherein the facility of e-voting is provided, shall be sent either by registered post or speed post or by courier or by e-mail or by any other electronic means.**

   An advertisement containing prescribed details shall be published, immediately on completion of dispatch of Notices for Meeting but at least twenty one days before the date of the General Meeting, 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 country-wide circulation, and specifying therein, *inter-alia* the following matters, namely:

(a) A statement to the effect that the business may be transacted by e-voting;

(b) The date and time of commencement of Remote e-voting;

(c) The date and time of end of Remote e-voting;

(d) The cut-off date as on which the right of voting of the Members shall be reckoned;

(e) The manner in which persons who have acquired shares and become Members after the dispatch of Notice may obtain the login ID and password;

(f) The manner in which company shall provide for voting by Members present at the Meeting;

(g) The statement that:

(i) Remote e-voting shall not be allowed beyond the said date and time;

(ii) A Member may participate in the General Meeting even after exercising his right to vote through Remote e-voting but shall not be entitled to vote again; and

(iii) A Member as on the cut-off date shall only be entitled for availing the Remote e-voting facility or vote, as the case may be, in the General Meeting;

(h) Website address of the company, in case of companies having a website and Agency where Notice is displayed; and

(i) Name, designation, address, e-mail ID and phone number of the person responsible to address the grievances connected with the e-voting.

Advertisement shall simultaneously be placed on the website of the company till the conclusion of Meeting, in case of companies having a website and of the Agency.

2. **Notice shall simultaneously be placed on the website of the company, in case of companies having a website, and of the Agency.**

Such Notice shall remain on the website till the date of General Meeting.

Notice shall inform the Members about procedure of Remote e-voting, availability of such facility and provide necessary information thereof to enable them to access such facility

Notice shall clearly state that the company is providing e-voting facility and that the business may be transacted through such voting.

Notice shall describe clearly the Remote e-voting procedure and the procedure of voting at the General Meeting by Members who do not vote by Remote e-voting.

Notice shall also clearly specify the date and time of commencement and end of Remote e-voting and contain a statement that at the end of Remote e-voting period, the facility shall forthwith be blocked.

Notice shall also contain contact details of the official responsible to address the grievances connected with voting by electronic means.

Notice shall clearly specify that any Member, who has voted by Remote e-voting, cannot vote at the Meeting.

Notice shall also specify the mode of declaration of the results of e-voting. Notice shall also clearly mention the cut-off date as on which the right of voting of the Members

shall be reckoned and state that a person who is not a Member as on the cutoff date should treat this Notice for information purposes only.

Notice shall provide the details about the login ID and the process and manner for generating or receiving the password and for casting of vote in a secure manner.

8.6 Declaration of results

8.6.1 The scrutinizer(s) shall submit his report within three days from the date of the Meeting to the Chairman or a person authorized by him, who shall countersign the same and declare the result of the voting forthwith with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not.

8.6.2 The result of the voting, with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not shall be displayed for at least three days on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere. Further, the results of voting along with the scrutinizer's report shall also be placed on the website of the company, in case of companies having a website and of the Agency, immediately after the results are declared.

8.6.3 The Resolution, if passed by a requisite majority, shall be deemed to have been passed on the date of the relevant General Meeting.

8.7 Custody of scrutinizers' register, report and other related papers

The scrutinizers' register, report and other related papers received from the scrutinizer(s) shall be kept in the custody of the Company Secretary or any other person authorized by the Board for this purpose.

9. Conduct of Poll

9.1 When a poll is demanded on any Resolution, the Chairman shall get the validity of the demand verified and, if the demand is valid, shall order the poll forthwith if it is demanded on the question of appointment of the Chairman or adjournment of the Meeting and, in any other case, within forty-eight hours of the demand for poll.

9.2 In the case of a poll, which is not taken forthwith, the Chairman shall announce the date, venue and time of taking the poll to enable Members to have adequate and convenient opportunity to exercise their vote. The Chairman may permit any Member who so desires to be present at the time of counting of votes.

If the date, venue and time of taking the poll cannot be announced at the Meeting, the Chairman shall inform the Members, the modes and the time of such communication, which shall in any case be within 24 hours of closure of the Meeting.

A Member who did not attend the Meeting can participate and vote in the poll in such cases.

In case of a private company, the demand and conduct of poll shall be as stated above, unless otherwise provided in the Articles.

9.3 Each Resolution put to vote by poll shall be put to vote separately.

One ballot paper may be used for more than one item.

9.4 Appointment of scrutinizers

The Chairman shall appoint such number of scrutinizers, as he deems necessary, who may include a Company Secretary in Practice, a Chartered Accountant in Practice, a Cost Accountant in Practice, an Advocate or any other person of repute who is not in the employment of the company, to ensure that the scrutiny of the votes cast on a poll is done in a fair and transparent manner.

In case of a private company, the appointment of scrutinizer(s) shall be in accordance with this para, unless otherwise provided in the Articles.

9.5 Declaration of results

9.5.1 The scrutinizer(s) shall submit his report within seven days from the last date of the poll to the Chairman who shall countersign the same and declare the result of the poll within two days of the submission of report by the scrutinizer, with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not.

In case Chairman is not available, for such purpose, the report by the scrutinizer shall be submitted to a person authorized by the Chairman to receive such report, who shall countersign the scrutinizer's report on behalf of the Chairman.

The result shall be announced by the Chairman or any other person authorized by the Chairman in writing for this purpose.

The Chairman of the Meeting shall have the power to regulate the manner in which the poll shall be taken and shall ensure that the poll is scrutinized in the manner prescribed under the Act.

9.5.2 The result of the poll with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not shall be displayed for at least three days on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere, and in case of companies having a website, shall also be placed on the website.

9.5.3 The result of the poll shall be deemed to be the decision of the Meeting on the Resolution on which the poll was taken.

10. Prohibition on Withdrawal of Resolutions

Resolutions for items of business which are likely to affect the market price of the securities of the company shall not be withdrawn. Further, any resolution proposed for consideration through e-voting shall not be withdrawn.

11. Rescinding of Resolutions

A Resolution passed at a Meeting shall not be rescinded otherwise than by a Resolution passed at a subsequent Meeting.

12. Modifications to Resolutions

Modifications to any Resolution which do not change the purpose of the Resolution materially may be proposed, seconded and adopted by the requisite majority at the Meeting and, thereafter, the modified Resolution shall be duly proposed, seconded and put to vote.

No modification to any proposed text of the Resolution Shall be made if it in any way alters the Substance of the Resolution as set out in the Notice. Grammatical, clerical, factual and typographical errors, if any, may be corrected as deemed fit by the Chairman

No modification Shall be made to any Resolution which has already been put to vote by Remote e-voting before the Meeting.

13. Reading of Reports

1. The qualifications, observations or comments or other remarks, if any, mentioned in the Auditor's Report on the financial transactions, which have any adverse effect on the functioning of the company shall be read at the Annual General Meeting and attention of the Members present shall be drawn to the explanations / comments given by the Board of Directors in their report.
2. The qualifications, observations or comments or other remarks if any, mentioned in the Secretarial Audit Report issued by the Company Secretary in Practice, which have any material adverse effect on the functioning of the company, shall be read at the Annual General Meeting and attention of Members present shall be drawn to the explanations / comments given by the Board of Directors in their report.

14. Distribution of Gifts

No gifts, gift coupons, or cash in lieu of gifts shall be distributed to Members at or in connection with the Meeting.

15. Adjournment of Meetings

1. **A duly convened Meeting shall not be adjourned unless circumstances so warrant. The Chairman may adjourn a Meeting with the consent of the Members, at which a Quorum is present, and shall adjourn a Meeting if so directed by the Members.**

   Meetings shall stand adjourned for want of requisite Quorum.

   The Chairman may also adjourn a Meeting in the event of disorder or other like causes, when it becomes impossible to conduct the Meeting and complete its business.

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2. **If a Meeting is adjourned sine-die or for a period of thirty days or more, a Notice of the adjourned Meeting shall be given in accordance with the provisions contained hereinabove relating to Notice.**
3. **If a Meeting is adjourned for a period of less than thirty days, the company shall give not less than three days' Notice specifying the day, date, time and venue of the Meeting, to the Members either individually or by publishing an advertisement in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district.**

   However, if a Meeting is adjourned for a period not exceeding three days and where an announcement of adjournment has been made at the Meeting itself, giving in the details of day, date, time, venue and business to be transacted at the adjourned Meeting, the company may also opt to give Notice of such adjourned Meeting either individually or by publishing an advertisement, as stated above.
4. **If a Meeting, other than an Annual General Meeting and a requisitioned Meeting, stands adjourned for want of Quorum, the adjourned Meeting shall be held on the same day, in the next week at the same time and place or on such other day or at such other time and place as may be determined by the Board.**

   If a Meeting is adjourned for want of a Quorum to the same day on the next week, at the same time and place or with a change of day, time or place, the company shall give not less than three days' notice specifying the day, date, time and venue of the Meeting, to the Members either individually or by publishing an advertisement in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is Situated, and in an English newspaper in English language, both having a wide circulation in that district.

   If, at an adjourned Meeting, Quorum is not present within half an hour from the time appointed, the Members present, being not less than two in number, will constitute the Quorum.

   An adjourned Annual General Meeting, adjourned for want of quorum or otherwise, shall not be held on a National Holiday, only if any item relating to filling up of vacancy of a director retiring by rotation is included in the agenda of such adjourned Meeting.

   The company shall ensure compliance of the provisions of holding the Annual General Meeting every year, including adjournment thereof within a gap of not exceeding 15 months from the date of the previous Annual General Meeting or within such extended period permitted by the Registrar of Companies.
5. **If, within half an hour from the time appointed for holding a Meeting called by requisitionists, a Quorum is not present, the Meeting shall stand cancelled.**

   In case of a private company, the requisitioned meeting shall stand cancelled in accordance with this para, unless otherwise provided in the Articles.

6. **At an adjourned Meeting, only the unfinished business of the original Meeting shall be considered.**

   Any Resolution passed at an adjourned Meeting would be deemed to have been passed on the date of the adjourned Meeting and not on any earlier date.

16. Passing of Resolutions by postal ballot

1. **Every company, except a company having less than or equal to two hundred Members, shall transact items of business as prescribed, only by means of postal ballot instead of transacting such business at a General Meeting.**

   The list of items of businesses requiring to be transacted only by means of a postal ballot is given at Annexure.

   The Board may however opt to transact any other item of special business, not being any business in respect of which Directors or Auditors have a right to be heard at the Meeting, by means of postal ballot.

   Ordinary Business shall not be transacted by means of a postal ballot.

   Postal ballot cannot be conducted in respect of ordinary business and/or matters where the Directors, Auditors, etc. care a right of being heard at the Meeting.

   Every company having its equity shares listed on a recognized stock exchange other than companies whose equity shares are listed on SME Exchange or on the Institutional Trading Platform and other companies which are required to provide e-voting facility shall provide such facility to its Members in respect of those items, which are required to be transacted through postal ballot.

   Other companies presently prescribed are companies having not less than one thousand Members. Nidhis are not required to provide e-voting facility to their Members.

2. **Board Approval**

   The Board shall:

(a) **identify the businesses to be transacted through postal ballot;**

(b) **approve the Notice of postal ballot incorporating proposed Resolution(s) and explanatory statement thereto;**

(c) **authorize the Company Secretary or where there is no Company Secretary, any Director of the company to conduct postal ballot process and sign and send the Notice along with other documents;**

(d) **appoint one scrutinizer for the postal ballot;**

   The scrutinizer may be a Company Secretary in Practice, a Chartered Accountant in Practice, a Cost Accountant in Practice, an Advocate or any other person of repute who is not in the employment of the company and, who can in the opinion of the Board, scrutinize the postal ballot process in a fair and transparent manner.

   The Scrutinizers shall however not be an officer or employee of the company.

   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.

Prior consent to act as a scrutinizer shall be obtained from the scrutinizer and placed before the Board for noting.

The scrutinizer should be willing to be appointed and be available for the purpose of ascertaining the requisite majority.

(e) **Appoint an Agency in respect of e-voting for the postal ballot;**

An Agency should be appointed by the Board which can handle the whole process of postal ballot through e-voting.

(f) **Decide the cut-off date for reckoning Voting Rights and ascertaining those Members to whom the Notice and postal ballot forms shall be sent.**

Only Members as on the cut-off date shall be entitled to vote on the proposed Resolution by postal ballot.

3. **Notice**

1. **Notice of the postal ballot shall be given in writing to every Member of the company. Such Notice shall be sent either by registered post or speed post, or by courier or by e-mail or by any other electronic means at the address registered with the company.**

The Notice shall be accompanied by the postal ballot form with the necessary instructions for Filling, Signing and returning the same.

In case the Notice and accompanying documents are sent to Members by e-mail, these shall be sent to the Members' e-mail addresses, registered with the company or provided by the depository, in the manner prescribed under the Act.

Such Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to Debenture Trustees, if any, and, wherever applicable or so required, to other Specified recipients.

An advertisement containing prescribed details 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 Notice and the ballot papers.

2. **In case of companies having a website, Notice of the postal ballot shall simultaneously be placed on the website.**

Such Notice shall remain on the website till the last date for receipt of the postal ballot forms from the Members.

3. **Notice shall specify the day, date, time and venue where the results of the voting by postal ballot will be announced and the link of the website where such results will be displayed.**

Notice shall also specify the mode of declaration of the results of the voting by postal ballot.

4. **Notice of the postal ballot shall inform the Members about availability of e-voting facility, if any, and provide necessary information thereof to enable them to access**

such facility.

In case the facility of e-voting has been made available, the provisions relating to conduct of e-voting shall apply, *mutatis mutandis*, as far as applicable.

Notice shall describe clearly the e-voting procedure.

Notice should also mention the Internet link of e-voting platform.

Notice shall also clearly specify the date and time of commencement and end of e-voting, if any and contain a statement that voting shall not be allowed beyond the said date and time. Notice Shall also contain contact details of the official responsible to address the grievances connected with the e-voting for postal ballot.

Notice shall clearly specify that any Member cannot vote both by post and evoting and if he votes both by post and e-voting, his vote by post shall be treated as invalid.

The advertisement shall, inter alia, state the following matters:

(a) a statement to the effect that the business is to be transacted by postal ballot which may include voting by electronic means;

(b) the date of completion of dispatch of Notices;

(c) the date of commencement of voting (postal and e-voting);

(d) the date of end of voting (postal and e-voting);

(e) the statement that any postal ballot form received from the Member after thirty days from the date of dispatch of Notice will not be valid;

(f) a statement to the effect that Member who has not received postal ballot form may apply to the company and obtain a duplicate thereof;

(g) contact details of the person responsible to address the queries/ grievances connected with the voting by postal ballot including voting by electronic means, if any; and

(h) Day, date, time and venue of declaration of results and the link of the website where such results will be displayed.

Notice and the advertisement shall clearly mention the cut-off date as on which the right of voting of the Members shall be reckoned and state that a person who is not a Member as on the cut-off date should treat this Notice for information purposes only.

5. **Each item proposed to be passed through postal ballot shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon**

4. Postal ballot forms

1. **The postal ballot form shall be accompanied by a postage prepaid reply envelope addressed to the scrutinizer.**

   A single postal ballot form may provide for multiple items of business to be transacted.

2. **The postal ballot form shall contain instructions as to the manner in which the form is to be completed, assent or dissent is to be recorded and its return to the scrutinizer.**

The postal ballot form may specify instances in which such form shall be treated as invalid or rejected and procedure for issue of duplicate postal ballot forms.

3. **A postal ballot form shall be considered invalid if:**

(a) A form other than one issued by the company has been used;

(b) It has not been signed by or on behalf of the Member;

(c) Signature on the postal ballot form doesn't match the specimen signatures with the company;

(d) It is not possible to determine without any doubt the assent or dissent of the Member;

(e) Neither assent nor dissent is mentioned;

(f) Any competent authority has given directions in writing to the company to freeze the Voting Rights of the Member;

(g) The envelope containing the postal ballot form is received after the last date prescribed;

(h) The postal ballot form, signed in a representative capacity, is not accompanied by a certified copy of the relevant specific authority;

(i) It is received from a Member who is in arrears of payment of calls;

(j) It is defaced or mutilated in such a way that its identity as a genuine form cannot be established;

(k) Member has made any amendment to the Resolution or imposed any condition while exercising his vote.

A postal ballot form which is otherwise complete in all respects and is lodged within the prescribed time limit but is undated shall be considered valid.

5. Declaration of results

1. **The scrutinizer shall submit his report within seven days from the last date of receipt of postal ballot forms to the Chairman or a person authorized by him, who shall countersign the same and declare the result of the postal ballot on the date, time and venue specified in the Notice, with details of the number of votes cast for and against the Resolution, invalid votes and the final result as to whether the Resolution has been carried or not.**
2. **The result of the voting with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not, along with the scrutinizer's report shall be displayed for at least three days on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere, and also be placed on the website of the company, in case of companies having a website.**
3. **The Resolution, if passed by requisite majority, shall be deemed to have been passed on the last date specified by the company for receipt of duly completed postal ballot forms or e-voting.**

4. **Custody of scrutinizer's registers, report and other related papers**

   The postal ballot forms, other related papers, register and scrutinizer's report received from the scrutinizer shall be kept in the custody of the Company Secretary or any other person authorized by the Board for this purpose.

5. **Rescinding the Resolution**

   A Resolution passed by postal ballot shall not be rescinded otherwise than by a Resolution passed subsequently through postal ballot.

6. **Modification to the Resolution**

   No amendment or modification shall be made to any Resolution circulated to the Members for passing by means of postal ballot.

17. **Minutes**

Minutes' are the official recording of the proceedings of the Meeting and the business transacted at the Meeting.

Every company shall keep Minutes of all Meetings. Minutes kept in accordance with the provisions of the Act evidence the proceedings recorded therein. Minutes help in understanding the deliberations and decisions taken at the Meeting.

Maintenance of Minutes:

Minutes shall be recorded in books maintained for that purpose.

A distinct Minutes Book shall be maintained for Meetings of the Members of the company, creditors and others as may be required under the Act.

Resolutions passed by postal ballot shall be recorded in the Minutes book of General Meetings.

A company may maintain its Minutes in physical or in electronic form.

Minutes may be maintained in electronic form in such manner as prescribed under the Act and as may be decided by the Board. Minutes in electronic form shall be maintained with Timestamp.

A company shall, however, follow a uniform and consistent form of maintaining the Minutes. Any deviation in such form of maintenance shall be authorized by the Board.

The pages of the Minutes Books shall be consecutively numbered.

This shall be followed irrespective of a break in the Book arising out of periodical binding in case the Minutes are maintained in physical form. This shall be equally applicable for maintenance of Minutes Book in electronic form with Timestamp.

In the event any page or part thereof in the Minutes Book is left blank, it shall be scored out and initialed by the Chairman who signs the Minutes

Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.

Minutes of Meetings, if maintained in loose-leaf form, shall be bound periodically at least once in every three years.

There shall be a proper locking device to ensure security and proper control to prevent removal or manipulation of the loose leaves.

Minutes Books shall be kept at the Registered Office of the company.

Contents of Minutes

General Contents

Minutes shall state, at the beginning the Meeting, name of the company, day, date, venue and time of commencement of the Meeting.

Minutes of Annual General Meeting shall also state the serial number of the Meeting.

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 shall be recorded by the Chairman or any Director present at the Meeting in the Minutes.

Minutes shall record the names of the Directors and the Company Secretary present at the Meeting.

The names of the Directors shall be listed in alphabetical order or in any other logical manner, but in either case starting with the name of the person in the Chair.

Specific Contents

Minutes shall, inter alia, contain:

(a) **The Record of election, if any, of the Chairman of the Meeting.**

(b) **The fact that certain registers, documents, the Auditor's Report and Secretarial Audit Report, as prescribed under the Act were available for inspection.**

(c) **The Record of presence of Quorum.**

(d) **The number of Members present in person including representatives.**

(e) **The number of Proxies and the number of shares represented by them.**

(f) **The presence of the Chairmen of the Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee or their authorized representatives.**

(g) **The presence if any, of the Secretarial Auditor, the Auditors, or their authorized representatives, the Court/ Tribunal appointed observers or scrutinizers.**

(h) **Summary of the opening remarks of the Chairman.**

(i) **Reading of qualifications, observations or comments or other remarks on the financial transactions, which have any adverse effect on the functioning of the company, as mentioned in the report of the Auditors.**

(j) **Reading of qualifications, observations or comments or other remarks, which have any material adverse effect on the functioning of the company, as mentioned in the report of the Secretarial Auditor.**

(k) **Summary of the clarifications provided on various Agenda Items.**

In respect of each Resolution, the type of the Resolution, the names of the persons

who proposed and seconded and the majority with which such Resolution was passed.

Where a motion is moved to modify a proposed Resolution, the result of voting on such motion Shall be mentioned. If a Resolution proposed undergoes modification pursuant to a motion by Shareholders, the minutes Shall contain the details of voting for the modified Resolution.

(l) **In the case of poll, the names of scrutinizers appointed and the number of votes cast in favor and against the Resolution and invalid votes.**

(m) **If the Chairman vacates the Chair in respect of any specific item, the fact that he did so and in his place some other Director or Member took the Chair.**

(n) **The time of commencement and conclusion of the Meeting.**

In respect of Resolutions passed by e-voting or postal ballot, a brief report on the e-voting or postal ballot conducted including the Resolution proposed, the result of the voting thereon and the summary of the scrutinizer's report shall be recorded in the Minutes Book and signed by the Chairman or in the event of death or inability of the Chairman, by any Director duly authorized by the Board for the purpose, within thirty days from the date of passing of Resolution by e-voting or postal ballot.

Recording of Minutes

Minutes shall contain a fair and correct summary of the proceedings of the Meeting.

The Company Secretary shall record the proceedings of the Meetings. Where there is no Company Secretary, any other person authorized by the Board or by the Chairman in this behalf shall record the proceedings.

The Chairman shall ensure that the proceedings of the Meeting are correctly recorded.

The Chairman has absolute discretion to exclude from the Minutes, matters which in his opinion are or could reasonably be regarded as defamatory of any person, irrelevant or immaterial to the proceedings or which are detrimental to the interests of the company.

Minutes shall be written in clear, concise and plain language.

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.

Each item of business taken up at the Meeting shall be numbered.

Numbering shall be in a manner which would enable ease of reference or cross-reference.

Entry in the Minutes Book

Minutes shall be entered in the Minutes Book within thirty days from the date of conclusion of the Meeting.

In case a Meeting is adjourned, the Minutes in respect of the original Meeting as well as the adjourned Meeting shall be entered in the Minutes Book within thirty days from the date of the respective Meetings.

The date of entry of the Minutes in the Minutes Book shall be recorded by the Company Secretary.

Where there is no Company Secretary, it shall be entered by any other person authorized by the Board or the Chairman.

Minutes, once entered in the Minutes Book, shall not be altered.

Signing and Dating of Minutes

Minutes of a General Meeting shall be signed and dated by the Chairman of the Meeting or in the event of death or inability of that Chairman, by any Director who was present in the Meeting and duly authorized by the Board for the purpose, within thirty days of the General Meeting.

The Chairman shall initial each page of the Minutes, sign the last page and append to such signature the date on which and the place where he has signed the Minutes.

Any blank space in a page between the conclusion of the Minutes and signature of the Chairman shall be scored out.

If the Minutes are maintained in electronic form, the Chairman shall sign the Minutes digitally.

Inspection and Extracts of Minutes

Directors and Members are entitled to inspect the Minutes of all General Meetings including Resolutions passed by postal ballot.

Minutes of all General Meetings shall be open for inspection by any Member during business hours of the company, without charge, subject to such reasonable restrictions as the company may, by its Articles or in General Meeting, impose so, however, that not less than two hours in each business day are allowed for inspection.

The Company Secretary in Practice appointed by the company, the Secretarial Auditor, the Statutory Auditor, the Cost Auditor or the Internal Auditor of the company can inspect the Minutes as he may consider necessary for the performance of his duties.

Inspection of Minutes Book may be provided in physical or in electronic form.

While providing inspection of minutes Book, the Company Secretary or the official of the company authorized by the Company Secretary to facilitate inspection shall take all precautions to ensure that the Minutes Book is not mutilated or in any way tampered with by the person inspecting.

Extract of the Minutes shall be given only after the Minutes have been duly signed. However, any Resolution passed at a Meeting may be issued even pending signing of the Minutes, provided the same is certified by the Chairman or any Director or the Company Secretary.

When a Member requests in writing for a copy of any Minutes, which he is entitled to inspect, the company shall furnish the same within seven working days of receipt of his request, subject to payment of such fee as may be specified in the Articles of the company. In case a Member requests for the copy of the Minutes in electronic form, in respect of any previous General Meetings held during a period immediately preceding three financial years, the company shall furnish the same on payment of such fee as prescribed under the Act.

Copies of the minutes or the extracts thereof as requisitioned by the Member, duly certified by the Company Secretary or where there is no Company Secretary, an officer duly authorized by the Board in this behalf, may be provided in physical or electronic form.

18. Preservation of Minutes and other Records

Minutes of all Meetings shall be preserved permanently in physical or in electronic form with Timestamp.

Where, under a scheme of arrangement, a company has been merged or amalgamated with another company, Minutes of all Meetings of the transferor company, as handed over to the transferee company, shall be preserved permanently by the transferee company, notwithstanding that the transferor company might have been dissolved.

Office copies of Notices, scrutinizer's report and related papers shall be preserved in good order in physical or in electronic form for as long as they remain current or for eight financial years, whichever is later and may be destroyed thereafter with the approval of the Board.

Office copies of Notices, Scrutinizer's report and related papers of the transferor company, as handed over to the transferee company, shall be preserved in good order in physical or electronic form for as long as they remain current or for eight financial years, whichever is later and may be destroyed thereafter with the approval of the Board and permission of the Central Government, where applicable

Minutes Books shall be kept in the custody of the Company Secretary.

Where there is no Company Secretary, Minutes shall be kept in the custody of any Director duly authorized for the purpose by the Board.

19. Report on Annual General Meeting

Every listed public company shall prepare a report on Annual General Meeting in the prescribed form, including a confirmation that the Meeting was convened, held and conducted as per the provisions of the Act.

Such report which shall be a fair and correct summary of the proceedings of the Meeting shall contain:

(a) the day, date, time and venue of the Annual General Meeting;

(b) confirmation with respect to appointment of Chairman of the Meeting;

(c) number of Members attending the Meeting;

(d) confirmation of Quorum;

(e) confirmation with respect to compliance of the Act and Standards with respect to calling, convening and conducting the Meeting;

(f) business transacted at the Meeting and result thereof with a brief summary of the discussions;

(g) particulars with respect to any adjournment, postponement of Meeting, change in venue; and

(h) Any other points relevant for inclusion in the report.

Such report shall be filed with the Registrar of Companies within thirty days of the conclusion of the Annual General Meeting.

20. Disclosure

The Annual Return of a company shall disclose the date of Annual General Meeting held during the financial year.

EFFECTIVE DATE

SS-2 is effective from 1st July, 2015.

Further it is revised in June 2017 (effective from 1st October, 2017).

ANNEXURE

Items of business which shall be passed only by postal ballot

1. Alteration of the object clause of the Memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the Main Objects of the Memorandum.
2. Alteration of Articles of Association in relation to insertion or removal of provisions which are required to be included in the Articles of a company in order to constitute it a private company.
3. Change in place of Registered Office outside the local limits of any city, town or village.
4. 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.
5. Issue of shares with differential rights as to voting or dividend or otherwise.
6. Variation in the rights attached to a class of shares or debentures or other securities.
7. Buy-back of Shares by a company.
8. Appointment of a Director elected by Small Shareholders.
9. Sale of the whole or substantially the whole of an undertaking of a company or where the company owns more than one undertaking, of whole or substantially the whole of any of such undertakings.
10. Giving loans or extending guarantee or providing Security in excess of the limit Specified.
11. Any other Resolution prescribed under any applicable law, rules or regulations.

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Chapter 12 : 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 practicing company secretary has also changed substantially over last three decades. Company Secretary in Practice 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, so also Insolvency and Bankruptcy Code 2016, has considerably enhanced the role and responsibilities of Company Secretaries both in employment and in practice. Company Secretary is a key managerial person 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.

ADOPTION OF MODE OF PRACTICE

To meet the expectation and to survive competition, molding, 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.

Before we talk about big firms let us understand the features of being in practice.

Decision whether to join a company as whole time secretary or to start one's own practice itself is a tough decision to make. 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;
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 Quo* 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 loosing 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:

S. No.	Firm with Several Partners	Proprietor
1.	Various avenues of practice, un-trodden areas can be explored.	Likely to get restricted to the "Routine" procedural matters.
2.	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.
3.	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.
4.	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.
5.	Partner's *inter-se* should have full faith & trust.	Not relevant since it is 'one man show'.
6.	Frequencies of the partners should match. It is desirable that their family background, culture, political thinking	Not relevant since it is 'one man show'.

	should be more or less similar.	
7.	Freedom of decision making gets restricted.	Not required. Proprietor is his own master. No need to consult others.
8.	All partners should be mentally prepared to share revenues.	Not required. Proprietor is his own master. No need to share revenues.
9.	One is responsible to the wrongs & liabilities of his partners.	Not relevant since it is 'one man show'.
10.	There should not be communication gap *interest*	Not relevant since it is 'one man show'.
11.	One of the partners can afford to become Resolution Professional (RP)/value .	It is very difficult for a proprietor to act as RP / Value while simultaneously handing routine practice as PCS.

Applicable Rules, Regulations and Guidelines for PCS or Firm of PCS

Whether a Company Secretary in Practice or a Firm of Company Secretaries they are subject to Rules, Regulations and Guidelines enumerated as under:

(i) Company Secretaries Regulations, 1982

(ii) Schedule I and III of Company Secretaries Act, 1980 in relation to Professional misconduct

(iii) Guideline's for requirement of maintenance of a register of attestation certification Services rendered by practicing Company Secretary/firm of practicing Company Secretaries

(iv) Guideline's for issuing compliance certificate and Signing of annual return

(v) Guideline's framed by the council relating to approval of proprietorship concern/firm's name under regulation 169 of the Company Secretaries Regulations, 1982

(vi) Guidelines for advertisement by Company Secretary in Practice

(vii) Guidelines for compulsory attendance of Professional development programmers by the members

(viii) Mechanism for maintenance of attendance records of members at professional development programmers and issuance of Certificates for programmer credit hours (PCH)

(ix) Guidelines for peer review of attestation services by Practicing Company Secretaries

(x) Guidelines for professional dress of Company Secretaries

(xi) Guidelines for setting up and Conversion of Firms of PCS into LLP.

(xii) ICSI Unique Document Identification Number (UDIN) Guideline's, 2019

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 Company Secretaries, however, they can acquire expertize in any other area like direct- indirect taxation, labor laws, economic laws, finance, accounting, insurance, international business and IPRS and they may be in position to provide single window business solutions.

Multidisciplinary Firm – According to Regulation 165A of The Company Secretaries Regulations, 1982 inserted by the Company Secretaries (Amendment) Regulations, 2020- A member in practice 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. For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, a person has to be member of any of the following, namely :-

(a) The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949 (No.38 of 1949);

(b) The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959 (No. 23 of 1959);

(c) Bar Council of India established under the Advocates Act, 1961 (No. 25 of 1961);

(d) The Indian Institute of Architects established under the Architects Act, 1972 (No. 20 of 1972);

(e) The Institute of Actuaries of India established under the Actuaries Act, 2006 (No. 35 of 2006);

(f) The membership of the professional bodies or institutions whose qualifications relating to Company Secretary ship are recognized by the Council under Sub-section (2) of Section 38 of the Act.

2. For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, the following shall be the persons qualified in India, namely :-

(a) Chartered Accountant within the meaning of the Chartered Accountants Act, 1949;

(b) Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959;

(c) Actuary within the meaning of the Actuaries Act, 2006;

(d) Bachelor in Engineering from a University established by law or an institution recognized by law;

(e) Bachelor in Technology from a University established by law or an institution recognized

by law;

(f) Bachelor in Architecture from a University established by law or an institution recognized by law;

(g) Bachelor of Law from a University established by law or an institution recognized by law;

(h) Master in Business Administration 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 (No. 38 of 1949);
- The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959 (No.23 of 1959);
- Bar Council of India established under the Advocates Act, 1961 (No. 25 of 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 (No. 20 of 1972);
- The Institute of Actuaries of India established, under the Actuaries Act, 2006 (No. 35 of 2006);
- Professional bodies or institutions outside India whose qualifications relating to Company Secretary recognized by the Council under Sub-section (2) of Section 38 of the Act.

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, Labor laws, RBI/ FEMA, acting as Secretarial Auditor, Resolution Professional or 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.

Unless there are MDF/Mega firms, it may not be possible to cater to the bigger assignments.

PRE-REQUISITES

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;
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. Even the Small crack in the above stated pre requisites ruin the things.

BENEFITS

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, expertize, 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 two 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:** With large investment budgets, the MDF not only creates 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 expertize 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.

- **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 likeminded 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 acclimatized. 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

Operational functions are for providing Services by the firms, the operational functions requires expertize 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. Kaplan, chief operating officer of Goodwin Procter, argues the benefits of a multi-disciplinary, full-Service model in the New Turk 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.
5. Internally, different verticals can be created and surplus generated by each one can be assessed as an independent cost center.

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 costly.

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".

ANNEXURE-I

Frequently Asked Questions

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 no S. 2, 3, 4 & 5 of the First Schedule and CA / CWA cannot become full-fledged partners as contemplated by Clause 1 of Part I of the First Schedule. That is to say a PCS even if he is allowed to be a partner of a Chartered Accountant, will not be able to sign the Auditors report on behalf of the multidisciplinary firm. (See Regulation 168 A & B of Company Secretaries Regulations, 1982, discussed in earlier chapter)

2. **How many Partners a PCS Partnership Firm can have ?**

   According to section 464(1) of the Companies Act, 2013, r/w Rule 10 of the Companies (Miscellaneous) Rules, 2014, provides that no association or partnership shall be formed, consisting of more than 50 persons for the purpose of carrying on any business that has for its objects the acquisition of gain by the association or partnership or by individual members thereof, unless it is registered as a company under the Act or is formed under any other law for the time being in force.

   The number of persons which may be prescribed under this sub-section shall not exceed 100.

   However, nothing in Section 464(1) shall apply to:

(a) A Hindu undivided family carrying on any business; or

(b) An association or partnership, if it is formed by professionals who are governed by special Acts.

   Every member of an association or partnership carrying on business in contravention of Section 464 (1) shall be punishable with fine which may extend to one lakh rupees and Shall also be personally liable for all liabilities incurred in such business.

3. **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. (See Regulation 168 A & B of Company Secretaries Regulations, 1982, discussed in earlier chapter)

4. **How many Partners LLP of Practicing professional can have?**

   The minimum number of members of LLP under LLP Act, 2008 is two, there is no restriction on a maximum number of members.

5. **Are there any restrictions on sharing fees with members/ non-members of ICSI?**

   A Company Secretary in Practice 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 Company Secretary in Practice 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. (See clause 3 of Part I of the First Schedule to the Companies Secretaries Act, 1982).

6. **Can MEGA firm charge fees to the clients based on the result of the matter/ success of the litigation?**

   Fees shall be charged for the professional work done.

7. **Can a Mega Firm have branches within / outside India? What regulations guide operations of such Branch office?**

   AS per Section 37(1) of the Company Secretaries Act, 1980 where a Company Secretary in Practice or a firm of Such Company Secretaries 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 Company Secretaries in Practice 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 two years within which a member must be appointed in the Separate charge of the branch office.

   Section 37(2) requires every Company Secretary in Practice or firm of Such Company Secretaries 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 Company Secretaries Regulations, 1982, requires the changes to be intimated to the Council within one month of such change(s).