CS-EXECUTIVE

MODULE-1

COMPANY LAW

(VOLUME -2)

FOR DEC 2024/JUNE 2025 EXAMS

SOURCE: ICSI MODULE

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.
- I**ncludes 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.

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.

COMPANY LAW

CS EXECUTIVE DEC 2024/ JUNE 2025

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CHAPTER-1: APPOINTMENT AND QUALIFICATIONS OF DIRECTORS

1. INTRODUCTION

According to Section 2(10) of the Companies Act, 2013 (in short 'the Act'), "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company. According to section 2(34) "director" means a director appointed to the Board of a company.

The directors are the individuals who are appointed to manage the business affairs of a company. A company is an artificial person created by law having separate legal existence but without any physical body or mind of its own. It needs to be managed through the human beings. Though the shareholders being owners are physically available to manage their company but as their number grows, all of them together may not be able to manage the affairs; and if they do so it shall be mismanagement and nothing else. That's why the concept of directors has emerged. The directors (within the permissible limit) may be elected from among the shareholders or outsiders.

Legal position of Directors

As regards legal position of directors in relation to a company, they can be considered both agents and trustees. As agents, they bind the company as their principal as soon as they enter into various transactions on its behalf. The law of agency comes into play and it governs the relationship between the company and its directors. At times, the company itself is principal as well as agent in respect of certain acts which cannot be delegated. The Companies Act, 2013 lays down provisions requiring as to when the company needs to act both as principal as well as agent and when the directors need to act as agent of the company. It may be noted that where directors are empowered to take certain decisions, the company cannot negate them or issue directions to the directors directing them to go for a particular decision except that it may replace the directors with the ones of its choice. As trustees, the directors are required to take care of properties, moneys, trade secrets, etc. belonging to the company. In fact, as trustees the directors are in a fiduciary relationship with the company (and not with any individual shareholder) and if such relationship is broken and the company suffers losses because of the illegal acts of the directors, the erring directors will be required to

compensate the losses suffered by the company. The office of directorship is an office of trust.

The definition of 'officer' given in Section 2 (59) of the Act, inter-alia, includes 'director' which means a director, at certain times, is also the officer of the company. Since an officer is an employee of the company, the director as officer is also an employee so far as certain provisions of the Companies Act, 2013 are concerned.

Collective body of the directors

The collective body of the directors is called the 'Board of Directors' or simply the 'Board'.

It is the Board which takes decisions at its meetings and not any individual director. This is the reason why a quorum (i.e., presence of minimum directors at the Board meetings) is prescribed so that collective decisions are taken. At times, if permitted, the decisions can be taken by the Board without calling a meeting but in that case too they are collective decisions

2. COMPANY TO HAVE BOARD OF DIRECTORS [SECTION 149]

Section 149 of the Act contains provisions which require that every company shall have to constitute Board of Directors. The provisions of constitution of Board of Directors are stated as under:

Number of Directors: According to section 149(1) of the Companies Act, 2013, every company shall have a Board of Directors consisting of individuals as directors. Thus, any person other than individuals like a body corporate, firm or association of persons cannot be appointed as a director.

Every company shall have-

(a) Minimum number of directors:

A. in case of a Public Company-3 Directors,

B. in case of a Private Company-2 Directors, and

C. in case of a One Person Company (OPC)-1 Director

(b) maximum number of directors: 15 Directors

Note: If the company wants to appoint more than 15 directors, it can do so after passing a special resolution.

Exemptions:

A. A Government company is exempted:

i. from the application of Section 149 (1) (b) which requires a company to have a maximum of 15 directors only; and

ii. from the application of First Proviso to Section 149 (1) which enables a company to appoint more than 15 directors after passing a special resolution.

However, above exemption is applicable only if such Government company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the registrar.

B. Similar exemption, as above, is also applicable to company incorporated under Section 8 of the Companies Act, 2013 subject to the condition that such a company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the registrar.

(c) Woman director: At least one woman director shall be on the Board of such class or classes of companies as has been prescribed in Rule 3 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 [Second proviso to section 149(1)]

Rule 3 provides that the following classes of companies shall appoint at least one woman director-

- Every listed company
- Every other public company having
  - paid up share capital of Rs. 100 crore or more, or
  - turnover of Rs. 300 crore or more

Explanation-For the purposes of having a woman director on the board, it is clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

Compliance by a newly incorporated company: A company, which has been incorporated under the Act and is covered by the provisions requiring appointment of a woman director, shall comply with such provisions within a period of six months from the date of its incorporation.

Filling of Intermittent Vacancy of Woman Director: Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board Meeting or 3 months from the date of such vacancy whichever is later.

Example 1: Sheetal was occupying the office of woman director in a company but due to her sudden death on 17th March, 2019, the intermittent vacancy so occurred was required

to be filled-up at the earliest because she was the only woman director on the board. The immediate Board meeting was held on 25th June, 2019. The vacancy of the women director must be filled-up latest by 25th June, 2019 or within three months from the date of such vacancy i.e. 16th June, 2019 whichever is later i.e., by 25th June 2019.

(d) Resident Director: Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year.

However, in case of a newly incorporated company the above requirement shall apply proportionately at the end of the financial year in which it is incorporated.[Section 149(3)]

(e) Independent Director: Specified public companies are required to appoint independent directors on their Board with a view to boost the level of corporate governance. Such Specified companies are the backbone of any economy and therefore, they must be managed in the best possible manner including adhereing to the specified legal provisions. An independent director needs to have an independent mindset which should not be unduly influenced by the other members of the Board; and if such members take any decision which is illegal or not in the best interest of the company or economy, it must be hindered by the independent directors at the outset. The provisions relating to independent directors are discussed later in the Chapter.

(f) Interested Director: An interested director is one among the other directors who constitute Board of Directors. In fact, when an existing director becomes interested in a transaction of the company, he is called interested director; and he needs to disclose his interest at the appropriate forum and at appropriate time. The provisions regarding interested director are discussed in another Chapter.

(g) Executive and Non-Executive Directors: The Board of Directors may comprise both executive and non-executive directors. The executive directors are responsible for managing different business operations undertaken by the company. It is their responsibility that the departments which they head operate smoothly. A whole time director and managing director are covered in this category of directors. In contrast, the non- executive directors participate through Board meetings in discussions relating to framing of policies for the efficient management of the company. Professional directors and nominee directors are covered in this category of directors. Independent directors are a type of non-executive directors. They are not as active as executive directors on

the board of the company. They are held to be liable only if they knowingly consented to the wrongful acts.

3. APPOINTMENT OF DIRECTORS [SECTION 152]

Section 152 of the Act deals with the matters relating to appointment of directors.

i. Appointment of First Directors

Where no provision is made in the articles of a company for the appointment of the first directors, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. [Section 152(1)]

In case of a One Person Company (OPC), an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section. [Section 152(1)]

In simple words, usually, articles of the company contain the names of the first directors. In case it is not so, then the individual subscribers to the memorandum are deemed to be the first directors. The corporate bodies, if they are also subscribers, shall not be capable of becoming directors. The first directors shall hold the office until the directors are duly appointed. In fact, the term of first directors is limited to the holding of first Annual General Meeting (AGM). So far as OPC is concerned, the individual member of the OPC is deemed as first director. Thereafter, such member may appoint director or directors as per his requirements.

ii. Appointment of subsequent Directors

Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting. [refer Section 152(2)]

At a general meeting, the shareholders of the company (i.e. the owners) gather and take decisions. Generally, every director shall be appointed by the company in general meeting except where the Companies Act expressly provides some other procedure for appointment of directors.

For example, it is expressly provided in the Act that additional directors or alternate directors can be appointed by the Board of Directors if the articles of the company empower Board in this respect.

iii. Other Requirements of Appointment

(a) **Allotment of Director Identification Number (DIN):** A person shall be appointed as a director of a company only when he has been allotted DIN under section 154 or any other number as may be prescribed under section 153. [refer Section 152(3)]

(b) **Providing of DIN and furnishing of Declaration by the proposed Director:** Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) or such other number as may be prescribed under Section 153. Further, he shall also furnish a declaration that he is not disqualified to become a director under this Act. [refer Section 152(4)]

(c) **Written Consent to act as Director:** A person appointed as a director shall not act as a director unless he gives his written consent to hold the office as a director. The consent shall be furnished to the company on or before his appointment as a director in Form DIR-2.

The company shall file the consent of the director with the Registrar within 30 days of such appointment in Form DIR-12 along with the prescribed fee as prescribed [refer Section 152 (5) and Rule 8 of the Companies (Appointment and Qualifications of Directors) Rules, 2014].

Example 2: Mr. Naresh wants to appoint himself as director in Global Services Private Limited. Mr. Naresh is required to apply for DIN (if he does not have the DIN) thereafter, he can be appointed as a director in Global Services Private Limited by giving written consent in Form DIR-2 to the company.

Global Services Private Limited shall have to file the consent of Mr. Naresh with the Registrar within 30 days of such appointment in Form DIR-12.

(d) **Explanatory Statement in case of appointment of Independent Director:** In case an independent director is appointed in the general meeting, an explanatory statement for such appointment annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment [refer Proviso to Section 152 (5)].

Exemptions:

Non-applicability of Section 152 (5):

- Section 152 (5) regarding 'furnishing of consent to act as a director' shall not apply in case of Government company where appointment of the director is done by the Central Government or State Government.

- Similar exemption from Section 152(5) is also applicable to a section 8 company.

Note: In both the above cases, the exemption is applicable only if the company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

iv. Retirement of Directors by Rotation [Section 152(6)]

Section 152 (6) deals with retirement of directors by rotation. The reason behind incorporation of such a provision in the Statute is that at no stage a self-perpetuating management should take control of the company. Under the model of self-perpetuating management, the Board of Directors is allowed to control its own composition i.e. such board can dictate the terms like how long a director can serve, and even it can elect and re-elect directors itself. This type of model may not be conducive to the healthy growth of the company. In effect, shareholders are the owners of the company but they cannot usurp the powers of the directors and interfere in the matters of managing the company. The concept of rotational directors enables them not to re-elect a retiring director for whom they have an unfavorable opinion.

The provisions of Section 152 (6) are stated as under:

(a) Appointment of Rotational director & no. of directors liable to retire by rotation: Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of public company shall—

A. be persons whose period of office is liable to determination by retirement of directors by rotation; and

B. save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(b) Appointment of non-rotational directors: The remaining directors in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

(c) Retirement from office of rotational director: At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

It is to be noted that the provision regarding 'retirement by rotation' is applicable to a public company or a private company which is subsidiary of a public company. In other words, a private limited company which is not a subsidiary of a public company, is exempted and therefore, if the articles permit it can appoint all its directors as non- rotational directors or permanent directors.

The articles of a public company may provide for the retirement of all the directors at every annual general meeting. If such is not the case, then not less than two-thirds of the total number of directors of that public company shall be the persons who are liable to retire by rotation. In other words, the articles must provide that minimum two-thirds of the total number of directors shall be liable to retirement by rotation. Such directors are called rotational directors.

The term "total number of directors" shall not include independent directors, whether appointed under the Companies Act, 2013 or any other law for the time being in force, on the Board of a company. Thus, independent directors are not liable to retire by rotation and therefore, they are non-rotational directors.

Further, any person appointed as a nominee director being nominated by any institution in pursuance of the provisions of any law or any agreement (like when a financial institution that has been created by an Act of Parliament nominates a person as its nominee director on the Board of a company which has availed financial assistance from such institution) cannot be considered as a director liable to retire by rotation. Nominee director may also be appointed by the Central Government or the State Government by virtue of its shareholding in a Government company.

One-third of directors to retire at AGM: Once the number of directors who are liable to retire by rotation is determined, only one-third out of that number shall retire. If such number is neither three nor a multiple of three, then, the number nearest to one-third, shall be considered and such of the directors shall retire from office.

Example 3: Khatkhata Advisory Limited constituted its board with 12 directors in which 2 directors are independent directors and 1 director is a nominee director. As per the provision of section 152 of the Companies Act, 2013, the concept of retirement by rotation of rotational directors shall be applicable to public company. Therefore, Khatkhata Advisory Limited shall be required to calculate the number of rotational directors which is liable to retire by rotation.

Total number of directors who are holding their office is 12 directors. It should be noted that at least 2/3rd of total number of directors shall be liable to retire by rotation. However, independent director and nominee director shall not be counted in "total number of the directors". Thus, 12 Directors less 3 Directors i.e. 9 directors shall be counted for "total number of the directors".

Here, 6 directors (9 * 2/3rd =6) shall be liable to retire by rotation. Now, 1/3rd of directors liable to retire by rotation (i.e. 6 * 1/3rd = 2 directors), shall actually retire by rotation at AGM.

Example 4: A company is having 6 directors.

Directors liable to retire by rotation: 6 * 2/3 i.e. 4

No. of directors to retire at AGM: 4* 1/3, i.e. 1.33 or nearest to 1/3rd is 1.

Example 5: A company is having 7 directors.

Directors liable to retire by rotation 7*2/3 i.e. 4.7 or 5 (not less than two-third)

No. of directors to retire at AGM: 5* 1/3 i.e. 1.67 or nearest to 1/3rd is 2.

Example 6: A company is having 9 directors out of which 3 are independent directors. The 'total number of directors' for the purpose of calculation of number of rotational directors shall be 6 only because 3 independent directors are to be excluded. Rest of the calculations shall be as per Example given above.

(d) Directors liable to retire by rotation: The directors who actually retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment. If two or more directors were appointed on the same day, retirement by rotation will be decided between them by mutual agreement among themselves or by lot as the case may be.

The above provision (d) clarifies the basic question that after the determination of number of directors liable to retire by rotation, who should actually retire at the AGM? For this purpose it is provided that the directors who have been longest in the office since their last appointment are the directors who need to be retired first. However, it may happen that some of those were appointed as directors on the same day. In that case, if there exists any mutual understanding relating to retirement among such directors, that should be followed; otherwise the determination shall be done by draw of lots.

(e) **Filling of vacancy of rotational director:** At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

Re-appointment: When a director is retired a vacancy is created. To fill that vacancy, the company may re-appoint the retiring director itself at the AGM. If the retiring director is not re-appointed, the company may appoint some other person at his place but in that case provisions of Section 160 are to be complied with.

The clause regarding appointment of directors for filling the vacancies created by retiring directors is quite important. However, the number of directors should not fall short of minimum directors required in a company at any stage. However, so long as the clause regarding minimum required directors is fulfilled the company may also resolve not to appoint anyone in place of retiring director.

In case Annual General Meeting is not held on due date, then the retirement of rotational directors cannot be postponed to that particular date when the AGM shall be held in future. The directors who are liable to retire must vacate the office of director immediately when the AGM is ought to have been held.

Non-rotational Directors: Remaining 1/3rdor less number of total directors (after determining the number of rotational directors) are not liable to retire by rotation. These are called non-rotational directors. They may also be appointed at the general meeting or as per the provisions contained in the articles of the company.

v. **Deemed re-appointment of retiring Directors under certain circumstances [Section 152(7)]**

Section 152 (7) provides the way for deemed appointment of a retiring director as under:

(a) **Adjournment of general meeting:** If the vacancy of the retiring director is not so filled- up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place.

In case that day is a national holiday, the meeting shall be adjourned till the next succeeding day which is not a holiday, at the same time and place.

(b) **Deemed re-appointment:** If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not

to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting with immediate effect.

Exceptions to deemed re-appointment: In the following circumstances, a retiring director shall not be deemed as re-appointed:

A. if at that meeting or at the previous meeting, a resolution for the re-appointment of such director has been put to the meeting and lost i.e., his re-appointment has not been considered favourably because of non-passing of resolution;
B. if the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;
C. if he is disqualified for appointment as per the provisions of the Act;
D. if a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
E. if Section 162 is applicable to the case i.e., where a single resolution was used to appoint two or more persons as directors without first moving a proposal which was required to be agreed to at the meeting and no vote was being cast against it. In such a case, Section 162 is contravened and two or more appointments made by a single resolution are void. Consequently, retiring director is not deemed to be re-appointed.

Note: For the purposes of Section 152, the "retiring director" means a director retiring by rotation

Exemptions:

Non-applicability of Sections 152(6) and 152(7): Section 152(6) and 152 (7) of the Act of 2013, shall not apply to:

(a) a Government company, which is not a listed company, in which not less than fifty-one per cent of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
(b) a subsidiary of a Government company, referred to in (a) above.

subject to the condition that such a company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

4. DIRECTOR IDENTIFICATION NUMBER (DIN) [SECTION 152 (3) AND SECTIONS 153 TO 159]

"Director Identification Number" (DIN): DIN means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company.

It is provided that the Director Identification Number (DIN) obtained by the individuals prior to the notification of the 'Specification of Definitions Details Rules' shall be the DIN for the purpose of the Companies Act, 2013.

Further, it is to be noted that "Director Identification Number" (DIN) shall include the Designated Partnership Identification Number (DPIN) issued under section 7 of the Limited Liability Partnership Act, 2008 and the rules made thereunder.

Example 7: Mr. Rajesh having DIN 00452568 and already appointed in Raj Industries Private Limited. Now, he wants to appoint himself in M/s. Karnawat Industries LLP as a designated partner. Here, he does not require to apply for DPIN. As per section 7 of the Limited Liability Partnership Act, 2008, DIN can be used as DPIN for Designated Partner.

Requirement of DIN: According to Section 152 (3), no person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154 or any other number as may be prescribed under section 153.

Filing of Application for allotment of DIN: Section 153 deals with the filing of application for allotment of DIN. Accordingly, every individual intending to be appointed as director of a company shall make an application for allotment of DIN to the Central Government in the prescribed form and manner and along with prescribed fees.

It is provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number and in case any individual holds or acquires such identification number, the requirement of Section 153 shall not apply or apply in such manner as may be prescribed.

Further, Rule 9 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 states the following procedure for making an application for allotment of DIN before appointment in an existing company:

(1) **Filing of application:** Every applicant, who intends to be appointed as director of an existing company shall make an application electronically in Form DIR-3, to the Central

Government6 for allotment of a Director Identification Number (DIN) along with the prescribed fees.

It is provided that in case of proposed directors not having DIN, the particulars of maximum three directors shall be mentioned in Form No. INC-32 (SPICe) and DIN may be allotted to maximum three proposed directors through Form INC-32 (SPICe).

Example 8- Mr. Varun, Mr. Ankit and Mr. Parag are planning to incorporate a private limited company. They do not have DIN because they are becoming directors in any company for the first time. Here, they can apply for allotment of DIN along with the form of incorporation of the Company i.e., Form INC-32 (SPICe).

(2) Providing of electronic system to facilitate submission of application: The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs.

(3)

(a) Filling of required information in Form attached with relevant documents: The applicant shall download Form DIR-3 from the portal, fill in the required particulars sought therein, verify and sign the form and after attaching copies of the following documents, scan and file the entire set of documents electronically-

i. photograph;
ii. proof of identity;
iii. proof of residence;
iv. board resolution proposing his appointment as director in an existing company
v. specimen signature duly verified.

(b) Submission of digitally signed Form: Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is intended to be appointed as director in an existing company.

(4) In case the name of a person does not have a last name, then his or her father's or grandfather's surname shall be mentioned in the last name along with the declaration in Form No.DIR-3A.

Allotment of DIN: According to section 154, the Central Government shall allot a Director Identification Number (DIN) to the applicant in the prescribed manner within one month from the receipt of application.

Rule 10 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 provides the following procedure for rejection or allotment of DIN:

i. **Generation of application number-**On the submission of the Form DIR-3 on the portal and on payment of the requisite fees, an application number shall be generated by the system automatically.

ii. **Communication of issue of DIN-**After generation of application number, the Central Government shall process the applications received for allotment of DIN and decide on the approval or rejection thereof and communicate the same to the applicant along with the DIN allotted in case of approval by way of a letter by post or electronically or in any other mode, within a period of one month from the receipt of such application.

iii. **In case of defective/incomplete application-**If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who has filed such application. The applicant shall be directed to rectify the defects or incompleteness by resubmitting the application within a period of 15 days of such placing on the website and email.

It is provided that the Central Government shall –

(a) reject the application and direct the applicant to file fresh application with complete and correct information, where the defect has been rectified partially or the information given is still found to be defective;

(b) treat and label such application as invalid in the electronic record in case the defects are not removed within the given time; and

(c) inform the applicant either by way of letter by post or electronically or in any other mode.

iv. In case of rejection or invalidation of application, the fee so paid with the application shall neither be refunded nor adjusted with any other application.

Note 1: All DINs allotted to individual(s) by the Central Government before the commencement of these rules shall be deemed to have been allotted to them under these rules.

Note 2: The DIN so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

Prohibition on obtaining more than one DIN: According to Section 155, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.

Example 9: Mr. Tahir was appointed as a director in Bombay Textiles Private Limited with DIN 00658400. Now, He wants to be appointed as a director in another company. Here, Mr. Tahir shall have to use existing DIN for appointment as a director in new company. He cannot apply for another DIN.

Director to intimate DIN: According to Section 156, every existing director shall, within one month of the receipt of DIN from the Central Government, intimate his DIN to the company or all the companies wherein he is a director.

Company to inform DIN to Registrar: According to section 157 (1), every company shall, within 15 days of the receipt of intimation under section 156, furnish the DIN of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees or additional fees as may be prescribed. Every such intimation shall be furnished in the prescribed form and manner.

According to Rule 10A of the Companies (Appointment and Qualifications of Directors) Rules, 20147:

(1) Every director, functioning as a director in one or more companies on or before the 30th June, 2007 and who has not yet intimated his DIN to such company or companies shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director as per Form DIR-3B.

(2) The intimation by the company of Director Identification Number of its directors under section 157 shall be furnished in Form DIR-3C within 15 days of receipt of intimation under section 156.

Punishment for failure to furnish the DIN to Registrar: According to Section 157 (2) if any company fails to furnish the DIN to Registrar, it shall be liable to a penalty as under:

- Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 1,00,000.
- Further, every defaulting officer of the company shall be liable to a penalty as under:

Minimum penalty of Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 1,00,000.

Obligation to indicate DIN: According to Section 158, every person or company, while furnishing any return, information or particulars as are required to be furnished under the Companies Act, 2013, shall mention the Director Identification Number in such return, information or particulars in case such return, information or particulars relate to the director or contain any reference of any director.

Punishment for contravention of Sections 152, 155 and 156: Section 159 provides that if any individual or director of a company makes any default in complying with any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be liable to a penalty as under:

- Penalty upto Rs. 50,000 and where the default is a continuing one,
- with a further penalty up to Rs. 500 for each day after the first during which such default continues.

Cancellation or Surrender or De-activation and Re-activation of DIN:

Rule 11 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 lays down the procedure for cancellation or surrender or deactivation and re-activation of DIN as under:

(1) The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with prescribed fee from any person, cancel or deactivate the DIN in case -

(a) the DIN is found to be duplicated in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number;

(b) the DIN was obtained in a wrongful manner or by fraudulent means;

However, before cancellation or deactivation of DIN pursuant to the clause (b) above, an opportunity of being heard shall be given to the concerned individual.

For this purpose:

i. the term "wrongful manner" means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation.

ii. the term "fraudulent" means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.

(c) of the death of the concerned individual;

(d) the concerned individual has been declared as a person of unsound mind by a competent Court;

(e) if the concerned individual has been adjudicated an insolvent.

(f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

However, before deactivation of any DIN in the above case (f), the Central Government shall verify e-records

(2) The Central Government or Regional Director (Northern Region), or any officer authorised by the Central Government or Regional Director (Northern Region) shall, deactivate the Director Identification Number (DIN), of an individual who does not intimate his particulars in e-form DIR-3-KYC within the stipulated time in accordance with Rule 12A.

(3) The de-activated DIN shall be re-activated only after e-form DIR-3 is filed along with the fee as prescribed under the Companies (Registration Offices and Fees) Rules, 2014.

Intimation of Changes in Particulars specified in DIN Application:

Rule 12 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, provides for the following procedure for intimation of changes in particulars specified in the DIN application:

(1) Intimation of change to Central Government: Every individual who has been allotted a DIN under these rules shall, in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of 30 days of such change(s) in Form DIR-6 in the following manner, namely:

i. The applicant shall download Form DIR-6 from the portal, fill in the relevant changes, verify the form and attach duly scanned copy of the proof of the changed particulars and submit electronically;

ii. the form shall be digitally signed by a chartered accountant in practice or a company secretary in practice or a cost accountant in practice;

iii. the applicant shall submit the Form DIR-6;

(2) Applicant to be informed of change in the electronic database: The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.

(3) Intimation to concerned Registrar: The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.

(4) Individual to inform change in particulars to the companies: The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within 15 days of such change

5. RIGHT OF PERSONS OTHER THAN RETIRING DIRECTORS TO STAND FOR DIRECTORSHIP [SECTION 160]

A person who is not a retiring director is also eligible to stand for directorship. Section 160 of the Act and Rule 13 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 contain provisions in this respect. These are discussed as under:

i. **Requirement of Written Notice:**

(a) Person who applies his candidature as a director: A person other than retiring director shall be eligible for appointment as a director in a company at any general meeting (Whether in AGM or EOGM), if he has given a notice in writing under his hand signifying his candidature as a director at least 14 days before the meeting at the registered office of the company.

(b) Member who intends to propose other person for directorship: Instead of above person, some other member of the company who intends to propose such other person as a director can also give a written notice at the registered office of the company signifying his intention to propose the other person as a candidate for directorship at least 14 days before the meeting.

ii. **Requirement of Deposit:** The written notice needs to be accompanied with the deposit of Rs. 1, 00,000 or such higher amount as may be prescribed.

iii. **Action by the company:** The company shall inform its members regarding the candidature of a person for the office of director in accordance with the manner prescribed in Rule 13

of the Companies (Appointment and Qualifications of Directors) Rules, 2014. The same is stated below:

At least 7 days before the general meeting, the company shall inform its members of such candidature-

(1) by serving individual notices through electronic mode to such members who have provided their e-mail addresses for communication purposes and in writing to all other members; and

(2) by placing notice of such candidature on its website, if any

When there is no need to serve notices individually: It shall not be necessary for the company to serve individual notices if it advertises such candidature, not less than 7 days before the meeting:

(a) 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

(b) at least once in English language in an English newspaper circulating in that district.

iv. **Refund of Deposit:** The amount of deposit shall be refunded to such person or, as the case may be, to the member, if the person proposed gets selected as a director or gets more than 25% of the total valid votes cast either on show of hands or on poll.

Explanation – No deposit fees shall be refunded to those candidates who are not appointed as directors or do not get more than 25% of total valid votes in favour of their appointment.

Note 1: For the purposes of Section 160, the expression 'retiring director' means a director retiring by rotation.

Note 2: Not all the directors are retiring directors. Therefore, if an additional director or an alternate director or a nominee director or a director appointed to fill a casual vacancy, is to be appointed as a regular director at the general meeting, the procedure prescribed by Section 160 is required to be followed. Similarly, where a director retires by rotation but instead of re-appointing him, a new person in his place is proposed to be appointed, provisions of Section 160 are attracted

Exemptions

(1) Section 160 shall not apply to:

(a) A Government company in which the entire paid-up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(b) A subsidiary of a Government company, referred to in (a) above, in which the entire paid-up share capital is held by the Government company.

(2) Similar exemption from Section 160 is applicable to a private company.

(3) Similar exemption from Section 160 is also applicable to Section 8 companies whose articles provide for election of directors by ballot.

Note: In all the three cases mentioned above exemption from the application of Section 160 is available only if the concerned company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the Registrar.

6. APPOINTMENT OF DIRECTOR ELECTED BY SMALL SHAREHOLDERS [SECTION 151]

According to Section 151 of Act, a listed company may have one director elected by the small shareholders. This provision enables the small shareholders to place their representative on the Board of Directors of a listed company so that their voice is also listened effectively.

The term "small shareholders" means a shareholder holding shares of nominal value of not more than 20,000 or such other sum as may be prescribed.

Manner of appointment of small shareholders' director and terms and conditions of such appointment are prescribed by Rule 7 of the Companies (Appointment and Qualifications of Directors) Rules, 2014. These provisions are discussed below:

i. **Strength of Small Shareholders required for appointment of their Director:** A listed company may, upon notice of not less than:

- 1,000 small shareholders; or
- 1/10th of the total number of such shareholders,

whichever is lower

have a small shareholders' director elected by the small shareholders.

However, a listed company may opt to have a director on suo moto representing small shareholders and in such a case the provisions given below in Point (ii), shall not apply for appointment of such director.

ii. **Serving of notice by small shareholders:** The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall give a notice of their intention with the company at least fourteen days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

iii. **Statement to be annexed with notice:** The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders' director stating-

(a) his Director Identification Number (DIN);

(b) that he is not disqualified to become a director under the Act; and

(c) His consent to act as a director of the company.

iv. **Small shareholders' director as independent director:** Such director shall be considered as an independent director. Therefore, he should meet the eligibility criteria pertaining to independent director as given under section 149(6) and should give a declaration of his independence in accordance with section 149(7) of the Act.

v. **Applicability of section 152:** The appointment of small shareholders' director shall be subject to the provisions of section 152 except that-

(a) such director shall not be liable to retire by rotation;

(b) such director's tenure as small shareholders' director shall not exceed a period of 3 consecutive years; and

(c) On the expiry of the tenure, such director shall not be eligible for re-appointment.

vi. **Applicability of Section 164:** A person shall not be appointed as small shareholders' director of a company, if he is not eligible for appointment in terms of section 164 which specifies the disqualifications for appointment as a director.

vii. **Vacation of office:** A person appointed as small shareholders' director shall vacate the office if -

(a) the director incurs any of the disqualifications specified in Section 164;

(b) the office of the director becomes vacant in pursuance of Section 167;

(c) The director ceases to meet the criteria of independence as provided in Section 149(6).

viii. **Maximum number of directorships:** No person shall hold the position of small shareholders' director in more than two companies at the same time.

However, the second company in which he has been so appointed shall not be in a business which is competing or is in conflict with the business of the first company.

ix. **Cooling period:** A small shareholders' director shall not be appointed in or be associated with such company in any other capacity, either directly or indirectly for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company.

7. APPOINTMENT OF ADDITIONAL DIRECTOR, ALTERNATE DIRECTOR, A DIRECTOR TO FILL CASUAL VACANCY AND NOMINEE DIRECTOR [SECTION 161]

A. **Additional Director [Section 161(1)]:** According to the section:

i. The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.

ii. A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.

iii. Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

With a view to meet urgent requirements of management, the Board of Directors is empowered to appoint any person as an additional director at any time if such power is

granted by the articles. The notable point is that it is not Section 161 (1) but the articles which confer such power.

The person to be appointed as additional director should possess DIN and must not be the person who failed to get appointed in a general meeting. This brings to the force the power of shareholders i.e., any person discarded as director at a general meeting by the shareholders cannot get appointed by the Board of Directors through back-door entry. Further, an additional director is not a retiring director. Therefore, his appointment as regular director requires that the provisions of Section 160 are followed.

Term of office of additional director: The term of additional director is limited to the holding of ensuing Annual General Meeting (AGM). Even if the AGM is not held on the last due date, the term ends there itself and it cannot be extended to a date when the AGM, in actuality, shall be held in future after its due date.

B. **Alternate Director [Section 161(2)]:** According to this section:

The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.

An alternate director shall not hold office for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate the office if and when the original director returns to India.

If the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

The power to appoint an alternate director rests with the Board of Directors. However, such power must be conferred by the articles or by a resolution passed at the general meeting.

An alternate director is appointed in place of a regular director who has gone out of India. The period of absence of such original director from India must be minimum three months

or more. A short absence of less than three months does not entitle the Board to appoint an alternate director. Such proposed alternate director should possess DIN.

A person selected for appointment as alternate director must not be the one who is holding any alternate directorship for any other director in the company. In other words, a person who is already an alternate director in the company cannot hold another alternate directorship in that company. Further, the selected person must also not be a director in the same company. Thus, a person already a director cannot at the same time be an alternate director in the same company but a person holding directorship in any other company can be considered for the appointment as alternate director. However, for considering maximum number of directorships of a person under Section 165, the alternate directorship shall also be counted. Thus, a fresh alternate directorship should be taken up by the person concerned only if his holding of regular as well as alternate directorships does not exceed the maximum limit. Further, he should not be disqualified to hold the office of a director.

Example 10: Mr. Devendra Kumar has been appointed as an alternate director in place of Mr. Gaurav Jain (i.e. Original Director) in Urban Development Private Limited. Now, company wants to appoint Mr. Devendra Kumar as an alternate director in place of Ms. Shaily Jaiswal (i.e. another original director of the same company).

Here, Mr. Devendra cannot be appointed as an alternate director of another original director of the company.

In case, the original director is an independent director and he leaves for a place outside India for three months or more, the person who is to be appointed in his place as alternate director must be qualified to be appointed as an independent director. In other words, the status of independence as well as other requisites of an independent director must form part of such alternate director who is selected for appointment in the absence of an independent director.

A 'would be alternate director' is not exempted from furnishing his consent to act as director. Therefore, he must furnish his consent in DIR-2 to the company on or before his appointment and in turn the company shall file his consent with the Registrar in DIR-12.

Term of office of alternate director: The term of office of an alternate director coincides with the permissible term applicable to the original director in whose place he

has been appointed. Thus, the term shall not be longer than the term which is permissible to the original director; and as soon as the original director ceases to be a director (death included) the alternate director follows his steps and is required to vacate the office. Further, the alternate director shall vacate the office immediately on the return of original director to India.

It may happen that the term of original director expires while he is still outside India. In such a case, the provisions relating to automatic deemed re-appointment as envisaged in Section 152 (7) (b) shall apply to the original director and not to the alternate director appointed in his place. Thus, the original director (and not alternate director) shall be deemed as re-appointed at the adjourned AGM if the company does not appoint another person on the expiry of the term of original director.

Appointment of alternate director by original director: The original director who is leaving to a place outside India cannot appoint an alternate director in his place. It is the Board which shall make the appointment because the authority for such appointment vests in the Board. Following example will make the situation clear:

Example 11: Mr. Q, a Director of PQR Limited proceeding on a long foreign tour (period of duration outside India exceeded three months), appointed Mr. Y as an alternate director to act for him during his absence. The articles of the company provide for appointment of alternate directors. Mr. Q claims that he has a right to appoint alternate director.

As per section 161(2), the Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than 3 months from India. From the above provision it is clear that the authority to appoint alternate director has been vested in the Board of Directors only and that too subject to empowerment by the articles or by a resolution passed by the company in general meeting.

Therefore, Q, in this case is not authorized to appoint an alternate director and the appointment of Mr. Y is not valid.

C. **Nominee Director [Section 161(3)]:** According to this section:

'Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.'

Simply stated, a nominee director is not like any other director. He represents the body which makes his nomination for appointment as director in the company. Whenever a company obtains financial assistance from some financial institution or bank, such institution invariably nominates its representative for safeguarding its interests till the loaned amount is completely repaid. The nominee director is expected to ensure that the terms of loan agreements are religiously complied with all the time by the company concerned which has been granted financial assistance. The Board of Directors (subject to the articles) is empowered to appoint a nominee director and the shareholders cannot interfere with such appointment. Further, by virtue of its shareholding in a Government company, the Central Government or the State Government may also nominate a person for appointment as nominee director and the Board shall have to follow the suit without any hindrance on its part.

D. **Casual Vacancy [Section 161(4)]:** According to this section:

   i. if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board [which shall be subsequently approved by members in the immediate next general meeting].

   ii. Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

The above provisions are discussed as under:

The term 'casual' means a sudden happening i.e., something which happened by chance or unexpectedly or unforeseen but not by efflux of time. A casual vacancy results when the office of any director appointed in the general meeting is vacated before the expiry of his term in the normal course. This is not the vacancy created due to the retirement of a director. It is created because of certain other factors that are not linked with retirement like occurrence of death or attraction of disqualification or tendering of

resignation or removal, etc. Further, in this case, the term of the office of director because of which the casual vacancy is created does not get expired in the normal course.

A vacancy which was created due to the fact that the elected director declined to assume the office after his appointment at general meeting cannot be said to result in a casual vacancy. In such a case, when there was no assume of office by the director, how can he vacate it. Thus, there arises no casual vacancy.

Section 161 (4) does not require that articles should expressly empower the Board of Directors for filling a casual vacancy. When a casual vacancy occurs it shall be filled by the Board at its meeting by passing a resolution and not otherwise. The vacancy so filled by the Board shall be approved subsequently by members in the immediate next general meeting. It is to be noted that where articles contain any regulations as regards filling of casual vacancy they need to be followed by the Board; but the subsequent approval of such filling of vacancy by members in the immediate next general meeting is a must.

As we have noticed, the casual vacancy arises when any director appointed in the general meeting vacates his office before the expiry of his term. Thus, such appointment of the director who vacates his office must have been made in the general meeting and when the casual vacancy is filled by the Board and subsequently approved by the members in the immediate next general meeting, the matter ends there. Subsequently, if the casual vacancy so filled is again vacated due to some casual occurrence, then it cannot be said to be a casual vacancy because it arose against an appointment which was not made in the general meeting. Such type of vacancy needs to be filled by the Board by appointing an additional director.

A director appointed to fill a casual vacancy is not a 'casual director'. He enjoys all the powers as well as is required to bear the responsibilities of the director in whose place he is appointed except that where the earlier director was an 'interested director', his 'interest' cannot be attached to the new director filling the casual vacancy.

In case a company has appointed a woman director because of statutory requirement and an intermittent vacancy is created in the office of such woman director, the Board shall fill such casual vacancy at the earliest but not later than immediate next Board meeting or three months from the date of creation of such vacancy, whichever is later. Similar is the case with an independent director whose intermittent vacancy must be filled at the earliest but not later than immediate next Board meeting or three months from the date

of occurrence of such vacancy, whichever is later. However, there is no such urgency so far as filling of any other casual vacancy is concerned (i.e. not of a woman director or of an independent director) because if the Board of Directors feels that the affairs of the company can be managed without appointing anybody, then the Board can postpone such appointment.

Term of office of a director appointed to fill a casual vacancy: The term of office of a director appointed to fill a casual vacancy continues till such time up to which the term of the director because of whom the casual vacancy was created would have continued. Thus, the person filling the casual vacancy shall hold office up to the date up to which the director in whose place he is appointed would have continued in the office which in other words means 'up to the unexpired term of such director'.

The 'continuation clause' is applicable because of the Proviso mentioned under Section 161 (4); but for the application of this 'continuation clause' the appointment made by the Board needs to be approved by the members in the immediate next general meeting.

8. APPOINTMENT OF DIRECTORS TO BE VOTED INDIVIDUALLY [SECTION 162]

Section 162 of the Companies Act prohibits appointment of directors by passing a single resolution. Electing more than one person as directors through a single resolution deprives the shareholders from exercising their choice to reject a specific individual. In such a situation, either they will have to vote against or in favour of all the prospective directors i.e., it shall be difficult for them to reject a particular person as director unless they reject such resolution in to, thus not appointing all the persons specified in that resolution. That is why, Section 162 requires every individual person to be voted individually for appointment as director. As stated in the box below, if certain conditions are satisfied this provision shall not apply to a Government company and its wholly-owned subsidiary. Further, a private company is also exempted from this provision.

In nutshell, provisions of Section 162 are as under:

i. Two or more directors of a company cannot be elected as directors by a single resolution. It implies that each person shall be appointed as director by a separate resolution.
ii. As an exception, two or more persons can be appointed as directors by a single resolution if a proposal to move such a resolution (i.e., appointing two or more persons as directors

by a single resolution) has first been agreed to at the general meeting without any vote being cast against it.

Example 11: A company held its general meeting at its registered office with twenty members present. At the meeting a proposal was moved to appoint three persons as directors by a single resolution. This proposal was agreed to by the 17 shareholders who voted in its favour but the remaining three members did not vote at all. Thus, no vote was cast against the proposal. In such a situation, the company can appoint three persons as directors by a single resolution. Such single resolution shall be passed by simple majority i.e. as an ordinary resolution.

iii. A resolution moved in contravention of the provision stated in point (ii) above shall be void, whether or not objection thereto was raised at the time when it was so moved.

iv. A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Exemptions:

Non-applicability of Section 162 of the Act of 2013:

(1) Section 162 requiring appointment of each person as director by a separate resolution, shall not apply to:

(a) A Government company in which the entire paid-up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(b) A subsidiary of a Government company, referred to in (a) above, in which the entire paid-up share capital is held by that Government company.

However, above exemption is applicable only if such Government company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

(2) Similarly, a private company also exempted from the application of Section 162.However, this exemption is applicable only if such private company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

9. OPTION TO ADOPT PRINCIPLE OF PROPORTIONAL REPRESENTATION FOR APPOINTMENT OF DIRECTORS [SECTION 163]

As a general rule, the directors in a company are appointed by simple majority. It implies that the shareholders having voting rights just equal to 51% can easily negate the choice of other minority shareholders who have substantial voting rights as high as up to 49 percent in the matter of appointment of directors. Thus, minority shareholders though having sizeable voting rights may not find it possible to appoint even a single director of their own on the Board of Directors. To counter this kind of unpleasant situation which may create confrontation in a company and adversely affect the managerial efficiency. Section 163 chalks out a system by which directors may be appointed by way of proportional representation. The provisions of Section 163 are stated as under:

i. Section 163 starts with the phrase 'Notwithstanding anything contained in this Act' which implies that this section has overriding effect i.e., it overrides all other provisions of the Companies Act, 2013.
ii. The articles of a company need to contain provisions for the appointment of directors by proportional representation. The procedure as contained in the articles must be capable enough to enable the minority shareholders to have a proportionate representation on the Board of Directors.
iii. The articles need to provide for the appointment of not less than two-third (i.e., minimum 2/3rd or more) of the total number of the directors in accordance with the principle of proportional representation.
iv. Such appointments to be made in accordance with the principle of proportional representation, may use following methods of voting:
    (a) Voting according to the single transferable vote. It means, a candidate gets elected if he secures the requisite votes fixed as quota; or
    (b) Voting according to a system of 'cumulative voting'; or
    (c) Otherwise i.e. Adoption of any other transparent and effective method of voting if it ensures that the Board shall have fair representation of the minority interest, in case methods stated at (a) or (b) are not adopted.
v. Such appointments may be made once in every 3 years.
vi. Casual vacancies of such directors shall be filled as provided in Section 161 (4) i.e. such casual vacancy shall be filled as per the provisions of the articles; and if there is no such provision, then the Board of Directors may fill the vacancy through a board resolution. Later on, such appointment may be regularized by the shareholders at the immediately held general meeting

Exemptions

Non applicability of Section 163: Section 163 of the Act, shall not apply to:

A Government company in which the entire paid-up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

A subsidiary of a Government company, referred to in (1) above, in which the entire paid-up share capital is held by that Government company.

Subject to the condition that such Government Company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

10. DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR [SECTION 164]

Section 164 of the Companies Act, 2013 contains disqualifications of a director. A person shall not be eligible for appointment as a director of a company if he suffers from any of the specified disqualifications. As such, the law does not specify any professional or educational qualifications of a director or requires him to hold requisite number of qualification shares except that as a general rule, any person desiring to become a director should be competent to contract and should have been allotted a Director Identification Number (DIN).

Various disqualifications are mentioned as under:

i. Section 164(1) states that a person shall not be appointed as a director if:

(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence.

However, in case a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of 7 years or more, he shall not be eligible to be appointed as a director in any company

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him and 6 months have elapsed from the last day fixed for the payment of the call. It is immaterial whether such shares are held individually by him or jointly with others;

(g) he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years; or

(h) he has not complied with section 152 (3) which requires a director to have a Director Identification Number (DIN).

(i) he has not complied with the provisions of Section 165 (1) relating to holding of specified number of directorships.

ii. Sub-section (2) of Section 164 prescribes disqualifications which get attached to a person if he is or has been a director of a company which has committed default as under —

(a) his company has not filed financial statements or annual returns for any continuous period of 3 financial years; or

(b) his company has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for 1 year or more.

In both the above cases of default, the director concerned shall not be eligible to be re-appointed as a director of such defaulting company or appointed in some other company for period of 5 years from the date on which the said company has committed default.

Where a person is appointed as a director in a defaulted company: However, in case a person is appointed as a director of a company which has committed default as per clause (a) or clause (b) above, he shall not incur the disqualification for a period of six months from the date of his appointment

Exemptions

Section 164(2) is not applicable to a Government company provided it has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

iii. **Additional qualifications by private company:** According to Section 164 (3), a private company (not being a subsidiary of a public company) is permitted to provide for additional disqualifications through its articles for appointment of a person as a director besides those specified in sub-sections (1) and (2) of section 164. [Refer points (i) and (ii) above].

Thus, it may specify certain qualifications like a graduate shall only be the director or the prospective director should hold certain number of qualification shares, etc.

Note: In terms of Proviso to Section 164 (3), the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

iv. **Disqualification as prescribed by Section 217 (6)(ii):** Section 217 relates to a company which is under investigation. In case any director of such a company has been convicted of an offence under Section 217, the director shall be deemed to have vacated his office on and from the date on which he is so convicted. On such vacation of office, he shall be disqualified from holding an office in any company

11. MAXIMUM NUMBER OF DIRECTORSHIPS [SECTION 165]

Section 165 of the Act provides for the maximum permissible directorships that a person can hold. The provisions are as under:

i. **Maximum number of directorships:** According to Section 165(1), a person, after the commencement of the Companies Act, 2013, shall not hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Further, out of the above limit of 20 companies, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

It may be noted that the limit of public companies (i.e. 10) shall include directorship in private companies that are either holding or subsidiary company of a public company.

However, the limit of directorships of 20 companies shall not include the directorship in a dormant company; as also in a Section 8 company (refer Exemption mentioned in the box below).

Exemptions:

Section 165(1) [refer point no.(i) above] shall not apply to a Section 8 company subject to the condition that such a company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the Registrar. In other words, a directorship in a Section 8 company shall not be counted for determining the maximum permissible limit.

ii. **Lesser number of directorships than maximum:** The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors. [Section 165(2)]

Prescription of Transition Period of One Year: Immediately before the commencement of the Companies Act, 2013 (i.e., before 01-04-2014), if a person was holding office as director in more companies than the specified limits, he was required, within one year (i.e. by 31-03-2015) to:

(a) choose not more than the specified limit of companies, in which he wished to continue to hold the office of director;

(b) resign his office as director in the other remaining companies; and

(c) intimate the choice made by him to each of the companies in which he was director and to the jurisdictional Registrar. [Section 165(3)]

Any resignation so made was to become effective immediately on the dispatch thereof to the company concerned. [Section 165(4)]

After dispatching the resignation of his office as director/non-executive director or after the completion of the transition period of one year (i.e. after 31-03-2015), whichever was earlier, no such person would act as director in more than the specified number of companies. [Section 165(5)]

In other words, after the completion of transition period of one year on 31-03-2015, no person is permitted to hold more directorships than the maximum specified.

Punishment for Contravention: According to Section 165(6), if a person accepts an appointment as a director in contravention of Section 165(1) i.e. holding directorship of more than 20 companies or more than 10 public companies (subject to the exemptions, if any), he shall be liable to a penalty of Rs. 2,000 for each day after the first during which such violation continues, subject to a maximum of Rs. 2,00,000.

12. INDEPENDENT DIRECTORS

The legal provisions regarding independent directors are discussed below:

(a) Number of Independent Directors: Following companies are required to appoint specified number of independent directors:

i. **Listed Companies:** Every listed public company shall have at least one-third of the total number of directors as independent directors. [Section 149(4)]

Note: Any fraction contained in such 1/3rd number shall be rounded off as one.

ii. **Other Public Companies:** The Central Government is empowered to prescribe certain minimum number of independent directors in case of any class or classes of public companies. Taking a step in this direction, Rule 4(1) of the Companies (Appointment and Qualifications of Directors) Rules, 2014 has been framed which states that the following class or classes of companies shall have at least two directors as independent directors:

(1)	all such public companies which have paid up share capital of Rs. 10 crores or more; or
(2)	all such public companies which have turnover of Rs. 100 crores or more; or
(3)	All such public companies which have, in the aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crores.

Requirement of higher number: Due to composition of its audit committee, if a public company covered under the above rule, is required to appoint a higher number of independent directors, such higher number of directors shall be applicable to it.

As per section 177(2) of Act, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.

Intermittent vacancy of an independent director: Any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

Duration of conditions after non-fulfilment of which no appointment required: A company which was obligated to appoint independent directors, shall not be required to make such appointment if it ceases to fulfil any of the three conditions relating to paid-up share capital or turnover or outstanding loans, etc. [as laid down above in Rule 4(1)] for 3 consecutive years. It shall again be required to appoint independent directors if it starts meeting any of such conditions.

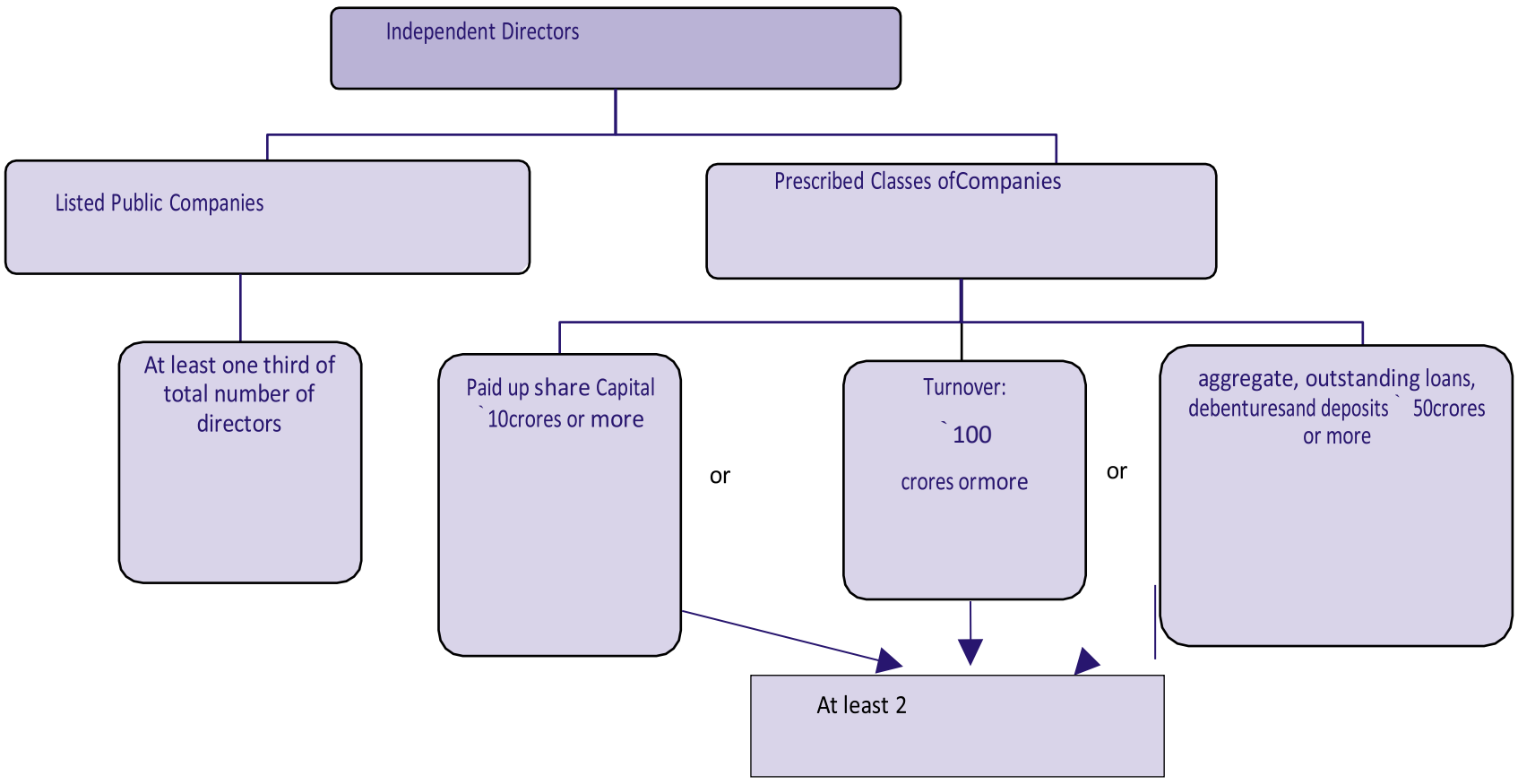
Clarification: Explanation to Rule 4 (1) clarifies that the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

Exempted classes of unlisted public companies: According to Rule 4(2), following classes of unlisted public companies shall not be covered under Rule 4(1):

(a) a joint venture;

(b) a wholly owned subsidiary; and

(c) a dormant company as defined under section 455 of the Act



If due to composition of audit committee any higher number of independent directors are required, such higher number shall be applicable.
Appointment of independent directors not required: If company ceases to fulfil any of the 3 conditions with respect to requirement of Paid-up share capital, Turnover or of aggregate outstanding loans, debentures and deposits for 3 consecutive years.
Joint ventures, wholly owned subsidiaries and dormant companies are not covered under Rule 4 (1) which mentions about mandatory appointment of independent directors.

(b) Who can become the Independent Director [Section 149(6)]: In relation to a company, an independent director means a director (other than a managing director or a whole-time director or a nominee director), and who fulfils the following criteria:

1. Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

   Exemptions

   In case of a Government company, the word "Board' shall be substituted by the words "Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government".

2.
   A. who is or was not a promoter of the company or its holding, subsidiary or associate company;
   B. who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
3. who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding 10% of his total income or such amount as may be prescribed, with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding financial years or during the current financial year;
4. none of whose relatives—
   i. in the company, its holding, subsidiary or associate company during the 2 immediately preceding financial years or during the current financial year.

      However, the relative may hold security or interest in the company of face value not exceeding Rs. 50 lakh or 2% of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

   ii. is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as prescribed under Sub-rule 2 of Rule 5 (i.e., Rs. 50 Lakhs) of the Companies (Appointment and Qualifications of Directors) Rules, 2014 during the 2 immediately preceding financial years or during the current financial year;

   iii. has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed under Sub-rule 2 of Rule 5 (i.e, Rs. 50 Lakhs) of the Companies (Appointment and Qualifications of Directors) Rules, 2014

during the 2 immediately preceding financial years or during the current financial year; or

iv. has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);

5. who, neither himself nor any of his relatives—

A. holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed;

However, in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding 3 financial years;

B. is or has been an employee or proprietor or a partner, in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, of —

i. a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

ii. any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 10% or more of the gross turnover of such firm;

C. holds together with his relatives 2% or more of the total voting power of the company; or

D. is a Chief Executive or director, by whatever name called, of any non- profit organisation that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or

6. who possesses such other qualifications as are prescribed under Rule 5 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 i.e.:

(a) An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

(b) None of the relatives of an Independent director, for the purposes of sub-clauses (ii) and (iii) of clause (d) of section 149(6) —

i. is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors; or

ii. has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company,

for an amount of Rs. 50 lakhs, at any time during the two immediately preceding financial years or during the current financial year.

(c) Declaration by Independent Director [Section 149(7)]: Every independent director shall give a declaration that he meets the criteria of independence as provided in Section 149 (6) [refer Point No. (b) above] in the following manner:

(1) at the first meeting of the Board in which he participates as a director; and

(2) thereafter at the first meeting of the Board in every financial year; or

(3) whenever there is any change in the circumstances which may affect his status as an independent director.

(d) Code for independent directors [Section 149(8)]: The company and independent directors shall abide by the provisions specified in Schedule IV to the Companies Act, 2013. As regards independent directors, Schedule IV specifies guidelines for professional conduct, role and functions, duties, manner of appointment and re-appointment, resignation and removal, provisions regarding separate meetings and evaluation mechanism.

(e) Remuneration of Independent Directors [Section 149(9)]: Not with standing anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of-

(1) fee provided under Section 197(5),

(2) reimbursement of expenses for participation in the Board and other meetings and

(3) profit related commission as may be approved by the members.

Entitled to:	**Not Entitled to:**
Fee provided under section 197(5)	Any stock option
Reimbursement of expenses for	

participation in: i. Board Meetings ii. Other Meetings	
Profit related commission as may be approved by the members	

Note: According to Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, sitting fee required to be paid to an independent director shall not be less than the sitting fee which is payable to other directors of the company.

Provided that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of section 197, in accordance with the provisions of Schedule V.

(f) Tenure [Section 149(10) & (11)]: These provisions are stated as under:

i.

(a) Term: Subject to the provisions of section 152 (Appointment of Directors), an independent director shall hold office for a term up to 5 consecutive years on the Board of a company

(b) Eligibility for Re-appointment: He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

Note: According to First Proviso to Section 169 (1), an independent director re-appointed for second term under Section 149(10) shall be removed by the company only by passing a special resolution.

ii. Limit on holding of office: An independent director shall not hold office for more than 2 consecutive terms.

Cooling period for appointment: However, he shall be eligible for appointment after the expiration of 3 years of ceasing to be an independent director.

However, during the said period of 3 years he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Note: It is clarified that for the purposes of sub-sections (10) and (11) of Section 149, any tenure of an independent director on the date of commencement of the Companies Act, 2013 shall not be counted as a term under those sub-sections.

(g) Liability [Section 149(12)]: As per section 149(12) of Act, following persons shall be liable for the following acts:

Parties Liable	For said Acts
i. an independent director	• acts of omission or commission by a company
ii. a non-executive director not being promoter or key managerial personnel	• which had occurred with his knowledge, • attributable through Board processes • with his consent or connivance, or where he had not acted diligently

(h) Retirement by rotation [Section 149(13)]: The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 shall not be applicable to appointment of independent directors.

(i) Independent Director is different from Nominee Director: Appointment of a nominee director cannot be taken as a substitute for appointment of an independent director. Though a nominee director is also independent of the other Board members but this independence does not make him an independent director. He is appointed to safeguard the interest of the respective financial institution to which he belongs. His appointment triggers from the fact that his financial institution has given financial assistance to the company and he remains on the Board till the loan amount is repaid satisfactorily. Nominee director's appointment is mandatory only if the financial institution so desires because of the financial assistance given by it to the company; or any Government requires such appointment to represent its interest.

An independent director is appointed by the prescribed companies mandatorily. He is appointed to promote the confidence of the investing bodies, particularly minority shareholders. In fact, the companies in which his appointment is compulsory are much

larger than other companies and therefore, they must always be well managed so that the confidence of the stakeholders is not shaken and their investment remains in safe hands. The appointment of independent director is a robust step in this direction. In the matter of good corporate governance, the regulators fall back upon him. The independent director at all times is required to maintain his independence and where circumstances arise which make him lose his independence, such fact must immediately be brought to the knowledge of the Board. The independent directors are required to hold at least one meeting in a financial year, without the attendance of non-independent directors and members of management.

13. MANNER OF SELECTION OF INDEPENDENT DIRECTORS AND MAINTENANCE OF DATA BANK OF INDEPENDENT DIRECTORS [SECTION 150]

Section 150 of the Act and Rule 6 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, contain provisions regarding the manner of selection of independent directors and maintenance of databank of independent directors. These provisions are stated below:

Maintenance of Data Bank of Independent Directors: According to section 150(1), an independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, subject to the provisions contained in section 149(6).

Such data bank shall be maintained by any body, institute or association, as may be notified by the Central Government as having the expertise in creation and maintenance of such data bank and put on their website for the use by companies appointing such directors.

Rule 6 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 lays down procedure required for a person who is eligible and willing to be appointed as an independent director. Accordingly-

1. **Apply online for inclusion of name in the data bank:** Every individual -
   (a) who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualifications of Directors) Fifth Amendment Rules, 2019, shall within a period of 13 months from such commencement; or
   (b) who intends to get appointed as an independent director in a company after such commencement, shall before such appointment,

   apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company:

   Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

2. **Renewal of period for inclusion of his name in the data bank:** Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of one year or five years or for his life-time, within a period of 30 days from the date of expiry of the period upto which the name of the individual was applied for inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute:

   Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

3. **Submission of declaration of compliance to the Board:** Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under sub-section (7) of section 149 of the Act.
4. **To pass an online proficiency self-assessment test:** Every individual whose name is so included in the data bank under sub-rule (1) shall pass an online proficiency self-assessment test conducted by the institute within a period two years from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the databank of the institute:

Exemptions from online proficiency self-assessment test: Provided that an individual shall not be required to pass the online proficiency self-assessment test when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank: -

A. as a director or key managerial personnel, as on the date of inclusion of his name in the databank, in one or more of the following, namely: -
   (a) listed public company; or
   (b) unlisted public company having a paid-up share capital of rupees ten crore or more; or
   (c) body corporate listed on any recognized stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; or
   (d) bodies corporate incorporated outside India having a paid-up share capital of US$ 2 million or more; or statutory corporations set up under an Act of Parliament or any State Legislature carrying on commercial activities; or
B. in the pay scale of Director or above in the Ministry of Corporate Affairs or the Ministry of Finance or Ministry of Commerce and Industry or the Ministry of Heavy Industries and Public Enterprises and having experience in handling the matters relating to corporate laws or securities laws or economic laws; or
C. in the pay scale of Chief General Manager or above in the Securities and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Development Authority of India or the Pension Fund Regulatory and Development Authority and having experience in handling the matters relating to corporate laws or securities laws or economic laws:

Provided further that for the purpose of calculation of the period of three years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate or statutory corporations at the same time shall be counted only once.

Explanation: For the purposes of this rule: -

(a) the expression "institute" means the 'Indian Institute of Corporate Affairs at Manesar' notified under sub-section (1) of section 150 of the Companies Act, 2013 as the institute for the creation and maintenance of data bank of Independent Directors;

(b) an individual who has obtained a score of not less than fifty per cent., in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;

(c) there shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.

i. **Due diligence to be exercised by the company:** Further, the responsibility of exercising due diligence before selecting a person as an independent director from the data bank, shall lie with the company making such appointment [Proviso to Section 150(1)].

ii. **Approval of Appointment in general meeting:** The appointment of independent director shall be approved by the company in general meeting as provided in section 152(2) and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director. [Section 150(2)].

iii. **Data bank to contain list of willing persons who desire to act as Independent Directors:** The data bank shall create and maintain data of persons willing to act as independent director in accordance with Rule 6 of the Companies (Appointment and Qualifications of Directors) Rules, 2014. [Section 150(3)]

iv. **Manner & procedure of selection specified by CG:** The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualifications and requirements specified under section 149 [Section 150(4)]

Exemption:

Section 8 company is exempted from the application of Section 150 of the Act, only if such company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

14. DUTIES OF DIRECTORS

Directors appointed in a company have various duties to perform. The foremost duty of the directors is to act honestly and diligently and in the best interest of the company so that the objective of wealth maximization is achieved for the stakeholders. In no case any business opportunity which falls within the ambit of the company be exploited by the directors for their own benefits.

A. **Duties as per Section 166:** Duties of directors, more particularly statutory duties, have been prescribed for the first time in the Statute. Section 166 specifies the following duties which are required to be accomplished by a director:

i. He shall act in accordance with the articles of the company, subject to the provisions of the Companies Act, 2013.

ii. He shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole. Further, he shall act in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

iii. He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

iv. He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

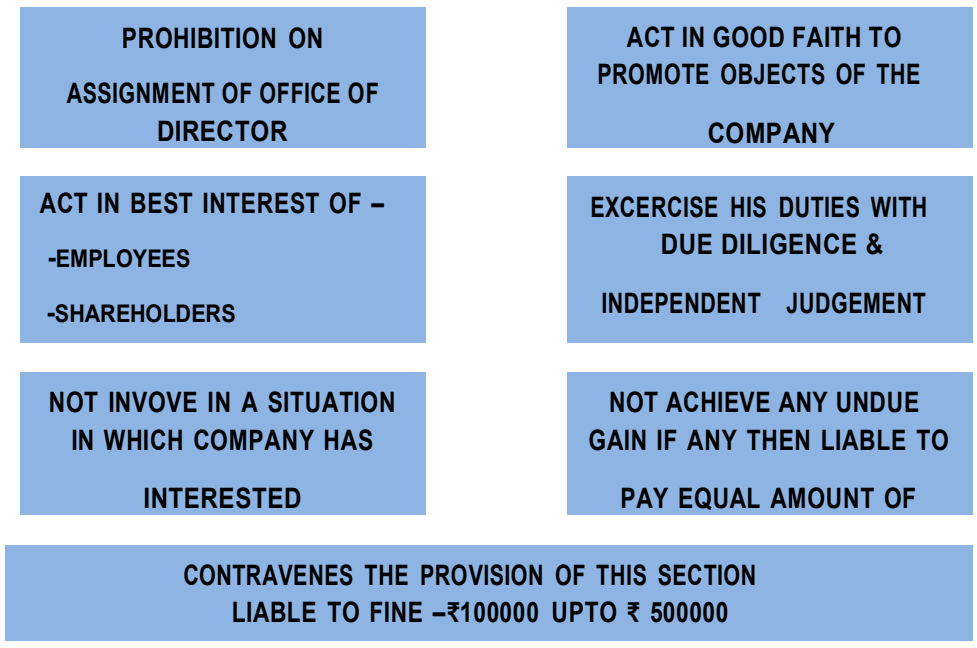
v. He shall not achieve any undue gain or advantage either to himself or to his relatives, partners, or associates. In case such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

vi. He shall not assign his office and if any assignment is so made, it shall be void.

The assignment of office has been made invalid because of the fact that the shareholders have elected a particular person as director for the management of their company. If such person assigns his office to some other person, the shareholders may not have faith in the other person; and therefore, a person who does not command the faith of the shareholders cannot be given the responsibility to manage the company. In other words, it is required of the original director to carry out his duties of directorship on his own without assigning them to some other person. Delegation of duties to other staff members, wherever permitted, is not akin to assignment of office.

Punishment for not accomplishing statutory duties: If any director of the company contravenes the provisions of Section 166, such director shall be punishable with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 5,00,000.

DUTIES OF DIRECTOR [SECTION – 166]



B. **Some Other Duties:** They are described as under:

i. **To file various documents:** It is the duty of the directors to file various documents required to be filed with the Registrar within the specified time limits. Similarly, wherever required, the requisite documents must also be filed with other statutory bodies.

ii. **To convene General Meetings:** As and when required, Annual General Meeting (AGM) and extraordinary general meetings (EGMs) need to be convened by the directors.

iii. **To attend Board Meetings:** Board meetings is the platform where collective decisions are taken for managing the company profitably. It is statutorily required of a company to hold at least four board meetings every year and the gap between two board meetings must not exceed 120 days. However, a company may, as per the exigencies, hold more meetings than statutorily required and every director is duty-bound to attend them. A director, though, may not attend all the Board meetings held in a year but in case he remains absent from all such meetings held within a period of twelve months either with or without seeking leave of absence, he shall be deemed to have vacated his office.

iv. **To disclose interest:** In the ordinary course, it is required of a director that his interest should not clash with the interests of the company i.e., he should not get himself benefitted from a transaction, the profit of which belongs to the company. If it happens and a director gets interested in a transaction belonging to the

company, it his duty to disclose such interest at the very first Board meeting he attends after becoming interested in the transaction. Thereafter, such interest should be disclosed in the first board meeting held in every financial year. In case there is any change in the disclosure already made by the director, such change needs to be brought in the knowledge of other directors in the first board meeting which he attends after occurring of such change. A detailed disclosure of interest and punishment for non-disclosure is discussed at the appropriate place.

v. **To approve the annual financial statements:** Before seeking auditor's report, the annual financial statements i.e., balance sheet, statement of profit and loss, cash flow statement, etc. including consolidated financial statements, if any, are required to be approved by the directors.

vi. **To approve and attach Board Report:** A report by the Board of Directors containing requisite particulars on the affairs of the company including Directors' Responsibility Statement is required to be attached with the financial statements after its approval.

vii. **To appoint first Auditors:** It is the duty of directors to appoint first auditors of the company.

15. VACATION OF OFFICE OF DIRECTOR [SECTION 167]

Section 167 of the Act contains provisions detailing out as to when the office of a director shall become vacant. As soon as, any such event occurs, the director is required to demit the office of director of the company. These provisions are given as under:

i. **Grounds for vacation:** According to Section 167 (1), the office of a director shall become vacant in case:

(a) he incurs any of the disqualifications specified in section 164;

However, if he incurs disqualification under section 164(2), the office of the director shall become vacant in all the companies, except the company which is in default under that sub-section;

(b) he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;

(c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

(d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;

(e) he becomes disqualified by an order of a court or the Tribunal;

(f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced to imprisonment for 6months or more.

Exception: The office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)—

i. for thirty days from the date of conviction or order of disqualification;

ii. where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or

iii. where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of;

(g) he is removed in pursuance of the provisions of the Companies Act, 2013 like when he is required to vacate office for disqualification incurred under Section 217 (6) i.e. conviction for committing an offence under Section 217;

(h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

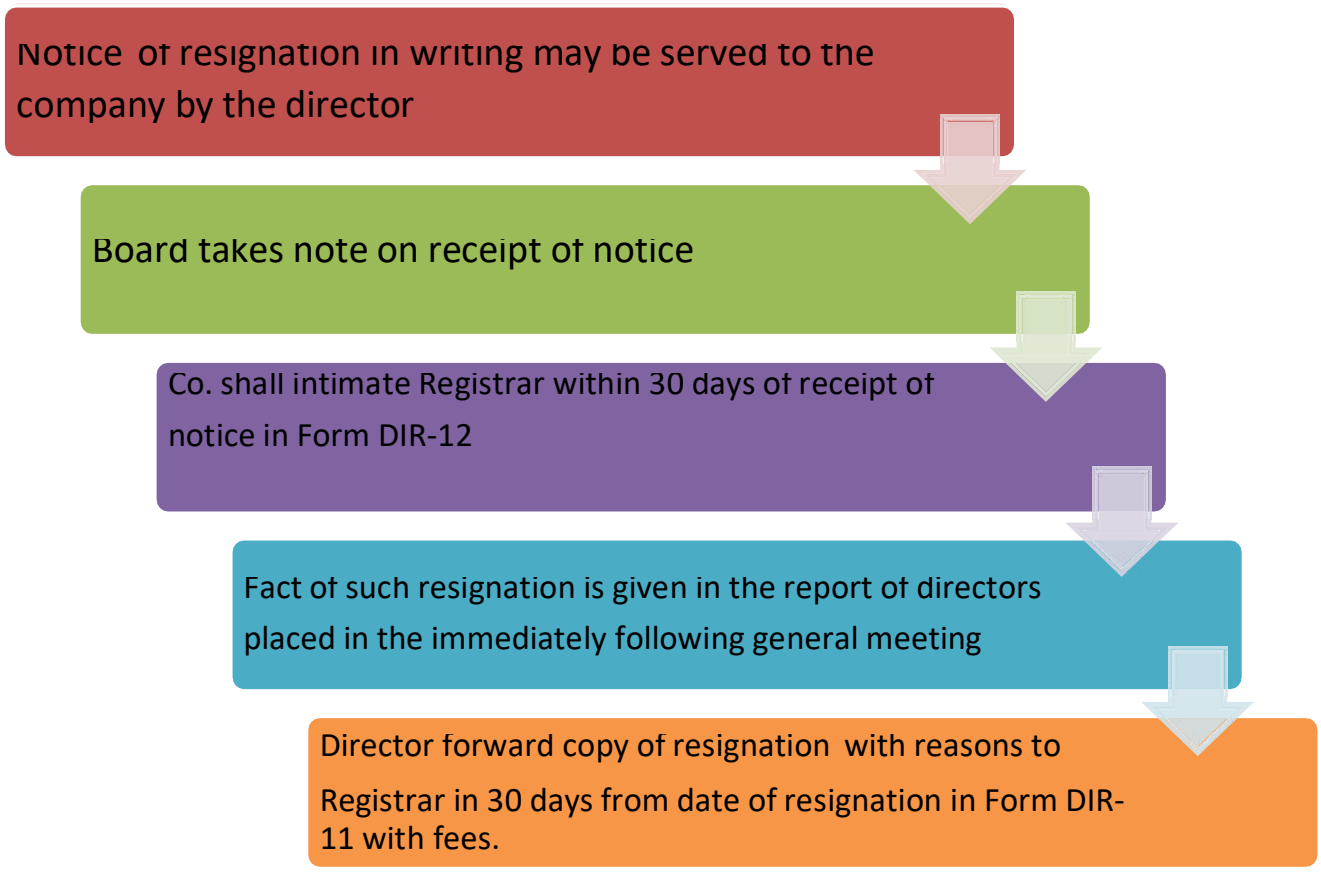
Provision of additional ground for vacation by a private company: According to Section 167(4), a private company may provide any other ground for the vacation of the office of a director in addition to those specified above, through its articles.

ii. **Punishment:** Section 167(2) prescribes punishment in case of contravention of section 167(1). Thus, if a person functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in Section 167(1), he shall be punishable with fine of Rs. 1,00,000 extendable to Rs. 5,00,000.

All the Directors vacating the office: Section 167(3) mentions about the eventuality when all the directors of a company vacate their offices under any of the disqualifications specified in Section 167(1). In that case, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting

16. RESIGNATION OF DIRECTOR [SECTION 168]

Provisions regarding resignation of directors have been included in the Companies Act, 2013 for the first time. Section 168 read with Rule 15 and Rule 16 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 deals with resignation of a director as under:



Signing and Filing of Form DIR-11 in case of a Foreign Director: In case a company has already filed Form DIR-12 with the Registrar, a foreign director of such company resigning from his office may authorise in writing a practicing chartered accountant or cost accountant in practice or company secretary in practice or any other resident director of the company to sign Form DIR-11 and file the same on his behalf intimating the reasons for the resignation.

Effective date of resignation: The resignation of a director shall take effect:

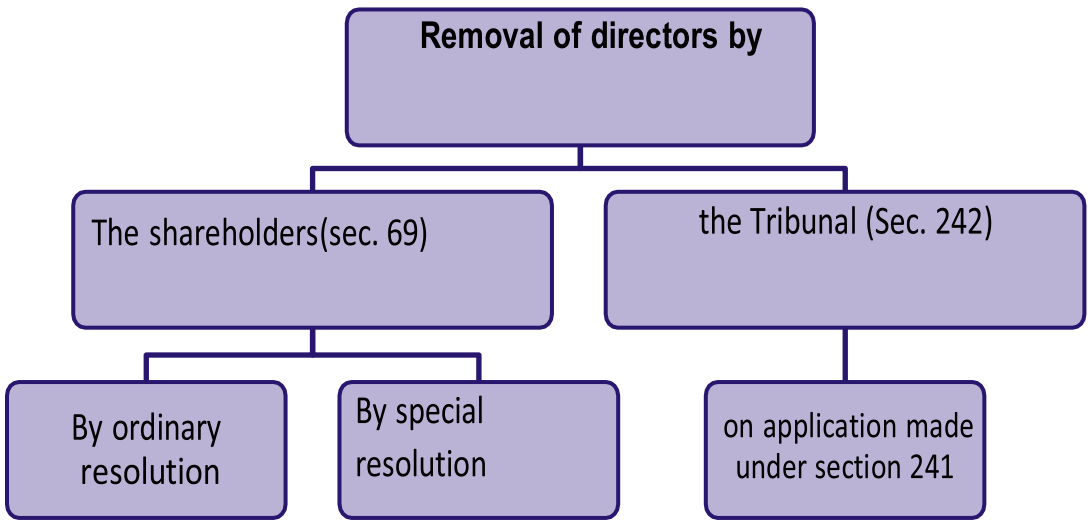
i. from the date on which the notice is received by the company,
ii. the date, if any, specified by the director in the notice, whichever is later

Liability: The director who has so resigned shall be liable even after his resignation for the offences which occurred during his tenure.

All the Directors tendering resignation: In case all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting

17. REMOVAL OF DIRECTORS

A director of a company may be removed before completion of his term as director. Removal of



directors is discussed here under the following heads:

I. **Removal of Director by the Shareholders:** Section 169 of the Act contains provisions for removal of directors by the shareholders. The way shareholders are empowered to appoint a director, in the same way they can also remove a director. The procedure of removal may be in the following manner:

   i. **Requirement of Ordinary Resolution:** A company may, by ordinary resolution, remove a director before the expiry of the period of his office except the following:

      (a) When a director is appointed by the Tribunal under Section 242.

      (b) When as per Section 163, two-thirds or more of the total number of directors are appointed according to the principle of proportional representation, then such directors cannot be removed.

      For example, if a company has eight directors, of which six were appointed according to the principle of proportional representation. In such a case, only two directors which were not appointed following the system of proportional representation, can only be removed by the shareholders.

   ii. **Requirement of Special Resolution in case of removal of re-appointed independent director:** An independent director re-appointed for second term under Section 149(10) shall be removed by the company only by passing a special resolution43.

      Note: Under both the clauses (i) and (ii) above, the director to be removed shall be given a reasonable opportunity of being heard before his removal.

   iii. **Special Notice:** A special notice as per Section 115 shall be required for proposing any resolution to remove a director.

      Special notice under Section 115 is required to be signed by:

i. members holding not less than 1% of total voting power; or

ii. members holding shares on which at least Rs. 5,00,000 has been paid in the aggregate.

Such notice shall be sent by the members not earlier than 3 months but at least 14 days before the meeting at which the resolution is desired to be moved.

iv. **Action by the company:** On receipt of the special notice of a resolution to remove a director, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

v. **Representation by the director:** In case the director concerned makes a written representation to the company and requests that it should be notified to members, the company shall, if the time permits it to do so -

(a) state the fact of the representation having been made by the director in any notice of the resolution given to members of the company; and

(b) send the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company).

In case, the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Representation of director need not be sent: It is provided that representation need not be sent out and read out at the meeting if, on the application either of the company or of any other aggrieved person, the Tribunal is satisfied that the rights of representation are being abused to secure needless publicity for defamatory matter.

Further, the Tribunal may order the director concerned (notwithstanding that he is not a party to it) to make payment in whole or in part of the costs incurred by the company on the application so made to the Tribunal.

vi. **Filling of vacancy:** The vacancy resulting from the aforesaid removal if he had been appointed by the company in general meeting or by the Board, may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given.

Non-Filling of vacancy: If the vacancy is not filled in the same meeting as above, then it may be filled as a casual vacancy provided that the director who was so removed from office shall not be reappointed as a director.

vii. **Period of holding of office by new director:** A director so appointed shall hold office for the remaining period for which the director who has been removed would have held office if he had not been removed.

viii. **Payment of compensation:** A person so removed as director shall not be deprived of his rights to compensation or damages payable to him in respect of the premature termination of the directorship, or terms of his appointment as director or of any appointment terminating with that as a director. The restrictions imposed by Section 202 are also to be kept under consideration while making payment of compensation for loss of office of directorship.

ix. **No restriction imposed by Section 169:** Nothing in Section 169 shall be taken as derogating from any power to remove a director under any other provisions of the Companies Act, 2013.

In other words, Section 169 does not impose any restriction on any other power available under some other provisions of the Companies Act, 2013 which allows removal of a director.

II. **Removal of Director by the Tribunal:** According to Section 242, a director may be removed by the Tribunal where an application has been made to it under Section 241 for prevention of oppression and mismanagement in the company. The Tribunal is also empowered to terminate, set aside or modify any agreement between the company and any of its directors on such terms and conditions which in the opinion of Tribunal are just and equitable.

According to Section 243, a director so removed as per the order of Tribunal shall not be entitled to claim any compensation for loss of his office. Further, he shall not be offered appointment as director for a period of five years from the date of the order without first seeking the leave of the Tribunal.

18. REGISTER OF DIRECTORS AND KEY MANAGERIAL PERSONNEL AND THEIR SHAREHOLDING [SECTION 170]

A company is required to maintain a register of directors and key managerial personnel and their shareholding under Section 170 of the Act. These provisions are as under:

Every company shall keep at its registered office a register containing the prescribed particulars of its directors and key managerial personnel. The prescribed particulars shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies. In this respect Rule 17 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, is relevant. It prescribes the following particulars to be included in the Register:

(a) Director Identification Number (optional for key managerial personnel);

(b) present name and surname in full;

(c) any former name or surname in full

(d) father's name, mother's name and spouse's name (if married) and surnames in full;

(e) date of birth;

(f) residential address (present as well as permanent);

(g) nationality (including the nationality of origin, if different);

(h) occupation;

(i) date of the board resolution in which the appointment was made;

(j) date of appointment and reappointment in the company;

(k) date of cessation of office and reasons therefor;

(l) office of director or key managerial personnel held or relinquished in any other body corporate;

(m) membership number of the Institute of Company Secretaries of India in case of Company Secretary, if applicable; and

(n) Permanent Account Number (mandatory for key managerial personnel if not having DIN);

In addition to the above details, the company shall also include in the Register the details of securities held by them in the company, its holding company, subsidiaries, subsidiaries of the company's holding company and associate companies relating to:

(a) the number, description and nominal value of securities;

(b) the date of acquisition and the price or other consideration paid;

(c) date of disposal and price and other consideration received;

(d) cumulative balance and number of securities held after each transaction;

(e) mode of acquisition of securities;

(f) mode of holding – physical or in dematerialized form; and

(g) Whether securities have been pledged or any encumbrance has been created on the securities.

Filing of Return in Form DIR-12 with the Registrar: Section 170(2) read with Rule 18 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 requires a company to file a return in Form DIR-12 in respect of its directors and the key managerial personnel after paying the prescribed fee as under:

(a) within 30 days from the appointment; and

(b) within 30 days of any change taking place.

19. MEMBERS' RIGHT TO INSPECT [SECTION 171]

The members of the company have a right to inspect the register of directors and key managerial personnel under Section 171 of the Act. Accordingly:

i. **Timing for inspection:** The register of directors and key managerial personnel shall be kept open for inspection during business hours. The members shall have the right to take extracts therefrom and copies thereof on request and the same will be provided to them within 30 days free of cost. [Refer Section 171(1)(a)]

ii. **Open for inspection:** The register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting. [Refer Section 171(1)(b)]

iii. **Registrar to order in case of refusal:** If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the registrar shall on an application made to him order immediate inspection and supply of copies. [Refer Section 171(2)]

Exemptions:

Section 171 shall not apply to a Government company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government subject to the condition that such Government company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the registrar.

20. PUNISHMENT [SECTION 172]

Section 172 of the Act provides that if a company contravenes any of the provisions of Chapter XI containing Sections 149 to 171 and for which no specific penalty or punishment is provided therein, the company and every officer of the company who is in default shall be liable

to a penalty of Rs. 50,000, and in case of continuing failure, with a further penalty of Rs. 500 for each day during which such failure continues, subject to a maximum of Rs. 3,00,000 in case of a company and Rs. 1,00,000 in case of an officer who is in default.

CHAPTER-2: APPOINTMENT AND REMUNERATION OF MANAGERIAL PERSONNEL

1. INTRODUCTION

This Chapter deals with the appointment of managerial personnel and managerial remuneration payable to them as per the applicable provisions of the Companies Act, 2013, with relevant Rules made thereunder and Schedule V.

MEANING OF CERTAIN TERMS

"Chief Executive Officer" [Section 2(18)] means an officer of a company, who has been designated as such by it.

"Chief Financial Officer" [Section 2(19)] means a person appointed as the Chief Financial Officer of a company.

"Company Secretary" or "secretary" [Section 2(24)] means a company secretary as defined in clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under the Companies Act, 2013.

"Company Secretary in practice" [Section 2(25)] means a company secretary who is deemed to be in practice under sub-section (2) of Section 2 of the Company Secretaries Act, 1980.

"Key Managerial Personnel" [Section 2(51)] 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.

"Manager" [Section 2(53)] 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.

According to the above definition, a manager is an individual person. Such person is given the charge of whole or substantially the whole of managing the affairs of a company. Therefore, a person appointed as manager to head one of the sections of the company (say, marketing department) cannot be said to be a 'manager' within the meaning of Section 2 (53). ***A manager functions under the superintendence, control and direction of the Board of Directors.***

It is not necessary that a manager should also be a director of the company though there is no restriction in designating a director as manager of the company. It is not permitted by Section 196(1) for a company to appoint both managing director and manager at the same time. The simple reason behind this restriction is that when a person is entrusted with whole or substantially the whole of management, how can there be appointed another person for the same purpose. Moreover, due to overlapping of authorities between two powerful persons, the affairs of a company shall not be conducted the way they should, leading to mismanagement.

Managing Director [Section 2(54)] 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.

On simplifying we can understand, Managing Director means a **director** who is entrusted with **substantial powers of management** of the affairs of the company by:

(i) virtue of the articles of a company, or

(ii) an agreement with the company, or

(iii) a resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2(54) clarifies that **substantial powers of the management** shall not be deemed to include the power to do such administrative acts of a routine nature when so authorized by the Board such as:

(i)	The power to affix the common seal of the company to any document, or
(ii)	To draw and endorse any cheque on the account of the company in any bank, or
(iii)	To draw and endorse any negotiable instrument, or
(iv)	To sign any certificate of share, or
(v)	To direct registration of transfer of any share

Thus, excluding the above administrative acts of a routine nature, the managing director enjoys substantial powers of conducting and managing the business of the company as per its memorandum and articles of association.

From the above definition, it emerges that a managing director needs to be a director in the first place. It is immaterial whether he is appointed as additional director or rotational director or rotational director. However, as soon as he ceases to be a director, he shall also cease to be a managing director.

It is not necessary that a director who occupies the position of the managing director needs to be called 'managing director'. He may be called by whatever name. The essential pre-requisite is that the director must be entrusted with substantial powers of management of the affairs of the company excluding routine administrative acts as entrusted by the Board. If such is the case, the director is a managing director, by whatever name called. It may be noted that Section 196 (1) prohibits a company to appoint both managing director and manager at the same time. However, it shall be appropriate if a person is designated as a Managing Director instead of manager.

The Board of Directors exercises control over the managing director. Thus, powers as managing director are exercisable according to the directions of the Board. **Whole Time Director (WTD) [Section 2(94)]:** WTD includes a director in the whole-time employment of the company. As the definition suggests WTD is a director. Also, he is in the whole-time employment of the company i.e., he is a full-time employee who is required to devote his time in totality for the management of the company. A person who is not a director in the company cannot be employed as whole-time director.

Remuneration [Section 2 (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.

2. APPOINTMENT OF MANAGING DIRECTOR, WHOLE TIME DIRECTOR OR MANAGER [SECTION 196]

Section 196 of the Act contains the provisions for appointment of managing director, whole time director or manager. According to this section:

(i) **Appointment [Section 196(1)]:** A company shall appoint or employ managing director, whole time director or manager. But a company shall not appoint or employ a managing director and a manager at the same time. In other words, no company is permitted to appoint a manager if a managing director is already appointed and vice-versa. However, there can be both MD and whole-time director in a company.

(ii) **Tenure [section 196(2)]:**

(a) No company shall appoint or re-appoint any person as its managing director, whole time director or manager for a term exceeding five years at a time.

(b) It is further provided that no re-appointment shall be made earlier than one year before the expiry of his term.

Example 1: 'X' was appointed as Managing Director for life by the Articles of Association of a private company which was incorporated on 1st une, 2019. Section 196(2) of the Companies Act, 2013 lays down that no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time. No concession or exception is allowed by the Act to private companies. Hence, 'X' cannot be appointed as managing director for life.

(iii) **Eligibility Conditions for Appointment:** For appointing a person as a managing director, whole-time director or manager, firstly he shall not be disqualified for appointment as a director under section 164.

As per section 196(3), no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who-

(a) is below the age of 21 years or has attained the age of 70 years.

Requirement of Special Resolution for appointment of a person above the age of 70 years: There is a relaxation in case of a person above the age of 70 years.

Accordingly, where a person has attained the age of seventy years, he may still be appointed to such office if a special resolution is passed in this respect. In such a case, the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

Government approval required if no Special Resolution is passed: Further, where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

In other words, approval of the Central Government is required if special resolution could not be passed. The significance of this provision lies in the fact that because majority of the members were in favour of such appointment, their wish should not be turned down simply due to non-passing of special resolution. Thus, the appointment can be regularized by seeking approval of the Central Government, which, if satisfied, can accord such approval.

(b) is an undischarged insolvent or has at any time been adjudged as an insolvent; or

(c) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or

(d) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

(e) **Additional eligibility conditions for appointment as per Schedule V:** Part I of Schedule V to the Companies Act, 2013, has prescribed additional eligibility conditions for appointment as managing director or whole-time director or a manager without seeking approval from the Central Government. They are stated as under:

(i) he had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under 19 Acts as specified under Part I of Schedule V.

(ii) he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA).

However, where the Central Government has given its approval to the appointment of a person convicted or detained under para (1) or para (2), as the case may be, no further approval of the Central Government shall be necessary

for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval.

(iii) he has completed the age of 21 years and has not attained the age of 70 years.

However, where he has attained the age of 70 years; and where his appointment is approved by a special resolution passed by the company in general meeting, no further approval of the Central Government shall be necessary for such appointment.

(iv) he is resident of India.

Explanation I clarifies that resident in India includes a person who has been staying in India for a continuous period of not less than 12 months immediately preceding the date of his appointment as a managerial person and who has come to stay in India, -

a) for taking up employment in India; or

b) for carrying on a business or vacation in India.

Explanation II clarifies that the condition above shall not apply to the companies in Special Economic Zones (SEZ). However, a person, being a non-resident in India shall enter India only after obtaining a proper Employment Visa from the concerned Indian mission abroad. For this purpose, such person shall be required to furnish, along with the visa application form:

- profile of the company,
- the principal employer, and
- terms and conditions of such person's appointment

(iv) Procedure of Appointment [Section 196(4)]:

Approval by Board and Shareholders	**Approval by Central Government**
Subject to the provisions of section 197 and Schedule V, a managing director, wholetime director or manager shall be appointed, and the terms and conditions of such appointment and remuneration payable shall be-	In case such appointment is at variance to the conditions specified in Part I of Schedule V, the appointment shall be approved by the Central Government.

Approved by the Board of Directors at a meeting ; and Approved by shareholders by a resolution at the next general meeting of the company	Form MR-2 has been prescribed by Rule 7 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 in which application for seeking approval from the Central Government shall be made within ninety days of such appointment of MD or WTD or manager in the company
Inclusion of certain disclosures in Notice	The notice convening Board or general meeting for considering such appointment shall include: i. the terms and conditions of such appointment, remuneration payable, and ii. such other matters including interest, of a director or directors in such appointments, if any
Filing of Return	A return in the prescribed form along with the prescribed fee shall be filled with the Registrar within **sixty days** of such appointment

(v) Validity of Acts [Section 196(5)]: Subject to the provisions of this Act, where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall be deemed to be valid.

Example 2: A Managing Director is appointed in the board meeting held on 20th May 2019. General meeting was to be held on 17th June, 2019 for approval of such appointment. Before the holding of general meeting, the managing director executed an agreement with another company of considerable importance on 3rd June, 2019. The general meeting was held accordingly on 17th June, 2019 but did not approve the appointment of managing director. Here, the agreement executed by Managing Director is valid. The acts done by

the managing director from 20thMay, 2019 to 17th June, 2019 i.e. upto the non-approval of his appointment by the shareholders at the general meeting, shall be valid subject to the provisions of the Companies Act, 2013.

Exemptions:

(i) In case of a Government Company, Section 196(2), (4) and (5) shall not apply. However, for availing the exemption, such Government Company must not have committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

(ii) In case of Private Company, Section 196(4) and (5) shall not apply provided such private company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

Example 3: Sukanya Limited, a company incorporated under the Companies Act, 2013, approved the appointment of Mr. Rajaram as the managing director of the company in the company's last annual general meeting. Accordingly, Mr. Rajaram was vested with the substantial powers of managing the business of the company. After a period of 1 year from the appointment of Mr. Rajaram, the company wants to employ Mr. Rakesh, the whole time employee of the company, as the manager of the finance department of the company. Now the company is in dilemma regarding the appointment of Mr. Rakesh.

In the said case, according to section 2(53) of the Companies Act, 2013, 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. According to the above definition, a manager is an individual person. Such person is given the charge of whole or substantially the whole of managing the affairs of a company. Therefore, a person appointed as manager to head any department of the company cannot be said to be a 'manager' within the meaning of section 2(53).

Further the provisions of section 196(1) of the Companies Act, 2013 applies to manager falling within the meaning of the definition of section 2(53).

In the given example, Mr. Rakesh is not falling within the meaning of the definition of section 2(53) and accordingly section 196(1) is not applicable. Hence company can go ahead with the appointment of Mr. Rakesh as manager of the Finance Department.

3. APPOINTMENT OF KEY MANAGERIAL PERSONNEL [SECTION 203]

Section 203 of the Act, and Rule 8 as well as Rule 8A of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 contain the provisions for appointment of Key Managerial Personnel in the prescribed companies.

(i) **Appointment of Key Managerial Personnel [Section 203(1)]:** Every company belonging to the prescribed class or classes of companies shall have the following whole time key managerial personnel:

According to Rule 8 following companies shall have whole-time key managerial personnel:

a) every listed company; and

b) every other public company having a paid-up share capital of 10 crore rupees or more.

Requirement of Company Secretary in certain other companies: According to Rule 8A6, every private company which has a paid-up share capital of Rs. 10 crores or more shall have a **whole-time company secretary.**

In other words, it is now mandatory for every private company to have a whole-time company secretary if it's paid-up share capital is Rs. 10 crores or more.

(ii) **Prohibition on individual to be appointed as Chairperson as well as Managing Director or Chief Executive Officer at the same time [Proviso to Section 203(1)]:**

An individual shall not be appointed or reappointed as the Chairperson of the company, in pursuance of the articles of the company, as well as the Managing Director or Chief Executive Officer (CEO) of the company at the same time, **unless** —

a) the articles of such a company provide otherwise; or

b) the company does not carry multiple businesses. [First proviso to Section 203(1)]

Exemption from restriction: However, above-mentioned prohibition shall not apply to such class of companies which is engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government. [refer Second proviso to Section 203(1)].

In other words, a person appointed as Chairperson of a company cannot be appointed as MD or CEO at the same time in that company. This prohibition is not applicable in the following cases: [Second proviso to Section 203(1)]

- Where the articles of such company provide otherwise i.e., they allow the Chairperson to be appointed as MD or CEO.
- Where the company belongs to the prescribed class of companies (refer Box below); is engaged in multiple businesses; and has appointed Chief Executive Officer for each such business.

(iii) Conditions for Appointment:

a) **Requirement of Board Resolution:** Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board. The resolution shall contain the terms and conditions of the appointment including the remuneration. [refer Section 203 (2)].

b) **Bar on multiple appointments:** A whole-time key managerial personnel shall not hold office in more than one company at the same time except in its subsidiary company. [Section 203 (3)].

However, key managerial personnel shall not be disentitled from being a director in any company with the permission of the Board. [refer Proviso to Section 203 (3)].

Provided further that whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of key managerial personnel.

(iv) Managing Director or Manager in more than one company [Third Proviso to Section 203(3)]: If a person is MD or manager in some other company it is permissible for a company to appoint him as its managing director. The modus operandi is as under:

Person so appointed /employed as MD

- should be MD/M in one company, and of not more than one other company
- made/approved by Board resolution
- passed with the consent of all the directors present at the meeting
- specific notice of such meeting, and of the resolution to be moved thereat has been given to all the directors then in India.

Example 4: Virasat Limited, a company incorporated under the Companies Act, 2013, has a board of directors consisting of 10 directors, wants to appoint Mr. Vakharia as its Managing Director (MD) in the upcoming Annual General Meeting (AGM). Mr. Vakharia is already serving as the MD of other public company. Accordingly, for the appointment of Mr. Vakharia specific notice for the board meeting and the resolution to be moved thereat has been given to all the directors. The resolution for the appointment of Mr. Vakharia has been passed at the board meeting Out of 8 directors present, 6 directors voted in favour of the resolution and the remaining 2 directors refrained from voting. Thereafter, the company approved the appointment of Mr. Vakharia in the AGM. Here in the given instance, appointment of Mr. Vakharia is not valid in law as the resolution is not passed by all the directors present in the board meeting.

(v) **Filling of Vacancy of Key Managerial Personnel (KMP) [Section 203(4)]:** If the office of any whole-time KMP is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

(vi) **Penalty for non-compliance [Section 203(5)]:**

a) **Company:** If any company makes any default in complying with the provisions of this section, such company shall be liable to a penalty of Rs. 5 Lakhs.

b) **Director and KMP:** Every defaulting director and KMP shall be liable to a penalty of Rs. 50,000. Where the default is a continuing one, they shall be liable with a further penalty of Rs. 1,000 for each day after the first during which such default continues but not exceeding Rs. 5 Lakh.

Exemptions

In case of Government companies:

"(4A) The provisions of sub-section (1), (2), (3) and (4) of this section shall not apply to a managing director or Chief Executive Officer or manager and in their absence, a whole time director of the Government company."

The sub-section (4A) shall be applicable to a Government company only if it has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

4. FUNCTIONS OF COMPANY SECRETARY [SECTION 205]

The provisions of Section 205 of the Act are stated as under:

i. **Functions to be performed by Company Secretary:** According to Section 205 (1) and Rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a Company Secretary shall perform the following functions:

   (a) to report to the Board about compliance with the provisions of the Companies Act, 2013, the rules made thereunder and other laws applicable to the company;

   (b) to ensure that the company complies with the applicable secretarial standards;

   (c) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;

   (d) to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;

   (e) to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Companies Act, 2013;

   (f) to represent before various regulators, and other authorities under the Companies Act, 2013 in connection with discharge of various duties under the said Act;

   (g) to assist the Board in the conduct of the affairs of the company;

   (h) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and

   (i) to discharge such other duties as have been specified under the Companies Act, 2013 or the Rules made thereunder; and

   (j) such other duties as may be assigned by the Board from time to time.

   Clarification: The expression "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government. Under Section 118 (10) of the Act, the Central Government has approved SS-1 (Secretarial Standard on Meetings of the Board of Directors) and SS-2 (Secretarial Standard on General Meetings).

ii. **No effect on duties and functions of certain important functionaries:** According to Section 205 (2), the provisions contained in Section 204 relating to the 'secretarial audit for bigger companies' and Section 205 relating to the 'functions of company secretary' shall not affect the duties and functions of the Board of Directors, Chairperson of the company,

Managing Director or Whole time Director under this Act, or any other law for the time being in force.

In other words, these important functionaries of the company cannot be absolved of their duties and functions simply because a secretarial audit has been conducted or certain functions have been assigned to the company secretary. They shall always remain responsible to the company and in no way their responsibility shall be reduced.

5. COMPANY TO FIX LIMIT WITH REGARD TO REMUNERATION [SECTION 200]

Section 200 of the Act is instructive in nature. According to this section, a company needs to take care of certain parameters and may adopt an administrative ceiling as it may deem fit within the statutory ceiling with regard to fixing of managerial remuneration where it has inadequate or no profits. However, effective from 12-09-20189, in such cases the company is not required to seek any approval from the Central Government.

Section 200 states that notwithstanding anything contained in this Chapter, a company may, while according its approval under Section 196 to any appointment or to any remuneration under Section 197 in respect of cases where the company has inadequate or no profits, fix the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company, as it may deem fit.

While fixing such remuneration the company shall have regard to:

(a)	The financial position of the company;
(b)	the remuneration or commission drawn by the individual concerned in any other capacity;
(c)	the remuneration or commission drawn by him from any other company;
(d)	professional qualifications and experience of the individual concerned;
(e)	any other matters as may be prescribed. **Parameters for consideration of remuneration** In this respect, Rule 6 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, prescribes that the company shall have regard to the following matters: (i) the Financial and operating performance of the company during the three

	preceding financial years. (ii) the relationship between remuneration and performance. (iii) the principle of proportionality of remuneration within the company, ideally by a rating methodology which compares the remuneration of directors to that of other directors on the board and employees or executives of the company. (iv) whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference. (v) the securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

6. OVERALL MAXIMUM MANAGERIAL REMUNERATION AND MANAGERIAL REMUNERATION IN CASE OF ABSENCE OR INADEQUACY OF PROFITS [SECTION 197]

Section 197 of the Act lays down the provisions relating to overall maximum managerial remuneration payable by every **public company** and the managerial remuneration payable by it in case of absence or inadequacy of profits. Section 197 read with Schedule V to the Companies Act, 2013 defines maximum remuneration payable to KMPs **and other directors**. This section does not apply to a private company. These provisions are discussed as under:

i. Overall Maximum Managerial Remuneration [Section 197(1)]

a) Section I of Part II of Schedule V headed as 'Remuneration Payable by Companies having Profits' states that 'subject to the provisions of Section 197, a company having profits in a financial year may pay remuneration to a managerial personnel or persons or other director or directors not exceeding the limits specified in this section'. Accordingly, the overall managerial remuneration to the Directors including managing director, whole time director and manager in respect of any financial year is summarized as below:

S. No.	Conditions	Maximum remuneration payable by public company to directors, including managing director and whole time director and manager	When remuneration can be exceeded as referred to in column (b)

		in any financial year	
	(a)	(b)	(c)
(i)	Overall limit applicable to managerial remuneration	11% of the net profits of the company for that financial year Note: Net profits are to be calculated in accordance with Section 198 except that the remuneration payable to the directors shall not be deducted from the gross profits.	Subject to the provisions of Schedule V, the company in general meeting may authorize exceeding the overall limit of 11%.
(ii)	If there is one Managing director/ Whole time director/ manager i.e. Remuneration payable to one managing director/whole time director/manager	5% of the net profits of the company for that financial year.	This limit of 5% may be exceeded with the approval of the company in general meeting by passing a Special Resolution.
(iii)	If there is more than one Managing Director/ Whole time director/manager i.e. Remuneration payable to all such Managing Director/Whole time Director/Manager taken together	10% of the net profits of the company for that financial year.	This limit of 10% may be exceeded with the approval of the company in general meeting by passing a Special Resolution.

(iv)	Remuneration payable to directors who are neither Managing Directors nor Whole time directors	1% of the net profits of the company if there is a Managing Director or a Whole time director	This limit of 1% may be exceeded with the approval of the company in general meeting by passing a Special Resolution.
(v)	Remuneration payable to directors who are neither Managing Directors nor Whole time directors	3% of the net profits of the company provided there is no Managing Director or Whole time director	This limit of 3% may be exceeded with the approval of the company in general meeting by passing a Special Resolution.

Instances to obtain prior approval in case of default: It is to be noted that where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, prior approval of such person (as applicable) shall have to be obtained by the company before obtaining the approval in the general meeting.

Exclusion of sitting fees: Section 197(2) provides that above percentages shall be exclusive of any fees payable to directors under section 197(5).

b) Section 197(8) provides that the net profits shall be computed in the manner laid down in section 198. This stipulation is already covered by Section 197 (1) which further provides that the remuneration of the directors shall not be deducted from the gross profits.

ii. No profits or inadequate profits [Section 197(3) & (11)]

a) If in any financial year, a company has no profits or its profits are inadequate, the company shall not pay by way of remuneration any sum (exclusive of sitting fees) to its directors, including any managing or whole- time director or manager or any other **non-executive director including an independent director**, except in accordance with the provisions of Schedule V.

b) In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or

has the effect of increasing the amount thereof, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule.

Accordingly, the following provisions which purport to increase or has the effect of increasing the remuneration payable to directors shall not have any effect unless are in accordance with the conditions specified in that schedule:

- the provision contained in the memorandum or articles of the company, or
- in an agreement entered into by the company, or
- in any resolution passed by the company in general meeting or its Board.

SECTION II OF PART II OF SCHEDULE V- Remuneration payable by companies having no profit or inadequate profit

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person 14or other director not exceeding the limits under (A) and (B) given below:

Limits under (A):

(1)	(2)	(3)
Where the effective capital is (in any FY)	Limit of yearly remuneration payable shall not exceed (in any FY) in case of managerial remuneration	Limit of yearly remuneration payable shall not exceed (in any FY) in case of other directors
(i) Negative or less than Rs. 5 crores	Rs. 60 lakhs	Rs. 12 lakhs
(ii) Rs. 5 crores and above but less than Rs. 100 crores	Rs. 84 lakhs	Rs. 17 lakhs
(iii) 100 crores and above but less than Rs. 250 crores	Rs. 120 lakhs	Rs. 24 lakhs
(iv) Rs. 250 crores and above	Rs. 120 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores	Rs. 24 Lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores:]"

However, the remuneration in excess of above limits may be paid if the resolution passed by the shareholders is a special resolution.

Explanation I — For the purposes of Section II of this Part, "effective capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

Explanation 2 —

a) Where the appointment of the managerial person is made in the year in which company has been incorporated, the effective capital shall be calculated as on the date of such appointment;

b) In any other case the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made

Explanation 3- It is hereby clarified that for a period less than one year, the limits shall be prorated. Thus, if a managerial person is employed for a part of the year, the remuneration payable to him shall be pro-rated.

Limits under (B):

In case of a managerial person or other director who is functioning in a professional capacity, remuneration as per item (A) may be paid, if such managerial person or other director:

- is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures (i.e., does not hold any shares subject to the deeming provision below);

  Note: "Statutory Structure" means any entity which is entitled to hold shares in any company formed under any statute.

- is not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last 2 years before or on or after the date of appointment;
- possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates:

Deeming provision as to the holding of shares: It is provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid-up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company.

Applicable conditions for payment of remuneration: The limits specified under items (A) and (B) above shall apply, if-

(i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under Section 178 (1), also by the Nomination and Remuneration Committee;

(ii) the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, and in case of default, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting;

(iii) an ordinary resolution or a special resolution, as the case may be, has been passed for payment of remuneration as per item (A) or a special resolution has been passed for payment of remuneration as per item (B), at the general meeting of the company for a period not exceeding three years.

(iv) a statement along with a notice calling the general meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:

I. General information:

(1) Nature of industry

(2) Date or expected date of commencement of commercial production

(3) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus

(4) Financial performance based on given indicators

(5) Foreign investments or collaborations, if any.

II. Information about the appointee:

(1) Background details

(2) Past remuneration

(3) Recognition or awards

(4) Job profile and his suitability

(5) Remuneration proposed

(6) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)

(7) Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel or other director, if any.

III. Other information:

(1) Reasons of loss or inadequate profits

(2) Steps taken or proposed to be taken for improvement

(3) Expected increase in productivity and profits in measurable terms

IV. **Disclosures:** The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the Financial statement:

(i) all elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;

(ii) details of fixed component and performance linked incentives along with the performance criteria;

(iii) service contracts, notice period, severance fees; and

(iv) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable

iii. Determination of Remuneration [Section 197(4)]

(a) The remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

   i. by the articles of the company, or

   ii. by a resolution or,

   iii. if the articles so require, by a special resolution, passed by the company in general meeting, and

(b) The remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

(c) Any remuneration for services rendered by any such director in other capacity shall not be so included if—

   1. the services rendered are of a professional nature; and

   2. in the opinion of the Nomination and Remuneration Committee, if the company is covered under Section 178 (1), or in the opinion of the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Simply stated, the Board of Directors cannot determine the remuneration payable to the directors. The remuneration shall be determined (subject to the provisions of Section 197) by the articles or by a resolution or if required by the articles, by passing a special resolution.

However, besides remuneration, a director may be paid some other remuneration if he provides professional services to the company and further, in the opinion of the Nomination and Remuneration Committee (if the company has formed such committee) or in the opinion of the Board of Directors (where no such committee exists) the director possesses the requisite qualification for practicing his profession.

Example 5: Star Health Specialties Ltd. owns a Multi-Specialty Hospital in Chennai. Dr. Hamilton, a practicing Heart Surgeon, has been appointed by the company as its director and it wants to pay him fee, on case to case basis, for surgery performed on the patients at the hospital.

In the given example, as Dr. Hamilton has been appointed as a director. He has to be paid a fee for surgeries performed by him. It is to be noted that such payment is permissible under Section 197(4) which states that the remuneration payable to the directors including

managing or whole-time director or manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:

(a) the services rendered are of a professional nature; and

(b) in the opinion of the Nomination and Remuneration Committee (if applicable) or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

The company, therefore, can pay extra remuneration to Dr. Hamilton like professional fee for surgeries performed by him in his professional capacity; and such payment shall not be construed as managerial remuneration under the Act.

iv. Sitting Fees to Directors [Section 197(5)]:

(a) A director may receive remuneration by way of fee for attending meetings of the OBoard or Committee thereof or for any other purpose whatsoever as may be decided by the Board subject to the conditions imposed by Rule 4 of the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014 as under:

- The sitting fees shall not exceed Rs. 1,00,000 per meeting of the Board or committee thereof. [As per Rule 4]
- The sitting fee payable to the Independent Directors and Women Directors shall not be less than that payable to other directors. [As per Proviso to Rule 4]

Note: According to Section 197 (2), the percentages mentioned under Section 197 (1) shall be exclusive of any sitting fees payable to directors for attending meetings of the Board or committee thereof or for any other purpose whatsoever as may be decided by the Board.

(b) **Scale of fees may differ:** Different fees for different classes of companies and fees in respect to independent directors may be such as may be prescribed.

Example 6: The Articles of Association of a listed company have fixed payment of sitting fee for each Meeting of Directors subject to a maximum of Rs. 30,000. In view of the increased responsibilities of the independent directors of listed companies, the company proposes to increase the sitting fee to Rs. 45,000 per meeting. W.r.t. to the said proposal, Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board provided that the amount of such fees shall not exceed the prescribed amount.

As per Rule 4 of the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014 the amount of sitting fees payable for attending meetings of the Board or Committees thereof may be decided by the Board but such sitting fees shall not exceed Rs. 1 lakh per meeting. Further, the sitting fee payable to an independent director shall not be less than that payable to other directors.

From the above, it is clear that sitting fees can be increased from Rs. 30,000 to Rs. 45,000 per meeting by passing a resolution in the Board Meeting and altering the Articles of Association by passing a Special Resolution. When sitting fees stands increased for other directors, it shall automatically be increased in case of independent directors because the latter cannot be paid less than that payable to former.

v. **Mode of payment of Remuneration [Section 197(6)]:**

A director or manager may be paid remuneration in any of the following manner:

Mode of Payment:

- by way of a monthly payment or
- at a specified percentage of the net profits of the company or
- partly by one way and partly by the other.

The term used in Section 197(6) is 'director' which may be taken to mean all types of directors i.e., MD or whole-time director or executive/non-executive director. Further, remuneration can be paid on monthly basis or on the basis of specified percentage of the net profits. Even, a combination of both the methods may also be adopted.

vi. **Refund of excess remuneration if paid to a director [Section 197(9) and (10)]:** If any director draws or receives excess remuneration than the limit prescribed by Section 197 or without approval required under this section, such director shall:

- refund such sums to the company
- within two years or for lesser period as may be allowed by the company
- until such sum is refunded, he shall hold it in trust for the company

Waiver, whether possible: The company shall not waive the recovery of any sum refundable to it under Section 197(9). However, the waiver is possible only if it is approved by the company by passing a special resolution within two years from the date the sum becomes refundable.

Instances to obtain prior approval of waiver in case of default: It is to be noted that where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of such person respectively shall be obtained by the company before obtaining approval of such waiver by a special resolution.

vii. Disclosure in Board's Report by a Listed Company [Section 197(12) and Rule 5]

(a) Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and other details as prescribed under Rule 5 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

(b) According to Rule 5 (1) every listed company shall disclose in the Board's report:

(i) the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year; this disclosure is also prescribed by Section 197(12).

(ii) the percentage increase in remuneration of each director, Chief Financial Officer, Chief Executive Officer, Company Secretary or manager, if any, in the financial year;

(iii) the percentage increase in the median remuneration of employees in the financial year;

(iv) the number of permanent employees on the rolls of company;

(v) average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration and justification thereof and point out if there are any exceptional circumstances for increase in the managerial remuneration; and

(vi) affirmation that the remuneration is as per the remuneration policy of the company.

Meaning of median:

- The expression "median" means the numerical value separating the higher half of a population from the lower half and the median of a finite list of

numbers may be found by arranging all the observations from lowest value to highest value and picking the middle one;

- if there is an even number of observations, the median shall be the average of the two middle values.

(c) According to Rule 5 (2) the board's report shall include a statement showing the **names of the top ten employees** in terms of remuneration drawn and the **name of every employee, who-**

(i) if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than Rs. 1.02 crore

(ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than Rs. 8,50,000 per month;

(iii) if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than 2% of the equity shares of the company.

(d) According to Rule 5 (3), the statement referred to in Rule 5 (2) [refer para (c) above] shall also indicate some particulars of the above employees like designation, remuneration received, nature of employment, qualification and experience, date of commencement of employment, age, last employment held by such employee before joining the company, the percentage of equity shares held by the employee in the company within the meaning of clause (iii) of Rule 5 (2) [refer para (c) (iii) above], and whether any such employee is a relative of any director or manager of the company and if so, name of such director or manager.

viii. Premium paid in respect of Insurance taken for indemnification [Section 197(13)]:

Section 197 (13) deals with taking of insurance by a company on behalf of its MD, WTD, manager, CEO, CFO or CS and whether to treat the premium paid on such insurance as remuneration or not.

ix. Remuneration/Commission permissible from holding/subsidiary company [Section 197(14)]:

If any director who is a managing or whole-time director receives any commission from the company, he shall not be disqualified from receiving any remuneration or commission from any

holding company or subsidiary company of such company subject to the provisions of Section 197.

However, the requirement is that such fact must be disclosed by the company in the Board's report.

x. **Penalty for non-compliance [Section 197(15)]:** Non-compliance with the provisions of Section 197 gives rise to following penalty:

- **Defaulting person:** liable to a penalty of Rs. 1 lakh.
- **Company:** liable to a penalty of Rs. 5 lakhs.

Auditors' report to contain a statement regarding remuneration [Section 197(16)]:

The auditor of the company shall, in his report under section 143, make a statement regarding remuneration as under:

- whether the remuneration paid by the company to its directors is in accordance with the provisions of Section 197;
- whether remuneration paid to any director is in excess of the limit laid down under Section 197; and
- give such other details as may be prescribed.

xi. **Application pending with Central Government as on 12-09-2018 [Section 197(17)]:**

On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of Section 197 [as it stood before such commencement i.e., before 12-09-2018], which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended.

In other words, in case of pendency of any application as on 12-09-2018, the company shall obtain the approval from the Central Government according to the amended Section 197 within one year from this date.

Exemptions/Modifications

In case of Government Companies, Section 197 shall not apply. However, for availing the exemption, such Government Company must not have committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

In case of Nidhi Company, second proviso to sub-section (1) of section 197 shall apply with the

modification that the remuneration of a director who is neither managing director nor whole-time director or manager for performing special services to the Nidhi's specified in the articles of association may be paid by way of monthly payment subject to the approval of the company in general meeting and also to the provisions of section 197:

Provided that no approval of the company in general meeting shall be required where:

(a) a Nidhi does not have a managing director or a whole-time director or a manager;

(b) the remuneration payable during a financial year to all the directors of the Nidhi does not exceed 10% of the net profits of such Nidhi or Rs. 15 lakhs, whichever is less; and

(c) a remuneration payable under clause (b) is approved by a special resolution passed in this behalf by the Nidhi.

Note: while availing the above modification, the Nidhi Company shall ensure that the interests of their shareholders are protected.

7. RECOVERY OF MANAGERIAL REMUNERATION IN CERTAIN CASES [SECTION 199]

The excess remuneration to be recovered shall be the difference between actual amount of remuneration received by such person and the remuneration that would have been payable to him as per restatement of financial statements.

Liability of the defaulter: The recovery of remuneration does not prejudice (i.e. impair) any liability that may be incurred under the provisions of the Companies Act, 2013 or any other law for the time being in force. In other words, the defaulting person because of whom fraud or non-compliance took place and the financial statements were restated at that time, even though has repaid excess remuneration, shall not escape from any liability that may be incurred under the provisions of the Companies Act, 2013 or any other law.

8. CALCULATION OF PROFITS [SECTION 198]

According to Section 198 of the Act, net profits for any financial year for the purpose of managerial remuneration payable under section 197 shall be calculated as follows:

(i) **Credit shall be given for the sums specified in Section 198(2) Add:** Bounties and subsidies received from any Government, or any public authority constituted or authorised in this behalf, by any Government, unless and except in so far as the Central Government otherwise directs.

(ii) Credit shall not be given for those sums specified in Section 198(3)

Less: (if credited to the P & L A/c for arriving at profit before tax)

(a) profits, by way of premium on shares or debentures of the company, which are issued or sold by the company [unless the company is an investment company as referred to in clause (a) of the Explanation to section 186];

(b) profits on sales by the company of forfeited shares;

(c) profits of a capital nature including profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof;

(d) profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets:

Provided that where the amount for which any fixed asset is sold exceeds the written down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written- down value;

(e) any change in carrying amount of an asset or of a liability recognized in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value.

(f) any amount representing unrealized gains, notional gains or revaluation of assets.

(iii) In making the computation aforesaid, the following sums specified under Section 198(4) shall be deducted,

(a) all the usual working charges;

(b) directors' remuneration;

(c) bonus or commission paid or payable to any member of the company's staff, or to any engineer, technician or person employed or engaged by the company, whether on a whole-time or on a part-time basis;

(d) any tax notified by the Central Government as being in the nature of a tax on excess or abnormal profits;

(e) any tax on business profits imposed for special reasons or in special circumstances and notified by the Central Government in this behalf;

(f) interest on debentures issued by the company;

(g) interest on mortgages executed by the company and on loans and advances secured by a charge on its fixed or floating assets;

(h) interest on unsecured loans and advances;

(i) expenses on repairs, whether to immovable or to movable property, provided the repairs are not of a capital nature

(j) outgoings inclusive of contributions made under section 181 (Company to contribute to bona fide and charitable funds);

(k) depreciation to the extent specified in section 123;

(l) The excess of expenditure over income, which had arisen in computing the net profits in accordance with this section in any year which begins at or after the commencement of this Act, in so far as such excess has not been deducted in any

subsequent year preceding the year in respect of which the net profits have to be ascertained;

(m) any compensation or damages to be paid in virtue of any legal liability including a liability arising from a breach of contract;

(n) any sum paid by way of insurance against the risk of meeting any liability such as is referred to in clause (m);

(o) debts considered bad and written off or adjusted during the year of account.

(iii) In making the computation aforesaid, the following sums specified under Section 198(5) shall not be deducted:

(a) income-tax and super-tax payable by the company under the Income-tax Act, 1961, or any other tax on the income of the company not falling under clauses (d) and (e) of sub-section (4);

(b) any compensation, damages or payments made voluntarily, that is to say, otherwise than in virtue of a liability such as is referred to in clause (m) of sub-section (4);

(c) loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or of any part thereof not including any excess of the written-down value of any asset which is sold, discarded, demolished or destroyed over its sale proceeds or its scrap value;

(d) any change in carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value.

9. FORMS OF, AND PROCEDURE IN RELATION TO, CERTAIN APPLICATIONS [SECTION 201]

Section 201 of the Act contains provisions which need to be followed for seeking approval from the Central Government if an application is made under Section 196 for the appointment of a person as Managing Director who has attained the age of seventy years but in whose case the appointment could not be regularised by passing a special resolution though votes cast in favour of the motion exceeded the votes cast against the motion. Non-passing of special resolution as before also contravenes Schedule V. Accordingly, for regularizing the appointment the company would apply to the Central Government for approval based on the fact that majority of the shareholders are in favour of such appointment as they find this appointment to be most

beneficial to the company. It may be noted that now no approval is required for managerial remuneration in any case.

The process for seeking approval as given in Section 201 and Rule 7 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 is stated as under:

(i) **Making of Application for Approval:** Every application made to the Central Government under Section 196 shall be in Form No. MR-2 as prescribed by Rule 7 and shall be accompanied by the specified fee. Rule 7 also requires that every such application shall be made to the Central Government within a period of ninety days from the date of such appointment.

(ii) **General Notice to Members:** Before any application is made by a company to the Central Government under section 196, a general notice to the members of the company shall be issued by or on behalf of the company, indicating the nature of the application proposed to be made.

(iii) **Publication of Notice:** Such notice shall be published:

- at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district; and
- at least once in English in an English newspaper circulating in that district.

(iv) **Attaching of Notice with the Application:** The copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application.

10. COMPENSATION FOR LOSS OF OFFICE OF MANAGING OR WHOLE-TIME DIRECTOR OR MANAGER [SECTION 202]

Section 202 of the Act contains provisions for compensation for loss of office of Managing Director or Whole-time director or Manager as under:

When payment to be made:	**Prohibition on payment of compensation:**	**Quantum of compensation payable** to such Managing Director or Whole-time director or manager:
A company may make payment to a Managing Director (MD) or Whole-time director (WTD) or Manager **(but not to any other director)** by means	No payment of compensation shall be made in the following cases	

of:		
• compensation for loss of office, or • as consideration for retirement from office, or • in connection with such loss or retirement.	• where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation; • where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation i.e., resigns on his own; • where the office of the director is vacated under section 167(1); • where the company is being wound up, (by an order of the Tribunal or voluntarily), due to the negligence or default of the director; • where the director has been guilty of fraud / breach of trust / of gross negligence /gross mismanagement in relation	shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or 3 years, whichever is shorter. In other words, if the remaining period of his term in the office is more than 3 years the compensation shall be restricted to 3 years only; otherwise it is to be paid for the remainder of his term.

	to the conduct of the affairs of the company or any subsidiary company or holding company thereof; and • where the director has instigated/ has taken part directly or indirectly in bringing about, the termination of his office.	

Calculation of compensation: The compensation shall be calculated on the basis of the average **remuneration** earned by him during a period of three years immediately preceding the date on which he ceased to hold such office, or where he held the office of less than three years, then for such shorter period.

No compensation if company is being wound up: No such payment of compensation can be made if winding up of the company is commenced whether:

- before the date on which he has ceased to hold office; or
- within 12 months after the date on which he has ceased to hold office,

if the assets on winding up (after deducting expenses on winding up) are not sufficient to repay the shareholders the share capital, including premiums if any, contributed by them.

Note: Section 202 does not prohibit the payment to a managing director or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity.

11. SECRETARIAL AUDIT FOR BIGGER COMPANIES [SECTION 204]

Section 204 of the Act contains provisions for secretarial audit for bigger companies. These provisions are discussed as under:

(i) Which companies to get conducted secretarial audit: Section 204(1) requires the following types of companies to get conducted secretarial audit:

a) every listed company; and

b) a company belonging to the other prescribed class of companies.

In this respect Rule 9(1) of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 prescribes following companies for the purpose of secretarial audit:

(a)	Every public company having a paid-up share capital of Rs. 50 crores or more; or
(b)	Every public company having a turnover of Rs. 250 crores or more; or
(c)	Every company having outstanding loans or borrowings from banks or public financial institutions of Rs. 100 crores or more.

Explanation to Rule 9: For the purposes of this sub-rule, it is hereby clarified that the paid up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of latest audited financial statement shall be taken into account.

(ii) Who is authorised to give secretarial audit report: According to Section 204 (1), a company secretary in practice is authorised to give Secretarial Audit Report. Such Report shall be in Form No. MR - 3.

(iii) Annexing of secretarial audit report: A company shall annex the secretarial audit report so obtained with its Board's report made in terms of section 134 (3).

(iv) Duty of the company as regards secretarial audit: The company is duty-bound to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company Section 204(2)].

(v) Duty of the Board of Directors: The Board of Directors, in the Board's Report prepared under section 134(3) shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report [Section 204 (3)].

(vi) Penalty for contravention: If a company or any officer of the company or the company secretary in practice, contravenes the provisions of Section 204, then

(a)	The company; or
(b)	Every officer of the company; or
(c)	The company secretary in practice,

who is in default, shall be liable to a penalty of Rs. 2,00,000 [Section 204(4)]

Example 7: Agro Chemical Ltd. a pharmaceutical company wants to know the provision for applicability to conduct secretarial audit. Board of director of the Company appointed an

expert to analyse the business of the organisation and advise whether they are contravening the provision of Companies Act, 2013 as they never conducted secretarial audit thinking they don't have enough business transactions to consider these requirements earlier. Company provides you following information: Paid-up share capital Rs. 45 crore, Turnover Rs. 200 crore and Outstanding Loans and Borrowing of Rs. 150 crores. In given case, Agro Chemical Ltd. crosses the threshold limit of outstanding loans and borrowings of Rs. 100 crore or more for getting Secretarial Audit conducted. Accordingly, Agro chemical Ltd. is required to conduct secretarial audit under Companies Act, 2013.

12.

A. PART II OF SCHEDULE V [SECTIONS I TO V] - MANAGERIAL REMUNERATION

i. **SECTION I -** Remuneration payable by companies having profits: Subject to the provisions of Section 197, a company having profits in a financial year may pay remuneration to a managerial person or persons 26or other director or directors not exceeding the limits specified in such section.

ii. **SECTION II - Remuneration payable by companies having no profit or inadequate profit [Discussed earlier u/s Section 197(3)]**

iii. **SECTION III — Remuneration payable by companies having no profit or inadequate profit in certain special circumstances:** In the following circumstances a company may pay remuneration to a managerial person **or other director** in excess of the amounts provided in Section II above:

(a) where the remuneration in excess of the limits specified in Section I or II is paid by any other company and that other company is either a foreign company or has got the approval of its shareholders in general meeting to make such payment, and treats this amount as managerial remuneration for the purpose of section 197 and the total managerial remuneration payable by such other company to its managerial persons 28or other directors including such amount or amounts is within permissible limits under section 197.

(b) Where the company –

(i)	A newly incorporated company	For a period of seven years from the date of its	

		incorporation, or	It may pay may remuneration to its managerial persons or other directors
(ii)	is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction	for a period of five years from the date of sanction of scheme of revival, or	
(iii)	is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016	for a period of five years from the date of such approval,	

(c) where remuneration of a managerial person or other director exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal: Provided that the limits under this Section shall be applicable subject to meeting all the conditions specified under Section II and the following additional conditions:

(i) except as provided in para (a) of this Section, the managerial person is not receiving remuneration from any other company;

(ii) the auditor or Company Secretary of the company or where the company has not appointed a Secretary, a Secretary in whole-time practice, certifies that all secured creditors and term lenders have stated in writing that they have no objection for the appointment of the managerial person or other director as well as the quantum of remuneration and such certificate is filed along with the return as prescribed under sub-section (4) of section 196.

(iii) the auditor or Company Secretary or where the company has not appointed a secretary, a secretary in whole-time practice certifies that there is no default on payments to any creditors, and all dues to deposit holders are being settled on time.

Explanation- For the purposes of Section I, Section II, and Section III, the term " or other director" shall mean a non-executive director or an independent director.

iv. SECTION IV— Perquisites not included in managerial remuneration:

1. A managerial person shall be eligible for the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:

   a) Contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-tax Act, 1961;

   b) Gratuity payable at a rate not exceeding half a month's salary for each completed year of service; and

   c) Encashment of leave at the end of the tenure.

2. In addition to the perquisites specified in paragraph 1 of this section, an expatriate managerial person (including a non-resident Indian) shall be eligible to the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II or Section III:

   a) Children's education allowance: In case of children studying in or outside India, an allowance limited to a maximum of rupees 12,000 per month per child or actual expenses incurred, whichever is less. Such allowance is admissible up to a maximum of two children.

   b) Holiday passage for children studying outside India or family staying abroad: Return holiday passage once in a year by economy class or once in two years by first class to children and to the members of the family from the place of their study or stay abroad to India if they are not residing in India, with the managerial person.

   c) Leave travel concession: Return passage for self and family in accordance with the rules specified by the company where it is proposed that the leave be spent in home country instead of anywhere in India.

Explanation I — For the purposes of this Schedule, "family" means the spouse, dependent children and dependent parents of the managerial person.

Explanation II — The Nomination and Remuneration Committee while approving the remuneration under Section II or Section III, shall —

a) take into account, financial position of the company, trend in the industry, appointee's qualification, experience, past performance, past remuneration, etc.;

b) be in a position to bring about objectivity in determining the remuneration package while striking a balance between the interest of the company and the shareholders.

Explanation III. — For the purposes of this Schedule, "negative effective capital" means the effective capital which is calculated in accordance with the provisions contained in Explanation I of this Part is less than zero.

Explanation IV. — For the purposes of this Schedule: — (A) Omitted (B) "Remuneration" means remuneration as defined in clause (78) of Section 2 and includes reimbursement of any direct taxes to the managerial person.

v. **SECTION V—Remuneration payable to a managerial person in two companies:**

Subject to the provisions of sections I to IV, a managerial person shall draw remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

B. PART III OF SCHEDULE V–PROVISIONS APPLICABLE TO PARTS I AND II

1. The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in general meeting.
2. The auditor or the Secretary of the company or where the company is not required to appoint a Secretary, a Secretary in whole-time practice shall certify that the requirement of this Schedule have been complied with and such certificate shall be incorporated in the return filed with the Registrar under sub-section (4) of section 196.

C. PART IV OF SCHEDULE V–EXEMPTION BY CENTRAL GOVERNMENT

The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule

Clarification
The MCA vide General Circular No. 07/2015 dated 10th April, 2015 has clarified that a

managerial person who has been appointed in accordance with provisions of Schedule XIII of the Companies Act, 1956, may continue to receive remuneration for his remaining term in accordance with terms and conditions approved by the company as per relevant provisions of Schedule XIII of the Companies Act, 1956 even if the part of his/her tenure falls after 1st April, 2014.

CHAPTER- 3: MEETINGS OF BOARD AND ITS POWERS

1. INTRODUCTION

The shareholders in general meetings and the directors acting collectively as a Board conduct the affairs of a company. Therefore, directors frequently meet to discuss various matters relating to the management and administration of the affairs of the company in the interest of the shareholders, the company and the public at large including society and economy and more particularly, the environment. The modern practice is to confer upon the directors the right to exercise all powers of the company in which they are appointed as directors except for those matters, which by law are required to be exercised by the company in general meetings through the shareholders. The Board of directors oversees management of the company to ensure that the interests of the shareholders are protected and the goal of wealth maximization is achieved.

The provisions related to meetings of Board and its powers are dealt with under Sections 173 to 193 of the Companies Act, 2013 (in short, the 'Act') and the relevant Rules.

2. MEETINGS OF BOARD

Section 173 of the Act contains provisions which deal with Meetings of the Board. This section requires the directors upon whose shoulders the management of the company rests to meet and interact regularly. The aim is to ensure that the powers which vest in the directors should be exercised collectively and every director should have the knowledge of the decisions taken for the smooth conduct of the business operations. The provisions of Section 173 are discussed hereunder:

i. **Frequency of Board Meetings:**

(a) First Board meeting: Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its Incorporation.

(b) Subsequent Board meetings: Every company shall hold minimum of 4 meetings every year but the gap between two consecutive board meetings shall not be more than 120 days.

Example 1: In case a company conducted its Board meeting on 2nd April, 2019, then the next meeting must be held within 120 days of this date i.e., ideally before 31st July, 2019; and, by 31st December, 2019, the company must conduct minimum four such meetings (including the meetings which have already been conducted in the year 2019).

The Board meetings may go beyond four also in a calendar year depending upon the urgency of any business.

ii. **Exemptions to Certain Companies [Section 173(5)]:**

In case of a One Person Company (OPC), small company and dormant company, the provision regarding conducting of four Board meetings every year is not applicable. These entities are required to conduct one Board meeting in each half of a calendar year and the gap between the two meetings must not be less than 90 days. This is the minimum requirement and if so done, they shall be deemed to have complied with the provisions of Section 173.

OPC having only one director: One more exemption is given to One Person Company which has only one director on its Board of Directors. Such OPC shall not be required to hold even a single Board meeting during the year. Thus, it is totally exempted from the provisions of Section 173(5).

iii. **Participation by Directors in Board Meetings:**

(a) Means to attend Board Meetings: Section 173(2) of the Act allows the directors of a company to attend Board meetings in the following manner:

- in person
- through video conferencing
- other audio-visual means

Thus, the directors besides meeting in person, are also permitted to meet through electronic mode i.e., video conferencing or other prescribed audio-visual means.

Meaning of the term "video conferencing or other audio-visual means": It refers to 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. [as per Explanation to Rule 3]

Essentials of audio-visual means: According to Section 173 (2), the audio-visual means should be capable of-

- recording and recognising the participation of the directors; and
- recording and storing the proceedings of such meetings along with date and time.

Matters which cannot be dealt with in a meeting through electronic mode: The Central Government may, by notification, specify matters which shall not be dealt with in a meeting through video conferencing and other audio-visual means. In this respect, Rule 4 specifies the following matters which shall not be considered in any meeting held through video conferencing or other audio-visual means:

i. the approval of the annual financial statements;
ii. the approval of the Board's report;
iii. the approval of the prospectus;
iv. the Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the board under Section 134(1) of the Act, and
v. the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Note: It is provided that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio-visual means in such meeting on those matters also which are not permitted to be dealt with in a meeting through video conferencing or other audio- visual means. These matters are enumerated above.

(b) **Procedural points relating to meetings of Board that are held through video conferencing or other audio-visual means:** The procedural points as given in Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, are as under:

Sl. No.	**Procedural aspects relating to meetings of Board that are held through video conferencing or other audio-visual means**	**For convening and conducting of the Board meetings**
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 authorized 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 is attending or have access to the proceedings of the meeting through video conferencing mode or other audio-visual means; 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;
3.	Notice of the meeting and the further process	A. Notices shall be sent to all the directors as per Section 173 (3); B. Notices shall inform the directors regarding the options available to them to participate through video conferencing mode or other audio-visual means, along with all the necessary information to enable the directors to participate through such mode;

		C. A director intending to participate through video conferencing mode or other audio- visual means shall communicate his intention to the Chairperson or the company secretary of the company; D. If a director intends to participate through video conferencing or other audio-visual means, he shall give prior intimation to that effect, to enable the company 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; However, 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 such intimation (i.e. participation through video conferencing mode or other audio-visual means) from the director, it shall be assumed that he will attend the meeting in person.
4.	Process of roll call at the Board Meeting	At the commencement of the meeting, a roll call shall be taken by the Chairperson. At this point, 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) received the agenda and all the relevant material for the meeting; and (d) no one other than the concerned director is attending /having access to the proceedings of the meeting at the location mentioned in clause (b);
5.	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 with the permission of the Chairperson and confirm that the required quorum is complete.
6.	Counting for quorum and ensuring of quorum	A director participating in a meeting through video conferencing or other audio-visual means shall be counted for the purpose of quorum. He shall not be counted if he is to be excluded for any items of business under any provisions of the Act or the rules. The Chairperson shall ensure that the required quorum is present throughout the meeting.
7.	Scheduled venue of the meeting as mentioned in the notice convening the meeting	Scheduled venue shall be deemed to be the venue of the meeting which is conducted through video conferencing or other audio- visual means authorized under these rules and all recordings at such meeting shall be deemed to have been made at that place.
8.	Signing of Statutory Registers placed at the scheduled venue of the meeting	The statutory registers 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.
9.	Identification of	Every participant shall identify himself for the

	participant	record before speaking on any item of business on the agenda.
10.	Statement interrupted or garbled	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.
11.	Objection against a motion	If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote.
12.	No access to unauthorized person	From the commencement of the meeting till its conclusion, no person except 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.
13.	Summary of decision on each agenda item	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.
14.	Preservation of draft minutes	Draft minutes shall be preserved till their confirmation. Further, the minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio-visual means.
15.	Circulation of draft minutes of the meeting	The draft minutes of the meeting shall be circulated among all the directors within 15 days of the

		meeting either in writing or in electronic mode as may be decided by the Board.
16.	Confirmation or written comments about the accuracy of recording of the proceedings	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.
17.	After completion of meeting	Minutes shall be entered in the minute book signed by the Chairperson

Explanation - For the purposes of this rule, "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.

Requirement of attending all the Board Meetings:

Is it necessary for all the directors to attend all the Board meetings of the company held during a year? Apparently, the answer is no because it shall be illogical to expect from every director to attend each and every meeting but as they are the guardians of the company they must try their best to attend as many Board meetings as possible. However, a continuous absence is also detrimental if we look at Section 167 (1) (b) which states that a director shall be required to vacate his office if he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board.

iv. **Notice of the Board Meeting:**

DISCUSSED IN CLASS

v. **Penalty for failure to give notice:** Section 173(4) prescribes a penalty of Rs 25,000 in respect of every officer of the Company whose duty is to give notice under Section 173 and who has failed to do so.

Example 2: The Board of Directors of Infotech Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2019. It was decided to hold board meeting in Chennai through video conferencing, though all the directors of the company reside at Kolkata. As provision in the Companies Act, 2013 does not requires that the board meetings must be held at a particular place. Accordingly, there is no difficulty in holding the current board meeting at Chennai through video conferencing even if all the directors of the company reside at Kolkata and the registered office is also situated at Kolkata. However, it is to be seen that the legal requirements as prescribed by Section 173 (2) and Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 are meticulously followed.

Example 3: XYZ Ltd. is a foreign collaborator in ABC Ltd. incorporated in India under the Companies Act, 2013. The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC Ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations, notices of the meetings of the Board can be sent by e-mail. Here in the given instance, such a provision in the Articles of Association of ABC Ltd. is valid.

In terms of the proviso to section 173(3) of the Companies Act, 2013 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. No exception is made for any class or classes of companies.

Further, under section 173(3) 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.

If we examine the above provision, it is amply clear that the notice is allowed to be sent, inter-alia, by electronic means also. Hence, the sending of notice by e-mail is a permissible mode of delivery and can be resorted to without any hindrance. In case Articles contain such a provision, there is no illegality involved even if there is a foreign collaborator in the company.

Therefore, in the given case the shorter notice by e-mail is legally permitted. It is to be noted that there should be the presence of quorum and at least one independent director

at the meeting. The provision of the Articles in this regard is not so relevant since the position is quite clear in the Act itself.

3. QUORUM FOR MEETINGS OF BOARD [SECTION 175]

A quorum is the minimum number of directors who must attend the proceedings in order to transact business validly at a duly convened Board meeting. The directors must not be disqualified to participate in the meeting. Unless the quorum is present at the meeting, it shall not be deemed to have been properly held.

Section 174 of the Companies Act, 2013 contains provisions in respect of quorum required for the meetings of the Board of Directors. These provisions are discussed as under:

i. **Quorum for a Board Meeting [Section 174 (1)]:** In respect of quorum for Board meeting following points are noteworthy:

- The quorum for a Board Meeting shall be 1/3rd of its total strength or two directors, whichever is higher.
- While calculating the quorum, any fraction of a number shall be rounded off as one.
- The total strength shall not include those directors whose places are vacant.
- The quorum needs to be present throughout the meeting.

It may be noted that the articles of a company cannot specify a quorum which is less that prescribed by Section 174 (1). However, there is no bar in fixing a higher quorum than required statutorily.

ii. **Participation through electronic means to be counted for Quorum:** The directors who participate by video conferencing or other audio-visual means shall also be counted for the purpose of determining the quorum at the meeting unless they are to be excluded for any items of business under any provisions of the Act or the rules.

iii. **In case when there is vacancy in the Board [Section 174 (2)]:** In case there is any vacancy in the Board (i.e. strength is less than that mentioned in the Articles), the continuing directors may act irrespective of such vacancy.

However, the problem will arise when due to such vacancy/ies the number of directors is reduced below the quorum fixed by the Companies Act, 2013.

If this is the situation, the continuing directors or director may act for the following purposes only and nothing else:

(a) to increase the number of directors to that fixed for the quorum i.e., appoint additional director; or

(b) to summon a general meeting of the company.

iv. **Quorum in case of interested directors [Section 174 (3)]:** Where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of Directors, the quorum shall be the number of non-interested directors who are present at the meeting; but their number must not be less than two. While calculating the quorum, any fraction of a number shall be rounded off as one.

Meaning of Interested Director: The term "Interested director" for the purposes of Section 174 (3) means a director within the meaning of Section 184 (2).

According to Section 184(2) "interested director" means every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

(a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be.

v. **Adjournment of meeting which could not be held for want of quorum:** As we have noticed that a Board meeting cannot be validly held if there is no quorum present. Thus, where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

Exemption to OPC: According to Proviso to Section 173 (5), the provisions of Section 174 relating to quorum are not applicable to such One Person Company (OPC) which has only one director on its Board.

Example 4: There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant. According to section 174(1) of the Companies Act, 2013, quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded of as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, where total number of directors is 9 and 2 offices of the directors have fallen vacant; the total strength comes to seven. In this case 1/3 of 7 = 21/3 directors which will be rounded off as 3 which is higher than 2. Therefore, 3 directors would constitute the quorum for the Board meetings here.

Now, if suppose, there are total 15 directors in a company and during discussion on a particular item, 13 of the directors happen to be 'interested' within the meaning of section 184(2) of the Companies Act, 2013. Under section 174(3) of the Companies Act, 2013, if at any time the number of the interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of the directors who

are non-interested but present at the meeting, not being less than two shall constitute the quorum.

In the given situation, there are total 15 directors and the Board meeting commences with all of them. During the meeting, an item comes up for discussion in respect of which 13 directors happen to be 'interested directors'. Inspite of the fact that the interested directors are more than two-thirds, minimum two non-interested directors who are present at the meeting shall constitute the quorum and they can validly transact that particular item of business in view of Section 174 (3).

Example 5: A meeting of the Board of 'No Holiday Ltd' was held on a holiday on account of Ganesh Chaturthi. However due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting with the consent of the majority decided that the Board meeting be adjourned to next week on the same day. However, the date fixed for the adjourned meeting happened to be a Sunday. In such case, where a board meeting is adjourned due to lack of quorum, then under section 174(4) the adjourned meeting can be held on the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise.

Since Section 174(4) specifies exclusion of only a national holiday, any original/adjourned/ committee meetings can be held on Sundays and other holidays. In view of this provision, the adjourned meeting of the Board of 'No Holiday Ltd' can be held on Sunday without involvement of any illegality.

4. PASSING OF RESOLUTION BY CIRCULATION

Section 175 of the Act and Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014, contain provisions for passing of resolutions by circulation. Normally, a board meeting is conducted to pass resolutions. There are certain matters, which according to the provisions of the Companies Act, 2013, can only be considered and decided at the duly convened board meetings and therefore, they cannot be implemented through passing resolutions by circulation. However, in cases where the matter is not that much important and therefore, does not require its consideration at a board meeting though consent of directors is required to implement that matter or the calling of board meeting is a lengthy and costly affair keeping in view the urgent implementation of certain decisions, the company may, in respect of such matters, resort to passing of resolutions by circulation. As a matter of fact, all such matters which do not require consideration at a board meeting can be decided through resolutions which are passed by circulation.

The provisions of Section 175 and Rule 5 are discussed as under:

i. **Requirements to pass resolution by circulation [Section 175 (1)]:** A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation in case:

DISCUSSED IN CLASS

Rule 5 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e- mail or fax.

ii. **When a resolution cannot be passed by circulation [Proviso to Section 175 (1)]:** If at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).

iii. **Noting of passed resolution in next meeting [Section 175 (2)]:** A resolution that has been passed by circulation shall have to be necessarily noted in the next meeting of board or the committee thereof, as the case may be, and made part of the minutes of such meeting.

Example 6: In respect of certain matter which did not require to be decided at a board meeting, PQR Ltd. thought it prudent to pass resolution thereof by circulation.

Accordingly, a draft resolution was circulated among all the six directors by e-mail. Three directors did not give their consent and desired that the resolution was required to be decided at a meeting.

In the light of the Proviso to Section 175 (1) where minimum 1/3rd of the total number of directors require that any resolution under circulation must be decided at a meeting, the Chairperson shall put the resolution to be decided at a meeting of the Board. In the given case, one-half of the total number of directors (i.e., 3 out of 6) requires that the resolution must be decided at a Board meeting. Since their counting is more than one-third of total strength, the Chairperson needs to take the call and put the resolution to be decided at a duly convened meeting of the Board.

AUDIT COMMITTEE

SECTION 177 OF COMPANIES ACT, 2013	REGULATION 18 OF SEBI (LODR) REGULATIONS, 2015
(1) The Board of Directors of every listed public company shall constitute an Audit Committee:	Every listed entity shall constitute a qualified and independent audit committee in accordance with the terms of reference, subject to the following:
(2) The Audit Committee shall consist of a minimum of three directors with independent directors forming a majority. Provided that majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.	(a) The audit committee shall have minimum three directors as members. (b) Atleast 2/3rd of the members of audit committee shall be independent directors and in case of a listed entity having outstanding SR equity shares, the audit committee shall only comprise of independent directors. (c) All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.
(3) Every Audit Committee of a company existing immediately before the	

commencement of this Act shall, within one year of such commencement, be reconstituted in accordance with sub-section (2).	For the purpose of this regulation — "financially literate" shall mean the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account, and statement of cash flows. For the purpose of this regulation , a member shall be considered to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities. (d) The chairperson of the audit committee shall be an independent director and he/she shall be present at Annual general meeting to answer shareholder queries. (e) The Company Secretary shall act as the secretary to the audit committee. (f) The audit committee at its discretion shall invite the finance director or head of the finance function, head of internal audit and a representative of the statutory auditor and any other such

	executives to be present at the meetings of the committee: Provided that occasionally the audit committee may meet without the presence of any executives of the listed entity.
(4) Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, inter alia, include — i. the recommendation for appointment, remuneration and terms of appointment of auditors of the company; ii. review and monitor the auditor's independence and performance, and effectiveness of audit process; iii. examination of the financial statement and the auditors' report thereon; iv. approval or any subsequent modification of transactions of the company with related parties; Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as may be prescribed;	The listed entity shall conduct the meetings of the audit committee in the following manner: (a) The audit committee shall meet at least four times in a year and not more than one hundred and twenty days shall elapse between two meetings. (b) The quorum for audit committee meeting shall either be two members or one third of the members of the audit committee, whichever is greater, with at least two independent directors. (c) The audit committee shall have powers to investigate any activity within its terms of reference, seek information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if it considers necessary.

Provided further that in case of transaction, other than transactions referred to in section 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board: Provided also that in case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it: Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company. v. scrutiny of inter-corporate loans and investments; vi. valuation of undertakings or assets of	

the company, wherever it is necessary; vii. evaluation of internal financial controls and risk management systems; viii. monitoring the end use of funds raised through public offers and related matters.	
(5) The Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and the management of the company.	The role of the audit committee and the information to be reviewed by the audit committee shall be as specified in Part C of Schedule II which are: i. oversight of the listed entity's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible; ii. recommendation for appointment, remuneration and terms of appointment of auditors of the listed entity; iii. approval of payment to statutory auditors for any other services rendered by the statutory auditors; iv. reviewing, with the management, the annual financial statements and auditor's report thereon before submission to the board for approval; v. reviewing, with the management, the quarterly financial statements before submission to the board for approval; vi. reviewing, with the management, the statement of uses / application of funds raised through an issue (public issue, rights

	issue, preferential issue, etc.), the statement of funds utilized for purposes other than those stated in the offer document / prospectus / notice and the report submitted by the monitoring agency monitoring the utilisation of proceeds of a public or rights issue, and making appropriate recommendations to the board to take up steps in this matter; vii. reviewing and monitoring the auditor's independence and performance, and effectiveness of audit process; viii. approval or any subsequent modification of transactions of the listed entity with related parties; ix. scrutiny of inter-corporate loans and investments; x. valuation of undertakings or assets of the listed entity, wherever it is necessary; xi. evaluation of internal financial controls and risk management systems; xii. reviewing, with the management, performance of statutory and internal auditors, adequacy of the internal control systems; xiii. reviewing the adequacy of internal audit function, if any, including the structure of the internal audit department, staffing and seniority of the official heading the department, reporting structure coverage and frequency of internal audit; xiv. discussion with internal auditors of any significant findings and follow up there on;

	xv. reviewing the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature and reporting the matter to the board; xvi. discussion with statutory auditors before the audit commences, about the nature and scope of audit as well as post-audit discussion to ascertain any area of concern; xvii. to look into the reasons for substantial defaults in the payment to the depositors, debenture holders, shareholders (in case of non-payment of declared dividends) and creditors; xviii. to review the functioning of the whistle blower mechanism; xix. approval of appointment of chief financial officer after assessing the qualifications, experience and background, etc. of the candidate; xx. Carrying out any other function as is mentioned in the terms of reference of the audit committee. xxi. reviewing the utilization of loans and/ or advances from/investment by the holding company in the subsidiary exceeding rupees 100 crore or 10% of the asset size of the subsidiary, whichever is lower including existing loans / advances / investments existing as on the date of coming into force of this provision.

	xxii. consider and comment on rationale, cost-benefits and impact of schemes involving merger, demerger, amalgamation etc., on the listed entity and its shareholders.] The audit committee shall mandatorily review the following information: 1. management discussion and analysis of financial condition and results of operations; 2. statement of significant related party transactions (as defined by the audit committee), submitted by management; 3. management letters / letters of internal control weaknesses issued by the statutory auditors; 4. internal audit reports relating to internal control weaknesses; and 5. the appointment, removal and terms of remuneration of the chief internal auditor shall be subject to review by the audit committee. 6. Statement of deviations: (a) quarterly statement of deviation(s) including report of monitoring agency, if applicable, submitted to stock exchange(s) in terms of Regulation 32(1). (b) annual statement of funds utilized for purposes other than those stated in the offer document/prospectus/notice in terms

	of Regulation 32(7)
(6) The Audit Committee shall have authority to investigate into any matter in relation to the items specified in sub-section (4) or referred to it by the Board and for this purpose shall have power to obtain professional advice from external sources and have full access to information contained in the records of the company.	
(7) The auditors of a company and the key managerial personnel shall have a right to be heard in the meetings of the Audit Committee when it considers the auditor's report but shall not have the right to vote.	
(8) The Board's report under sub-section (3) of section 134 shall disclose the composition of an Audit Committee and where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in such report along with the reasons therefor.	

Penalty as per Companies Act, 2013

In case of any contravention of the provisions of section 177, the company shall be liable to a penalty of Rs. 5 lakhs and every officer of the company who is in default shall be liable to a penalty of Rs. 1 lakh.

VIGIL MECHANISM

A 'vigil mechanism' is formed for the directors and employees who may report genuine concerns. Not all the companies but only the prescribes ones are required to establish 'vigil mechanism'. The provisions contained in Section 177 (9) and (10) and Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 govern the concept of 'vigil mechanism'. These are stated below:

Purpose of Vigil Mechanism [Section 177 (9)]: A vigil mechanism is formed for the directors and employees who may report genuine concerns in the manner prescribed in Rule 7.

Vigil Mechanism to ensure adequate safeguards: According to Section 177 (10), the vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the Chairperson of the Audit Committee in appropriate or exceptional cases.

Establishment of Vigil Mechanism and Manner of Reporting: The provisions of Rule 7 in this respect are stated as under:

Users of Vigil Mechanism: The directors and employees of the company can use the system of vigil mechanism for reporting their genuine concerns.

Companies having Audit Committee: The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the audit committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand.

Companies having no Audit Committee: In case of other companies, the Board of Directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism. Other directors and employees may report their concerns to such nominated director.

Action against repeated frivolous complaints: In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

SECTION 177 OF COMPANIES ACT,	REGULATION 22 OF SEBI (LODR)

2013	REGULATIONS, 2015
(9) Every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances- (a) the Companies which accept deposits from the public; (b) the Companies which have borrowed money from banks and public financial institutions in excess of Rs. 50 crores.	(1) The listed entity shall formulate a vigil mechanism for directors and employees to report genuine concerns.
(10) The vigil mechanism under sub-section (9) shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases: Provided that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report.	(2) The vigil mechanism shall provide for adequate safeguards against victimization of director(s) or employee(s) or any other person who avail the mechanism and also provide for direct access to the chairperson of the audit committee in appropriate or exceptional cases.

Penalty as per Companies Act, 2013

In case of any contravention of the provisions of section 177, the company shall be liable to a penalty of Rs. 5 lakhs and every officer of the company who is in default shall be liable to a penalty of Rs. 1 lakh.

RISK MANAGEMENT COMMITTEE

SECTION 134(3)(n) OF COMPANIES ACT, 2013	REGULATION 21 OF SEBI (LODR) REGULATIONS, 2015
There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include: - 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.	(1) The board of directors shall constitute a Risk Management Committee.
	(2) The Risk Management Committee shall have minimum three members with majority of them being members of the board of directors, including at least one independent director and in case of a listed entity having outstanding SR equity shares, at least 2/3rd of the Risk Management Committee shall comprise independent directors.
	(3) The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee. (3A) The risk management committee shall meet at least twice in a year. (3B) The quorum for a meeting of the Risk

	Management Committee shall be either two members or one third of the members of the committee, whichever is higher, including at least one member of the board of directors in attendance. (3C) The meetings of the risk management committee shall be conducted in such a manner that on a continuous basis not more than one hundred and eighty days shall elapse between any two consecutive meetings.
	(4) The board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit (such function shall specifically cover cyber security). Provided that the role and responsibilities of the Risk Management Committee shall mandatorily include the performance of functions specified in Part D of Schedule II: The role of the committee shall, inter-alia, include the following: 1. To formulate a detailed risk management policy which shall include: (a) A framework for identification

	of internal and external risks specifically faced by the listed entity, in particular including financial, operational, sectoral, sustainability (particularly, ESG related risks), information, cyber security risks or any other risk as may be determined by the Committee. (b) Measures for risk mitigation including systems and processes for internal control of identified risks. (c) Business continuity plan. 2. To ensure that appropriate methodology, processes and systems are in place to monitor and evaluate risks associated with the business of the Company; 3. To monitor and oversee implementation of the risk management policy, including evaluating the adequacy of risk management systems; 4. To periodically review the risk management policy, at least once in two years, including by considering the changing industry dynamics and evolving complexity; 5. To keep the board of directors informed about the nature and content of its discussions, recommendations and actions to be

	taken; 6. The appointment, removal and terms of remuneration of the Chief Risk Officer (if any) shall be subject to review by the Risk Management Committee. The Risk Management Committee shall coordinate its activities with other committees, in instances where there is any overlap with activities of such committees, as per the framework laid down by the board of directors.
	(5) The provisions of this regulation shall be applicable to: i. the top 1000 listed entities, determined on the basis of market capitalization as at the end of the immediate preceding financial year; and, ii. a 'high value debt listed entity'
	(6) The Risk Management Committee shall have powers to seek information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if it considers necessary.

Penalty as per Companies Act, 2013

If a company is in default in complying with the provisions of this section, the company shall be liable to a penalty of Rs.3 lakhs and every officer of the company who is in default shall be liable to a penalty of Rs. 50,000.

CORPORATE SOCIAL RESPONSIBILITY COMMITTEE

(1) Every company having

- net worth of Rs. 500 crore or more, or
- turnover of rupees Rs. 1000 crore or more or
- a net profit of Rs. 5 crore or more

during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of 3 or more directors, out of which at least 1 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.

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(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.

(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.

Functions

In accordance with section 135 the functions of the CSR committee include:

(a) formulating and recommending to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommending the amount of expenditure to be incurred on the CSR activities.

(c) monitoring the Corporate Social Responsibility Policy of the company from time to time.

(d) Further the rules provide that the CSR Committee shall institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

NOMINATION AND REMUNERATION COMMITTEE

SECTION 178 OF COMPANIES ACT, 2013	REGULATION 19 OF SEBI (LODR) REGULATIONS, 2015
(1) The Board of Directors of every listed public company shall constitute the Nomination and Remuneration Committee consisting of **three or more non-executive directors out of which not less than one-half shall be independent directors.** Provided that the chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.	(1) The board of directors shall constitute the nomination and remuneration committee as follows: (a) the committee shall comprise of at least 3 directors; (b) all directors of the committee shall be non-executive directors; and (c) at least 2/3rd of the directors shall be independent directors.
	(2) The Chairperson of the nomination and remuneration committee shall be an independent director: Provided that the chairperson of the listed entity, whether executive or non-executive, may be appointed as a member of the Nomination and Remuneration Committee and shall not chair such Committee.
	(2A) The quorum for a meeting of the nomination and remuneration committee shall be either two members or one third of the members of the committee, whichever is greater, including at least one independent director in attendance.
(2) The Nomination and Remuneration	(3) The Chairperson of the nomination and

Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance.	remuneration committee may be present at the annual general meeting, to answer the shareholders' queries; however, it shall be up to the chairperson to decide who shall answer the queries. (3A) The nomination and remuneration committee shall meet at least once in a year.
(3) The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.	
(4) The Nomination and Remuneration Committee shall, while formulating the policy under sub-section (3) ensure that— (a) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully; (b) relationship of remuneration to performance is clear and meets	(4) The role of the nomination and remuneration committee shall be as specified as in Part D of the Schedule II which include the following: (1) formulation of the criteria for determining qualifications, positive attributes and independence of a director and recommend to the board of directors a policy relating to, the remuneration of the directors, key managerial personnel and other employees;

appropriate performance benchmarks; and (c) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals: Provided that such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along with the web address of the policy, if any, shall be disclosed in the Board's report.	(1A) For every appointment of an independent director, the Nomination and Remuneration Committee shall evaluate the balance of skills, knowledge and experience on the Board and on the basis of such evaluation, prepare a description of the role and capabilities required of an independent director. The person recommended to the Board for appointment as an independent director shall have the capabilities identified in such description. For the purpose of identifying suitable candidates, the Committee may: (a) use the services of an external agencies, if required; (b) consider candidates from a wide range of backgrounds, having due regard to diversity; and (c) consider the time commitments of the candidates. (2) formulation of criteria for evaluation of performance of independent directors and the board of directors; (3) devising a policy on diversity of board of directors; (4) identifying persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, and recommend to the board of directors their appointment and removal. (5) whether to extend or continue the term of appointment of the independent director, on the basis of the report of performance

	evaluation of independent directors. (6) recommend to the board, all remuneration, in whatever form, payable to senior management.

Penalty as per Companies Act, 2013

In case of any contravention of the provisions of section 178, the company shall be liable to a penalty of Rs. 5 lakhs and every officer of the company who is in default shall be liable to a penalty of Rs. 1 lakh.

STAKEHOLDERS RELATIONSHIP COMMITTEE

SECTION 178 OF COMPANIES ACT, 2013	REGULATION 20 OF SEBI (LODR) REGULATIONS, 2015
(5) The Board of Directors of a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board.	(1) The listed entity shall constitute a Stakeholders Relationship Committee to specifically look into various aspects of interest of shareholders, debenture holders and other security holders.
	(2) The chairperson of this committee shall be a non-executive director. (2A) At least three directors, with at least one being an independent director, shall be members of the Committee and in case of a listed entity having outstanding SR equity shares, at least 2/3rd of the

	Stakeholders Relationship Committee shall comprise of independent directors.
	(3) The Chairperson of the Stakeholders Relationship Committee shall be present at the annual general meetings to answer queries of the security holders. (3A) The Stakeholders relationship committee shall meet at least once in a year
(6) The Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company.	(4) The role of the Stakeholders Relationship Committee shall be as specified as in Part D of the Schedule II which is: The role of the committee shall inter-alia include the following: 1. Resolving the grievances of the security holders of the listed entity including complaints related to transfer/transmission of shares, non-receipt of annual report, non-receipt of declared dividends, issue of new/duplicate certificates, general meetings etc. 2. Review of measures taken for effective exercise of voting rights by shareholders. 3. Review of adherence to the service standards by the listed entity in respect of various services being rendered by the Registrar & Share Transfer Agent.

	4. Review of the various measures and initiatives taken by the listed entity for reducing the quantum of unclaimed dividends and ensuring timely receipt of dividend warrants/annual reports/statutory notices by the shareholders of the company.

Penalty as per Companies Act, 2013

In case of any contravention of the provisions of section 178, the company shall be liable to a penalty of Rs. 5 lakhs and every officer of the company who is in default shall be liable to a penalty of Rs. 1 lakh.

Provided that inability to resolve or consider any grievance by the Stakeholders Relationship Committee in good faith shall not constitute a contravention of this section.

5. POWERS OF THE BOARD [SECTION 179]

Section 179 of the Act and Rule 8 of the Companies (Meetings of Board and its Power) Rules, 2014 lay down the provisions in respect of powers of the Board. They are described as under:

i. **BOD is entitled to exercise the same powers as the company is authorised:** According to Section 179 (1), the Board shall be entitled to exercise all such powers as the company is authorised to exercise; and to do all such acts and things which the company is authorised to do.

   In fact, the Board of Directors of a company enjoy wide-ranging powers; virtually all the powers for managing the affairs of the company except where the given matters require approval of shareholders in general meetings. In other words, the Board is empowered to exercise all such powers which shall secure the interests of the company and the shareholders.

ii. **Placing of restrictions on exercising of powers by the Board [Provisos to Section 179 (1)]:**

   (a) The exercise of powers by the Board of Directors is not unbridled or unrestricted. It is provided that while exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in the Companies Act, 2013, or in the memorandum or articles, or in any regulations which are not inconsistent with the Act or memorandum or articles and are duly made thereunder. This will include regulations made by the company in general meeting.

   (b) Further, the Board shall not exercise any power or do any act or thing which is directed or required, whether under the Companies Act, 2013 or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

iii. **Prospective effect of regulation made in general meeting [Section 179 (2)]:** Any regulation made by the company in general meeting shall not invalidate any prior act of the Board which would have been valid if that regulation had not been made.

   Thus, a regulation made by a company in general meeting cannot have retrospective effect and therefore, cannot invalidate prior acts of the Board if they were otherwise validly executed earlier.

iv. **Powers of Board to be exercised by means of resolutions [Section 179 (3)]:** Following powers are required to be exercised by the Board of Directors by means of the resolutions passed at a duly convened Board meeting:

(a) to make calls on shareholders in respect of money unpaid on their shares;

(b) to authorise buy-back of securities under Section 68;

(c) to issue securities, including debentures, whether in India or outside India;

(d) to borrow monies;

Note: By way of Explanation II, it is clarified that in respect of dealings between a company and its bankers, the exercise of the power by the company specified in clause (d) above shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise. This does not refer to the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(e) to invest the funds of the company. [Section 186 (5) requires this power to be exercised by a Board resolution which is passed with the consent of all the directors present at the Board meeting];

(f) to grant loans or give guarantee or provide security in respect of loans. [Section 186 (5) requires this power to be exercised by a Board resolution which is passed with the consent of all the directors present at the Board meeting];

(g) to approve financial statement and the Board's report;

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

(j) to take over a company or acquire a controlling or substantial stake in another company;

(k) other matters as prescribed in Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014. These matters, also to be exercised only by means of resolutions passed at the meetings of the Board, are:

1. to make political contributions;
2. to appoint or remove key managerial personnel (KMP);
3. to appoint internal auditors and secretarial auditor.

Note: It is to be noted that the above list is not exhaustive. There are certain other powers which are also to be exercised by the Board of Directors at a duly convened board meeting. Some of them are as under:

- Making of contributions to political parties under Section 182
- Filling of casual vacancy under Section 161 (4) when the office of a director appointed in the general meeting falls vacant before the expiry of his term in the normal course.
- Approving of transactions with related parties as provided under Section 188.
- Giving of loans or making of investment in the shares of other body corporates as provided under Section 186. In this case, besides passing the resolution at a board meeting, consent of all the directors present at the meeting is also required.
- Appointing a person as a managing director who is also holding office of managing director or manager in another company as provided under Section 203. This power is to be exercised with the consent of all the directors present at the meeting.

v. **Permission to BOD to delegate some of its powers [First Proviso to Section 179 (3)]:** The Board may, by a resolution passed at a meeting, delegate the powers specified in clauses (d) to (f) above (i.e. borrowing of monies, investing of funds and granting of loans or giving of guarantee or providing of security in respect of loans). The delegation may be made on such conditions as may be specified and to the following:

1. any committee of directors,
2. the managing director,
3. the manager or any other principal officer of the company, or
4. the principal officer of the branch office (if the company has a branch office).

vi. **Imposing of restrictions and conditions by the shareholders [Section 179 (4)]:** The company through the general meeting has powers to impose restrictions and conditions on the exercise by the Board of any of the powers specified in Section 179.

In other words, shareholders of a company are very much in their right to impose restrictions and conditions on the powers of the Board of Directors. The shareholders may exercise the powers of imposing restrictions by passing resolutions at the general meetings and may also make regulations (having only retrospective effect) curtailing the extent of powers exercisable by the Board.

As we know, the Board of Directors are fully empowered to manage day-to-day affairs of the company. The shareholders cannot impose their will on the Board; they cannot interfere and instruct the Board to discharge certain powers in a particular manner unless there are reasons to do so. In the following representative cases, however, the shareholders are empowered to exercise the powers of the Board:

(a) when directors are acting malafide i.e., their conduct is such that they are acting for their own benefits at the expense of the interests of the company. Thus, when directors are wrong-doers and their personal interest conflicts with their duty towards the company, the majority shareholders shall take decisions to undo the wrong done by the directors.

(b) when all the directors are interested in a particular transaction and therefore, incompetent to act due to absence of quorum. In such a case, shareholders shall decide through majority in the general meeting whether to entertain that transaction or not.

(c) when there happens to be deadlock in the management because the directors are not on talking terms or unwilling to act; thus, paving way for the shareholders to ensure running of the company

vii. **Exemption to banking companies [Second Proviso to Section 179 (3)]:** In respect of banking companies following exemptions are provided:

(a) the acceptance of deposits of money by a banking company in the ordinary course of its business from the public which is repayable on demand or otherwise and with drawable by cheque, draft, order or otherwise shall not be deemed to be a borrowing of monies within the meaning of Section 179;

(b) further, the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe shall not be deemed to be a making of loans by a banking company within the meaning of Section 179.

Note: By way of Explanation I, it is clarified that clause (d) above (i.e. to borrow monies) shall not apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act. Thus, in such cases of borrowings by a banking company, there is no need to obtain sanction by means of a resolution passed at a duly convened Board meeting. This is practical also to provide such exemption, keeping in view the business of a banking company.

6. RESTRICTIONS ON POWERS OF BOARD

The powers of the Board of Directors of a company are not unrestricted or uncontrollable as Section 180 portrays. This Section contains directive provisions which direct that the powers in respect of specified matters shall be exercised by the Board subject to the certain restrictions i.e., in such cases the exercise of powers by the Board shall be restricted as per law. Section 180 is not applicable to a private company.

i. **Matters in respect of which powers shall be exercised after obtaining consent by a special resolution:** According to Section 180 (1), following are the matters in respect of which the Board shall exercise the powers with the consent of the company by a special resolution and not on its own simply by passing a Board resolution at a Board meeting:

(a) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings. In other words, out of multiple undertakings of a company even if one is sold, leased or disposed of, either wholly or substantially, the consent by special resolution shall be required.

Imposition of conditions by the shareholders: According to Section 180(4), any special resolution passed by the company consenting to the transaction of sell, lease, etc., may stipulate certain conditions and if so, the same need to be specified in such resolution. Among others, the conditions shall be regarding the use, disposal or investment of the sale proceeds which may result from the transactions.

Section 180 (4) not to be taken as authorization for reduction in capital: It is provided that sub section (4) shall not be deemed to authorise the company to affect any reduction in its capital. Such reduction must be affected in accordance with the provisions contained in the Companies Act, 2013.

No need for special resolution if selling, leasing, etc. is part of ordinary business of the company: According to Section 180 (3) (b), the restriction in the form of special resolution is not attracted to the sale or lease of any property of the company where its ordinary business consists of such selling or leasing.

Clean title of the buyer, etc. [Section 180 (3) (a)]: In respect of a buyer who buys or in respect of other person who takes on lease (i.e., lessee) any property, investment or undertaking as is referred to in Section 180 (1) (a) in good faith, his title shall not be affected despite the fact that the directors resorted to selling or leasing without first obtaining the consent of the company by a special resolution.

Note 1: The expression "undertaking" means an undertaking in which the investment of the company exceeds twenty per cent of its net worth13 as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent of the total income of the company during the previous financial year.

Note 2: The expression "substantially the whole of the undertaking" in any financial year shall mean twenty per cent or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.

Note 3: In case the provisions of Section 110 of the Act apply to the company which is resorting to sale of the whole or substantially the whole of its undertaking in terms of Section 180 (1) (c), it shall pass the special resolution containing such item of business by means of voting through postal ballot. [Refer Rule 16 (i) of the Companies (Management and Administration) Rules, 2014.]

Note 4: A One Person Company and other companies having members up to two hundred are not required to transact any business through postal ballot. [Refer Proviso to Rule 16 of the Companies (Management and Administration) Rules, 2014.]

(b) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation. It implies that if the investment of the compensation amount is made in trust securities, there is no need to obtain consent of the members through a special resolution.

(c) To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium apart from temporary loans obtained from the company's bankers in the ordinary course of business.

In simple words, 'borrowings' (including loans raised for meeting financial expenditure of a capital nature) are not to include temporary loans which are obtained by the company from its bankers in the ordinary course of business.

Limit on 'borrowings' need to be specified: Section 180 (2) requires that every special resolution passed by the company in general meeting in relation to the 'borrowings' shall specify the total amount up to which monies may be borrowed by the Board of Directors. Thus, the Board cannot be given blanket powers to borrow monies up to any extent of its choice, but the special resolution must specify the total amount that can be borrowed. In other words, a rational thinking in the form of specifying a 'particular amount' must be exercised by the shareholders so that borrowings are restricted. The specifying of total amount that can be borrowed is a step in this direction. Excessive borrowings at the whims and caprices of the Board are dangerous to the company as a whole including its shareholders.

Debt raised in excess of the specified limit [Section 180 (5)]: If a company incurs debt in excess of the limit imposed i.e. more than the 'total amount' specified in the special resolution, it shall not be valid or effectual from the point of view of lender unless such lender proves that he advanced the loan in good faith and without knowledge that the limit imposed had been exceeded. Thus, lender has to be fully cautious before extending any loan to a company. The loaned amount must not be in excess of the limit imposed otherwise it shall not be legally enforceable against the company. In other words, the lender must be aware in no uncertain terms the implications of Section 180 (5) and must carefully check the financial statements as well as the special resolution, if any, passed by the company before extending any loan facility to it.

Meaning of "Temporary Loans": It is clarified by way of Explanation that the term 'temporary loans' means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature.

Exemption to a banking company: The acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company.

(d) To remit, or give time for the repayment of, any debt due from a director. Thus, if any debt is repayable by a director, then it cannot be remitted or its repayment time cannot be extended unless consent by passing a special resolution is given by the company.

ii. Contribution to bona-fide and charitable funds, etc.: This type of contributions by a company beyond certain limit requires passing of an ordinary resolution as required by Section 181, the provisions of which are discussed later in the Chapter.

Example 7: The Board of Directors of Stepping Stones Publications Ltd. resolved to borrow a sum of Rs. 15 crore from a nationalized bank at a Board meeting held on 15.1.2019. One of the directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the borrowing powers of the Board. The following data is given for your information:

- Share Capital Rs. 5 crore
- Reserves and Surplus Rs. 5 crore
- Secured Loans Rs. 15 crore
- Unsecured Loans Rs. 5 crore

According to the provisions of Section 180(1)(c) of the Companies Act, 2013, the borrowings should not exceed the aggregate of the paid-up share capital, free reserves and securities premium. While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case, the proposed borrowing of Rs. 15 crore will exceed the limit calculated as per the given information. Thus, the proposed borrowings are beyond the powers of the Board of directors.

In view of the above position, the management of Stepping Stone Publications Ltd., should take steps to pass a special resolution authorising to borrow the proposed amount of Rs. 15.00 crore, so that the requirement of Section 180(1)(c) is satisfied. Only thereafter, the proposed borrowing can be availed of.

7. COMPANY TO CONTRIBUTE TO BONA FIDE AND CHARITABLE FUNDS, ETC. [SECTION 181]

Section 181 of the Act, applicable to both public and private companies, empowers the Board of Directors to contribute to bona fide charitable and other funds up to a particular limit which if exceeded needs to be permitted by company through passing an ordinary resolution.

Limit on contribution by the Board of Directors: The Board is empowered to contribute any amount in any financial year if the aggregate amount of such contribution does not exceed five per cent of the average net profits of the company for the three immediately preceding financial years.

Where the above limit is exceeded: In case the aggregate contribution amount in any financial year is beyond the limit specified for the Board, prior permission of the company in general meeting shall be required for such contribution.

The expression "other funds" is wide enough to enable contributions of the kind, specified in the special resolution to be made by the company. [Straw Products Ltd. vs. Registrar of Companies [1969].

Example 8: The Board of Directors of Very Well Ltd., is contributing every year to a charitable organization a sum of Rs 60, 000. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses.

Under section 181 of the Companies Act, 2013, the Board of Directors of a company is authorized to contribute to bonafide charitable and other funds. However, in case the aggregate amount of such contribution in any financial year exceeds five per cent. of its average net profits for the 3 immediately preceding financial years, prior permission of the company in general meeting shall be required.

The section does not make it mandatory for the company to have a profit for making a charitable contribution in any financial year. As the amount of donation is restricted to the average of immediately previous 3 years' profits, it is possible for a company suffering a loss to make contribution provided it is made to a bonafide charitable fund and the average of the three immediately preceding financial years' profits (including current losses) is positive.

In the present case, even though the company has incurred a loss it can contribute to the charitable fund only if it is a bonafide charitable fund and the amount is up to 5% of the average of the immediately preceding 3 years' profits (including current losses). In case the contribution exceeds the limit, the prior approval of the members must be taken at a general meeting of the company.

8. PROHIBITIONS AND RESTRICTIONS REGARDING POLITICAL CONTRIBUTIONS [SECTION 182]

Section 182 of the Act, deals with the provisions relating to prohibitions and restrictions regarding political contributions. These provisions are stated as under:

i. **Contribution by a company to political parties:** A company is permitted to contribute any amount (without any limit) directly or indirectly to any political party, notwithstanding anything contained in any other provision of the Companies Act, 2013. It is to be noted that Section 182 (1) has overriding effect.

   Meaning of Political Party: The term "political party" means a political party registered under section 29A of the Representation of the People Act, 1951.

ii. **Companies not allowed contributing to political parties:** The following companies are not allowed to contribute to any political party:

   (a) a Government company; and

   (b) a company which has been in existence for less than three financial years.

iii. **Procedure for making contribution:** A company shall make the contribution to a political party only after a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors. In effect, such resolution shall be deemed to be justification in law for the making of the contribution authorised by it. [Proviso to Section 182(1)]

iv. **Deemed political contributions [Section 182(2)]:** In addition to making any direct contribution to a political party, following contributions are also deemed as political contributions:

   (a) a donation or subscription or payment given by a company to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given, can reasonably be regarded as likely to affect public support for a political party;

   (b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication being in the nature of a souvenir, brochure, tract, pamphlet or the like:

      1. where such publication is by or on behalf of a political party; and
      2. where such publication is not by or on behalf of, but for the advantage of a political party.

v. **Disclosure of contributed amount [Section 182(3)]:** Every company shall disclose in its profit and loss account the total amount contributed by it under Section 182 during the financial year to which the account relates.

vi. **Modes of contribution [Section 182 (3A)]:** The contribution to a political party under Section 182 shall be made according to following modes:

- by an account payee cheque drawn on a bank; or
- by an account payee bank draft; or
- by using electronic clearing system through a bank account; or
- through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties. [Section 182(3A)]

vii. **Punishment for contravention:** If a company makes any contribution in contravention of the provisions of Section 182, the punishment shall be as under:

- **Company: P**unishable with fine up to five times the amount of contribution so made.
- **Every defaulting officer:** Punishable with imprisonment up to six months and with fine up to five times the amount of contribution so made.

Example 9: The Board of Directors of LM Ltd., incorporated in April, 2017, proposes to donate Rs. 50,000 to a political party for the F.Y. 2019-20. The average net profits determined in accordance with the provisions of the Companies Act, 2013 during the two immediately preceding financial years are Rs. 20,00,000.

Answer: As per section 182(1) of the Companies Act, 2013 any company may contribute any amount directly or indirectly to any political party except a government company and a company which has been in existence for less than three financial years.

In the given case, as LM Ltd. happens to be a company which has been in existence for less than three financial years. Hence, it is not permitted to donate any amount to the concerned political party for the F.Y. 2019-20.

Example 10: Sea Hawk Cycles Limited is a company incorporated four years ago. It has earned profits amounting to Rs. 5 lakhs, Rs. 8 lakhs and Rs. 11 lakhs respectively during the last three financial years. The Board of Directors of the company proposes to donate a sum of Rs. 50,000 to a political party. The proposed donation is within the powers of Board of Directors of the company.

Answer:

In view of the section 182(1), Sea Hawk Cycles Limited can contribute the said amount of Rs. 50,000 to the concerned political party. However, it needs to pass a board resolution authorising making of such contribution at a meeting of the Board of Directors.

9. POWER OF BOARD AND OTHER PERSONS TO MAKE CONTRIBUTIONS TO NATIONAL DEFENCE FUND, ETC. [SECTION 183]

Section 183 of the Act, empowers the Board and other authorised persons to make contributions to the National Defence Fund, etc. as described below:

i. **Contribution of amount to National Defence Fund/other fund as approved by the Central Government:**

   (a) No limit: Contribution to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence can be made without any limit.

   (b) Exercise of power: The power to make such contribution shall be exercised by:

   - The Board of Directors of the company; or
   - Any person or authority exercising the powers of the Board of Directors or of the company in general meeting.

   (c) Overriding effect: Section 183 has overriding effect i.e., the contribution may be made notwithstanding anything contained in Sections 180, 181 and 182 or any other provision of the Companies Act, 2013 or in the memorandum, articles or any other instrument relating to the company.

ii. **Disclosure in profits and loss account:** Every company shall disclose in its profits and loss account the total amount or amounts contributed by it to the National Defence Fund or any other approved fund, during the financial year to which the amount relates.

10. DISCLOSURE OF INTEREST BY DIRECTOR [SECTION 184]

The office of director in a company is that of 'trust'. A person holds the directorship in a fiduciary capacity. As trustee of the assets of the company, the director is duty bound to pass on the benefits accruing from all such transactions which belong to the company. At any stage if he becomes interested in a transaction the benefits of which rightfully accrue to the company, he must disclose his interest so that the Board and if required, the company, may take a rational decision whether to continue with that transaction or not. The disclosure of interest to be made by a director includes both 'general disclosure of interest' and 'specific disclosure of interest'. Section 184 of the Act, which contains

provisions in respect of 'disclosure of interest' by the directors, is applicable to all the companies and their directors. These provisions are discussed as under:

i. **General disclosure of interest [Section 184(1)]:** Every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in the manner prescribed in Rule 9 of the Companies (Meetings of Board and its Powers) Rules, 2014.The intention of law behind such disclosure is to make known the other directors of the company about the interest of concerned director in other companies, firms, etc.

   When to make general disclosure of interest: Every director shall disclose his interest:

   (a) at the first meeting of the Board in which he participates as a director, and
   (b) thereafter, at the first meeting of the Board in every financial year, or
   (c) whenever there is any change in the disclosures already made, then at the first Board meeting held after such change.

ii. **Specific disclosure of interest:** According to Section 184(2), a director of a company shall make a specific disclosure of interest whenever he, in any way, whether directly or indirectly, is concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:

   (a) with a body corporate in which such director or such director in association with any other director holds more than two per cent shareholding of that body corporate; or
   (b) with a body corporate in which such director is a promoter, manager, Chief Executive Officer; or
   (c) with a firm or other entity in which, such director is a partner, owner or member.

When to make specific disclosure of interest: The disclosure shall be made as under:

- The interested director shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed for the first time; and

- He shall not participate in such meeting. 'Non-participation' implies that he shall not discuss the matter relating to such contract and also shall not vote if there happens to be a voting in this connection.
- It may happen that any director is not so concerned or interested at the time of entering into such contract or arrangement. However, if he becomes interested after the contract or arrangement is entered into, he shall disclose his concern or interest forthwith when he becomes so or at the first meeting of the Board held after his becoming concerned or interested.

iii. **Contract voidable at the option of company if there is non-disclosure [Section 184(3)]:** A contract or arrangement entered into by the company shall be voidable at its option if the interested director who has a direct or indirect concern or interest in such contract or arrangement, does not disclose his interest as required by Section 184(2) or if such director participates in the meeting where such contract or arrangement is discussed.

It may be noted that the contract is voidable and not void and the option of rescinding the contract lies with the company and not with the interested director. Thus, if the company decides to honour the contract, the interested director cannot rescind it because of irregularity.

iv. **Punishment for contravention [Section 184(4)]:** If a director of the company contravenes the provisions of Section 184 (1) and (2) i.e., does not disclose his interest or furnishes wrong information in this respect, he shall be 18liable to a penalty of one lakh rupees.

v. **No restriction on directors:** Nothing in Section 184 shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company.

vi. **Exemption from disclosure if the holding is up to 2%:** According to Section 184 (5) (b), the provisions of Section 184 regarding disclosure by interested director shall not apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the either company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

Example 11: Y Ltd. entered into a contract with Z Ltd. which has a paid-up capital of Rs. 50 lakhs. One of the directors of Y Ltd. is holding equity shares of the nominal value of Rs. 50,000 in Z Ltd. but he did not disclose his interest at the appropriate Board meeting.

In this case, as per section 184 (2) of the Companies Act, 2013 the disclosure of interest by directors is not required in any contract or arrangement between two companies where any of the directors of the company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company. Here, the holding of the director of Y Ltd. in Z Ltd. is only 1% [i.e. (50,000/50,00,000) * 100 = 1%] which is less than 2%. Therefore, he is does not require to disclose his interest regarding holding of equity shares in Z Ltd.

11. DEFECTS IN APPOINTMENT OF DIRECTORS NOT TO INVALIDATE ACTIONS TAKEN [SECTION 176]

Section 176 of the Act contains protective provisions by which actions taken by a director shall not get invalidated if subsequently it is noticed that there happened to be defects in his appointment. The validation of actions provides a kind of protection to the company as well as the third parties. The provisions of Section 176 are stated as under:

i. No act done by a person as a director shall be deemed to be invalid, if it was subsequently noticed that his appointment was invalid by reason of:
   - any defect; or
   - disqualification; or
   - had been terminated by virtue of any provision contained in the Companies Act, 2013 or in the articles of the company.

ii. Acts not valid if done after noticing his appointment to be invalid or to have terminated: It is provided that Section 176 shall not be deemed to give validity to

any act done by the director after his appointment has been noticed by the company to be invalid or to have terminated.

In other words, any subsequent act done by a director shall not get validated under the following circumstances:

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iii. Protection to the acts of MD or WTD or Manager: In terms of Section 196 (5), any act done by a managing director or whole-time director or manager before his appointment was disapproved by the company at a general meeting shall be deemed to be valid.

Example 12: Mr. Mohan was appointed as director at the Annual General Meeting of a company held on 30th September, 2018 and he functioned in the capacity as director from then onwards. Subsequently, during the mid of August, 2019, it was noticed that there were certain irregularities in his appointment and therefore, on 31st August, 2019, his appointment was declared invalid. However, Mr. Mohan continued to act as director even after 31st August, 2019.

in the given example, in view of the Section 176, the acts done by Mr. Mohan till the date of noticing irregularity in his appointment shall be deemed as valid and binding on the company.

Any act done by him after the date on which irregularity in his appointment was noticed by the company shall be invalid. Accordingly, acts done by Mr. Mohan after 31st August, 2019 shall be invalid and not binding upon the company.

12. LOAN TO DIRECTORS, ETC. [SECTION 185]

Section 185 of the Act contains provisions which impose restrictions on the loans, etc. being given to directors, etc. These provisions are stated below:

i. **Imposition of restrictions [Section 185 (1)]:** A company (subject to exemptions stated in the Box given later) is not permitted, directly or indirectly, to advance any loan, including any loan represented by a book debt to, or to give any guarantee or provide any security in connection with any loan taken by —

(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) any firm in which any such director or relative is a partner.

ii. **Relaxation from restrictions [Section 185 (2)]:** Subject to the specified conditions, a company is permitted to:

- advance any loan including any loan represented by a book debt, or
- give any guarantee or provide any security in connection with any loan taken,

by any person in whom any of the director of the company is interested.

The specified conditions to be followed are:

(a) a special resolution is passed by the company in general meeting.

However, the explanatory statement to the notice for the relevant general meeting shall disclose;

- the full particulars of the loans given or guarantee given or security provided; and
- the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security and
- any other relevant fact;

(b) the loans are utilized by the borrowing company for its principal business activities.

Explanation: The expression "any person in whom any of the director of the company is interested" means —

(a) any private company of which any such director is a director or member;

(b) any body corporate at a general meeting of which not less than 25% of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

iii. **Non-applicability of restrictions [Section 185 (3)]:** In the following cases, restrictions stated in Section 185 (1) or specified conditions for relaxation of restrictions stated in Section 185 (2) shall not apply:

(a) where any loan is given to a managing or whole-time director—

i. as a part of the conditions of service extended by the company to all its employees; or

ii. pursuant to any such scheme which is approved by the members by a special resolution.

(b) where a company in the ordinary course of its business:

- provides loans or gives guarantees or securities for the due repayment of any loan; and
- in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of 1 year, 3 years, 5 years or 10 years Government security closest to the tenor of the loan.

(c)

i. where any loan is made by a holding company to its wholly owned subsidiary company; or

ii. where any guarantee is given or security is provided by a holding company in respect of any loan made to its wholly owned subsidiary company.

(d) where any guarantee is given or security is provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company.

As a pre-condition, it must be ensured that the loans made under clauses (c) and (d) are utilized by the subsidiary company for its principal business activities.

Penalty for contravention: Penalty for contravention of the provisions of Section 185 (i.e., if any loan is advanced or a guarantee or security is given or utilized contravening the provisions of Section 185) shall be as under:

(a) Company: punishable with minimum fine of Rs 5,00,000 and maximum fine of Rs. 25,00,000.

(b) Every defaulting officer: punishable with imprisonment up to 6 months or with minimum fine of Rs. 5,00,000 and maximum fine of Rs. 25,00,000.

(c) the director or the other person to whom any loan is advanced or guarantee or security is given in connection with any loan taken by him or the other person: punishable with imprisonment up to 6 months or with minimum fine of Rs. 5,00,000 and maximum fine of Rs. 25,00,000, or with both.

13. LOAN AND INVESTMENT BY COMPANY [SECTION 186]

Section 186 of the Act, applicable to both public and private companies, deals with the provisions relating to 'Loan and Investment' by a company. In addition, Rules 11, 12 and 13 also contain provisions governing the making of loans and investments, giving of guarantees and providing of securities by a company. These provisions are discussed as under:

i. **Investment permitted through two layers of Investment Companies [Section 186(1)]:** A company, unless otherwise prescribed, is not permitted to make investment through more than two layers of investment companies. Placing of such a restriction helps in preventing diversion of funds. It is a common experience that the funds can be more flagrantly diverted if a company invests through a number of step-down subsidiaries.

Note: It is clarified by way of clause (a) of Explanation that the expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities. Further, a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or if its income derived from investment business constitutes not less than 50% as a proportion of its gross income.

Exception to the rule of two layers: In the following cases, the provisions of Section 186 (1) shall not apply i.e., rule of 'two layers' shall not be applicable:

(a) Acquisition of a company incorporated outside India: If a company acquires any other company incorporated in a country outside India and if such other company has investment subsidiaries beyond two layers as per the laws of such country, the rule of 'two layers' shall not prevent this kind of acquisition.

(b) Subsidiary from having an investment subsidiary: Again, the rule of 'two layers' shall not prevent a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

ii. **Imposition of limit on the quantum of loan and investment made by a company:** According to Section 186 (2), following types of transactions (both direct and indirect) shall be subject to the specified limit as depicted in the diagram:

(a) giving of loan to any person or other body corporate;

(b) giving of guarantee or provision of security in connection with a loan to any other body corporate or person;

(c) acquiring by way of subscription, purchase or otherwise the securities of any other body corporate.

Explanation: For the purposes of Section 186 (2), the word "person" does not include any individual who is in the employment of the company.

Loans and Advances to Employees – Clarification on the applicability of Section 186

The MCA has clarified that loans and/or advances made by the companies to their employees, other than the managing or whole-time directors (which is governed by Section 185) are not governed by the requirements of Section 186.

This clarification will, however, be applicable if such loans/advances to employees are in accordance with the conditions of service applicable to employees and are also in accordance with the remuneration policy, in cases where such policy is required to be formulated.

In other words, a company is permitted to enter into transactions of giving loan or guarantee or providing security or acquiring of securities (i.e. shares, debentures, etc.), in the aggregate, upto 60% of its paid-up share capital (both equity and preference), free reserves and securities premium or 100% of its free reserves and securities premium, whichever is more.

iii. **Prior approval by a special resolution for exceeding limit [Section 186(3)]:** Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under Section 186 (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Note 1: In case the provisions of Section 110 of the Act apply to the company which is considering giving of loans or extending guarantee or providing security in excess of the limit specified under Section 186 (3), it shall pass the special resolution containing such item of business by means of voting through postal ballot. [refer Rule 16 (j) of the Companies (Management and Administration) Rules, 2014.]

Note 2: A One Person Company and other companies having members up to two hundred are not required to transact any business through postal ballot. [refer Proviso to Rule 16 of the Companies (Management and Administration) Rules, 2014.]

Disclosure of total amount in resolution in respect of loan or guarantee or security or acquisition: As per the Rule 13 of the Companies (Meetings of Board and its Powers) Rules, 2014,a resolution passed at a general meeting in terms of Section 186 (3) to give any loan or guarantee or investment or providing any security or the acquisition under Section 186 (2) shall specify the total amount up to which the Board of Directors are authorised to give such loan or guarantee, to provide such security or make such acquisition.

Exemption from special resolution [First Proviso to Section 186 (3) and Rule 11 (1)]: However, where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of passing a special resolution as required by Section 186 (3) shall not apply.

Disclosure in financial statement [Second Proviso to Section 186 (3) and Proviso to Rule 11 (1)]: In case of exemption from special resolution, the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under Section 186 (4)

iv. **Disclosure to members [Section 186(4) and Proviso to Rule 13]:** The company shall make full disclosure to the members as depicted in the following diagram:

Company shall disclose to the members in the financial statements the full particulars of-		
loan given,	investment made or guarantee given or security provided,	the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.

v. **Unanimous resolution of the Board [Section 186(5)]:**

- Any investment shall be made or loan or guarantee or security given by the company only after when the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting.
- The prior approval of the public financial institution concerned where any term loan is subsisting shall also be obtained.

Circumstances when no prior approval of public financial institution (PFI) is required [Proviso to Section 186 (5)]: Prior approval of a public financial institution (PFI) shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given:

- does not exceed the limit as specified in section 186(2) (i.e., 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more), and
- there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

vi. **Rate of interest on loan [Section 186 (7)]:** A loan under this section shall be given at a rate of interest which is not lower than the prevailing yield of 1 year, 3 years, 5 years or 10 years Government Security closest to the tenor of the loan

1. **Clarification in respect of Section 186 (7) - Rate of Interest**

   The MCA has clarified that in cases where effective yield (effective rate of return) on tax free bonds is greater than the prevailing yield of 1 year, 3 year, 5 years or 10 years Government Security closest to the tenor of the loan, there is no violation of sub-section (7) of Section 186 of the Companies Act, 2013.

2. **Modification in Section 186 (7) in respect of Section 8 Companies**

In respect of Section 8 Companies which have not committed a default in filing their financial statements under Section 137 or Annual Return under Section 92 with the Registrar, following proviso shall be inserted in Section 186(7):

'Provided that nothing contained in this sub-section shall apply to a company in which 26% or more of the paid-up share capital is held by the Central Government or one or more State Governments or both, in respect of loans provided by such company for funding Industrial Research and Development projects in furtherance of its objects as stated in its memorandum of association'.

vii. **No giving of loan, etc., till default in respect of deposits is subsisting [Section 186 (8)]:** A company which is in default in the repayment of any deposits accepted before or after the commencement of the Companies Act, 2013 or in payment of interest thereon, shall not give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting.

viii. **Maintenance of Register [Section 186 (9)]:** Every company giving loan or giving a guarantee or providing security or making an acquisition shall keep a register. It shall contain such particulars and shall be maintained in such manner as is prescribed in Rule 12 of the Companies (Meetings of Board and its Powers) Rules, 2014. The requirements of Rule 12 are as under:

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ix. **Non-applicability of Section 186 except sub-section (1) to certain transactions [Section 186 (11)]:** Section 186, (except Section 186 (1), shall not apply:

(a) to any loan made, any guarantee given or any security provided or any investment:

- made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business; or
- made by a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;

(b) to any investment—

i. made by an investment company;

Note: The expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or if its income derived

from investment business constitutes not less than 50% as a proportion of its gross income

ii. made in shares allotted in pursuance of Section 62 (1) (a)[i.e. right shares] or in shares allotted in pursuance of rights issues made by a body corporate;

iii. made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities.

x. **Restriction on the inter-corporate loans/deposits to be taken by companies registered under Section 12 of SEBI [Section 186 (6) and Rule 11 (3)]:** A company registered under Section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies which may be notified by the Central Government in consultation with the Securities and Exchange Board, shall not take inter-corporate loan or deposits in excess of the limits specified under the regulations applicable to this kind of company, pursuant to which it has obtained certificate of registration from the Securities and Exchange Board of India.

Further, such company shall furnish in its financial statement the details of the loan or deposits.

Note: Section 12 of the SEBI Act, 1992 requires stock broker, sub-broker, share transfer agent, banker to an issue, registrar to an issue, merchant banker, underwriter, portfolio manager, etc. to get registered with SEBI and obtain certificate of registration. There are regulations framed by SEBI which regulate such entities.

xi. **Punishment for contravention [Section 186 (13)]:** In case of contravention of any of the provisions of Section 186, the punishment shall be as under:

- **Company:** punishable with minimum fine of Rs. 25,000 and maximum of Rs 5 lakhs.
- **Every defaulting officer:** punishable with imprisonment maximum up to two years and with fine minimum of Rs. 25,000 and maximum of Rs. 1,00,000.

For the purposes of section 186,

the expression "infrastructure facilities" means the facilities specified in Schedule VI.

Note: The students may also refer the Companies (Restriction on Number of Layers) Rules, 2017, which have been enforced w.e.f. 20th September 2017.

14. INVESTMENTS OF COMPANY TO BE HELD IN ITS OWN NAME [SECTION 187]

Section 187 of the Act contains provisions which, as a general rule, require that all investments made by a company shall be held by it in its own name. There are certain exemptions also. The provisions of Section 187 are discussed as under:

i. **Investments by a company in its own name:** According to Section 187 (1), all investments made or held by a company in any property, security or other assets shall be made and held by it in its own name. Following diagram depicts this provision: As an exception22, it is provided that company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

ii. **Exemptions:** It is not always necessary that a company must hold the investments in its own name. Certain exemptions provided by Section 187 (2) are as under:

   (a) **Deposit of shares and debentures with bankers for collection of dividend and interest:** A company is permitted to deposit with its bankers any shares or securities for the collection of any dividend or interest payable thereon.

   (b) **Deposit or transfer to or hold in the name of its bankers shares or securities, in order to facilitate the transfer:** A company is permitted to deposit with or transfer to or hold in the name of its bankers (i.e. the State Bank of India or a scheduled bank), shares or securities, in order to facilitate the transfer thereof.

   However, if within a period of 6 months from the date on which the shares or securities are transferred by the company to, or are first held by the company in the name of its bankers (i.e. the State Bank of India or a scheduled bank), no transfer of such shares or securities takes place, the company shall, as soon as practicable after the expiry of that period, have the shares or securities re-transferred to it from its bankers or, as the case may be, again hold the shares or securities in its own name.

(c) **Deposit with or transfer to any person any shares or securities, by way of security for the repayment of any loan:** A company is permitted to deposit with or transfer to any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it.

(d) **Depository investments in the form of securities held as a beneficial owner:** A company is permitted to hold investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.

iii. **Maintenance of Register by a company in case securities are held in the name of a depository and not in its own name [Section 187 (3)]:** Section 187 (2) (d) permits a company to hold securities (i.e. any shares or securities) in the name of a depository, the company being the beneficial owner. In this case, though the investment in shares and securities has been made by the company but the securities are not held by it in its own name.

When the above situation arises, the company shall maintain a register which shall contain such particulars as may be prescribed (refer Rule 14 below) and such register shall be open to inspection by any member or debenture-holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose.

Provisions regarding maintenance of register as per Rule 14: The requirements of Rule 14 of the Companies (Meetings of Board and its Powers) Rules, 2014 are as under:

(a) **Maintenance of Register:** From the date of its registration, every company shall maintain a register in Form MBP-3.

(b) **Entry of particulars of investments:** The company shall enter in the register, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name. It shall also record the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person.

(c) The company shall also record whether such investments are held in a third party's name for the time being or otherwise.

(d) **Place:** The register shall be maintained at the registered office of the company and shall be preserved permanently.

(e) **Custody of register:** The register shall be kept in the custody of the company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board.

(f) **Authentication of entries:** The entries in the register shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

Securities held by any person in which the company holds beneficial interest, compliance of section 89 requires declaration in respect of beneficial interest of any securities.

iv. **Punishment for contravention [Section 187 (4)]:** If a company is in default in complying with the provisions of this section, the company shall be liable to a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

15. RELATED PARTY TRANSACTIONS [SECTION 188]

Section 188 of the Act along with Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 contain provisions which regulate 'related party transactions'. Further, Section 2(76) of the Act defines who is a 'related party'. These provisions are discussed in the following paragraphs:

(1) Meaning of 'Related Party':

i. As per Section 2(76), 'related party', with reference to a company, means-

ii. a director or his relative;

iii. a key managerial personnel (KMP) or his relative;

iv. a firm, in which a director, manager or his relative is a partner;

v. a private company in which a director or manager or his relative is a member or director;

vi. a public company in which a director or manager is a director and holds along with his relatives, more than 2% of its paid-up share capital;

vii. 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;

any person on whose advice, directions or instructions a director or manager is accustomed to act:

Note: It is provided that sub-clauses (vi) and (vii) shall not apply to the advice, directions or instructions which are 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.

Note: It is clarified by way of Explanation that "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:

In case of 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 sub- clause (viii) of clause 76 of Section 2 shall not apply with respect to Section 188.

ix. such other person as may be prescribed.

In this respect, Rule 3 of the Companies (Specification of Definitions Details) Rules, 2014 provides that for the purposes of sub-clause (ix) above, 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.

Further, the persons covered under sub-clauses (vi) and (vii) above shall not be related parties if advice, directions or instructions are given by them in a professional capacity.

Meaning of 'Relative'

Section 2 (77) of the Act defines the term 'relative'. Accordingly, 'relative', with reference to any person, means any one 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 the prescribed manner as under:

- Father (including step-father).
- Mother (including step-mother).
- Son (including step-son).
- Son's wife.
- Daughter.
- Daughter's husband.
- Brother (including the step-brother).
- Sister (including the step-sister).

(2) Related party transactions to which Section 188 is applicable: Section 188(1) specifies certain transactions (i.e., contracts or arrangements) which shall be termed as 'related party transactions' if a company undertakes them with a 'related party'. Such transactions are depicted in the following diagram:

Transactions referred to in sub-section (1) of Section 188:

Meaning of "Office or Place of Profit"

The expression "office or place of profit" means any office or place—

1. where such office or place is held by a director - if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;
2. where such office or place is held by an individual other than a director or by any firm, private company or other body corporate - if the individual, firm, private company or body corporate holding it receives from the company

anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise.

It is noteworthy that **Section 188 does not bar a company from entering into 'related party transactions'**. They can very well be undertaken, but after following the procedure prescribed as per the law like taking permission from the Board and if required, from the company in general meeting when prescribed limits are exceeded. If the provisions do not require any procedure to be followed, these transactions can also be entered without following the prescribed procedure.

(3) Related Party Transactions for which no approval is required [Fourth Proviso to Section 188 (1)]: In case any related party transaction is entered into by the company in its ordinary course of business and at an arm's length basis, Section 188 (1) is not attracted and therefore, no approval is required. However, transactions which are not on an arm's length basis shall require the appropriate approval.

Note: The expression **"arm's length transaction"** means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

(4) Related Party Transactions requiring consent of the Board: In case, a related party transaction covered under Section 188 (1) (i.e. contract or arrangement between a company and related party) is not on arm's length basis and also does not require approval of the shareholders, it shall be entered into by the company after obtaining consent of the Board of Directors given by a resolution at a meeting of the Board and subject to the conditions as prescribed by Rule 15 (1) of the Companies (Meetings of Board and its Powers) Rules, 2014.

According to Rule 15 (1), if a company enters into a transaction with a related party, the agenda of the Board meeting at which the resolution is proposed to be moved shall disclose the **following matters:**

(a) the name of the related party and nature of relationship;
(b) the nature, duration of the contract and particulars of the contract or arrangement;
(c) the material terms of the contract or arrangement including the value, if any;
(d) any advance paid or received for the contract or arrangement, if any;

(e) the manner of determining the pricing and other commercial terms, both included as part of contract and not considered as part of the contract;

(f) whether all factors relevant to the contract have been considered, if not, the details of factors not considered with the rationale for not considering those factors; and

(g) any other information relevant or important for the Board to take a decision on the proposed transaction.

Note: According to Rule 15 (2), in case any director is interested in any contract or arrangement with a related party, he shall not be present at the meeting during discussions on the resolution relating to such contract or arrangement-

(5)

(i) Related Party Transactions requiring approval by ordinary resolution: In case a company enters into a contract or arrangement with a related party and the value of transaction exceeds the prescribed value as per Rule 15 (3), it shall be entered into with the prior approval of the company by passing an ordinary resolution.

The provisions of Rule 15(3) are explained as under:

A. Approval by an ordinary resolution is required where the transaction or transactions to be entered into as contracts or arrangements with respect to clauses (a) to (e) of Section 188 (1) are as per the following criteria:

Details of transactions to be entered into as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of Section 188	**Prescribed limits for seeking approval by a resolution relating to the specified transactions**
(i) Sale, purchase or supply of any goods or materials, directly or through appointment of agent, as mentioned in clause (a) and clause (e) respectively of sub- section (1) of Section 188.	If the value of such transaction or transactions amounting to 10% or more of the turnover of the company29. Note: Above limit shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.
(ii) Selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent, as mentioned in clause (b) and clause (e) respectively of sub-section of Section 188.	If the value of such transaction or transactions amounting to 10% or more of net worth of the company. Note: Above limit shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.
(iii)Leasing of property of any kind, as mentioned in clause (c) of sub-section (1) of Section 188.	If the value of such transaction or transactions amounting to ten per cent or more of the turnover of the company. Note: Above limit shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

(iv) Availing or rendering of any services, directly or through appointment of agent, as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188.	If the value of such transaction or transactions amounting to 10% or more of the turnover of the company. Note: Above limit shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

B. Where the transaction or transactions to be entered into as contract or arrangement is **for appointment to any office or place of profit in the company**, its subsidiary company or associate company at a monthly remuneration **exceeding Rs. 2.5 lakh rupees as mentioned in clause (f) of sub-section (1) of Section 188,** approval by an ordinary resolution is required.

C. Where the transaction or transactions to be entered into as contract or arrangement is **for remuneration for underwriting** the subscription of any securities or derivatives thereof, of the company **exceeding 1% of the net worth as mentioned in clause (g) of sub-section (1) of Section 188**, approval by an ordinary resolution is required.

Note 1: Turnover or Net Worth: The turnover or net worth shall be computed on the basis of the audited financial statement of the preceding financial year.

Note 2: The explanatory statement to be annexed to the notice of a general meeting convened pursuant to Section 101 shall contain the following particulars, namely:

(a) name of the related party;

(b) name of the director or key managerial personnel who is related, if any;

(c) nature of relationship;

(d) nature, material terms, monetary value and particulars of the contract or arrangement;

(e) any other information relevant or important for the members to take a decision on the proposed resolution."

(ii) No voting by a related member [Second Proviso to Section 188(1)]: A member of the company who is a related party shall not vote on the resolution meant for approving any contract or arrangement which may be entered into by the company.

Note: However, nothing contained in the second proviso shall apply to a company in which 90% or more members, in number, are relatives of promoters or are related parties.

Exemptions:

First and Second Proviso to Section 188(1) shall not apply to:

- a government company in respect of contracts or arrangements entered into by it with any other government company;
- a government company, other than a listed company, in respect of contracts or arrangements other than those referred to in clause(a), in case such company obtains approval of 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 before entering into such contract or arrangement.

  Note: The above exemption is 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.

Second Proviso to Section 188(1) shall not apply to a private company provided it has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

Note: This exemption implies that a member of a private company is permitted to vote on the resolution irrespective of the fact that such member is a related party.

Scope of Second Proviso to Section 188(1) - Clarification

The second proviso to sub-section (1) of Section 188 requires that no member of the company shall vote on a resolution to approve the contract or arrangement (referred to in the first proviso), if such a member is a related party.

The MCA has clarified that 'related party' referred to in the Second Proviso has to be construed with reference only to the contract or arrangement for which the said resolution is being passed.

Thus, the term 'related party' in the above context refers only to such related party as may be a related party in the context of the contract or arrangement for which the said resolution is being passed.

(6) **Transactions between a holding company and its wholly owned subsidiary [Fifth Proviso to Section 188 (1)]:** In case transactions are entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting, there is no need for seeking approval of the company by passing an ordinary resolution by the members.

Explanation (2) to Rule 15 (3) states that in case of a wholly owned subsidiary, the resolution passed by the holding company shall be sufficient for the purpose of entering into the transactions between the wholly owned subsidiary and the holding company.

(7) **Related party transactions voidable at the option of the Board/shareholders [Section 188 (3)]:** A contract or arrangement shall be voidable at the option of the Board or, as the case may be, of the shareholders:

(a) **Contract/arrangement entered without obtaining the consent of the Board or approval by a resolution:** Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting as required under Section 188 (1), and

No ratification by Board/shareholders: if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into.

Further, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

(b) **Company may proceed to recover loss in contravention of the provisions of this section:** Section 188 (4) provides that it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of Section 188 for recovery of any loss sustained by it as a result of such contract or arrangement.

(8) **Punishment for contravention [Section 188 (5)]:** Any director or any other employee of a company who had entered into the contract or arrangement, or

authorised it, in violation of the provisions of Section 188 shall be punishable as under:

In the case of	Punishment
Listed company	**liable to a penalty of Rs. 25 lakhs, and**
Any other company	**liable to a penalty of Rs. 5 lakhs**

(9) Disclosures of 'related party transactions' in Board's report [Section 188 (2)]: Every contract or arrangement entered into under Section 188 (1) (i.e., the related party transactions) shall be mentioned in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.

16. REGISTER OF CONTRACTS OR ARRANGEMENTS IN WHICH DIRECTORS ARE INTERESTED [SECTION 189]

Section 189 of the Act, contains provisions for maintenance of Register of contracts or arrangements in which directors are interested. According to this section:

i. **Maintenance of register of contracts or arrangements [Section 189(1)]:** It is mandatory for all companies to keep one or more registers giving separately the particulars of all contracts or arrangements as required under:

   (a) Section 184(2) [Disclosure of Interest by Directors]; or

   (b) Section 188 [Related Party Transactions].

ii. **Manner of preparation of register:** Such register shall be prepared in the prescribed manner and shall contain prescribed particulars. [Section 189(1)]

As regards prescribed manner and particulars, we may refer Rule 16 of the Companies (Meetings of Board and its Powers) Rules, 2014 which states that the Register of contracts or arrangements shall be maintained in Form No. MBP 4. The company concerned shall enter therein:

- the particulars of company or companies or bodies corporate, firms or other association of individuals, in which any director has any concern or interest, as mentioned under Section 184 (1).

  As an exception, the particulars of the company or companies or bodies corporate in which a director himself together with any other director holds two percent or

less of the paid-up share capital would not be required to be entered in the register.

- the particulars of contracts or arrangements with a body corporate or firm or other entity as mentioned under Section 184 (2), in which any director is, directly or indirectly, concerned or interested; and
- the particulars of contracts or arrangements with a related party with respect to transactions to which Section 188 applies.

iii. **When to make entries in the Register:** As per Rule 16, the entries in the Register shall be made at once and in the chronological order. They shall be authenticated by the Company secretary or any other person authorised by the Board.

iv. **Register to be signed [Section 189(1)]:** The register, after being duly filled and updated, shall be placed before the next meeting of the Board and signed by all the directors present at the meeting.

v. **Disclosure to be made by a director or KMP [Section 189(2)]:** Every director or key managerial personnel (KMP) shall, within a period of 30 days of his appointment, or relinquishment of his office, as the case may be, disclose the particulars specified in Section 184(1) relating to his concern or interest in the other associations which are required to be included in the register or such other information relating to himself as may be prescribed.

vi. **Register to be kept at registered office [Section 189(3)]:** The register shall be kept at the registered office of the company and it shall remain open for inspection at such office during business hours.

vii. **Preservation and custody:** According to Rule 16 (3), the register shall be preserved permanently and shall be kept in the custody of the Company Secretary or any other person authorised by the Board for the purpose.

viii. **Extracts from register [Section 189(3) and Rule 16 (4)]:** The company shall provide extracts from such register to a member of the company on his request, within seven days from the date on which such request is made upon the payment of such fee as may be specified in the articles of the company, subject to a maximum of Rs10 per page.

ix. **Register to be produced at AGM [Section 189(4)]:** The register shall be produced at the commencement of every annual general meeting (AGM). It shall remain open

and accessible during the continuance of the meeting to any person having the right to attend the meeting. Thus, even a proxy has a right to inspect the Register.

x. **Exceptions [Section 189(5)]:** Section 189(1) shall not apply to any contract or arrangement i.e., the particulars of a contract or arrangement shall not be entered in the Register -

(a) if it is for the sale, purchase or supply of any goods, materials or services and the value of such goods and materials or the cost of such services does not exceed Rs. 5,00,000 in the aggregate in any year; or

(b) if it is entered into by a banking company for the collection of bills in the ordinary course of its business.

xi. **Penalty for contravention [Section 189(6)]:** Every director who fails to comply with the provisions of Section 189 regarding maintenance of 'Register of contracts or arrangements in which directors are interested' and the Rules made there under shall

be liable to a penalty of Rs. 25,000.

In respect of a Section 8 company which has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar, the provisions of Section 189 shall apply only if the transaction with reference to Section 188 on the basis of terms and conditions of the contract or arrangement exceeds Rs. 1 lakh.

17. CONTRACT OF EMPLOYMENT WITH MAHAGING OR WHOLE - TIME DIRECTORS [SECTION 190]

A Company may enter into a contract of employment with managing or whole-time directors. Section 190 of the Act contains provisions relating to keeping of such contract of employment. These provisions are stated as under:

(i) Maintenance of copy of contract of employment: Every company shall keep at its registered office —

(a) **where a contract of service with a managing or whole-time director is in writing,** a copy of the contract; or

(b) **where such a contract is not in writing,** a written memorandum setting out its terms.

(ii) **Inspection:** The copies of the contract or the memorandum shall be open to inspection by any member of the company without payment of fee.

(iii) **Penalty for non-compliance [Section 190 (3)]:** If any default is made in complying with Section 190, the penalty shall be as under:

- **Company:** liable to a penalty of Rs. 25,000 for each default
- **Every defaulting officer:** liable to a penalty of Rs. 5,000 for each default.

(iv) **Exception [Section 190 (4)]:** The provisions of Section 190 shall not apply to a private company.

18. PAYMENT TO DIRECTOR FOR LOSS OF OFFICE, ETC., IN CONNECTION WITH TRANSFER OF UNDERTAKING, PROPERTY OR SHARES [SECTION 191]

Section 191 of Act, applicable to all companies, contains provisions which regulate payment to the directors for loss of office, etc., in connection with transfer of undertaking, property or shares by a company. These provisions are discussed as under:

(i) **No compensation except after specific disclosures and after approval of payment proposal by members:** Section 191(1) enumerates happening of certain specific events in relation to a company and also states, inter-alia, whether or not any director of that company shall receive compensation, etc. on happening of such events. These events are given as under:

(a) the transfer of the whole or any part of any undertaking or property of the company; or

(b) the transfer to any person of all or any of the shares in a company being a transfer resulting from—

(i) an offer made to the general body of shareholders.

(ii) an offer made by or on behalf of some other body corporate with a view to a company becoming a subsidiary company of such body corporate or a subsidiary company of its holding company;

(iii) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than 1/3rd of the total voting power at any general meeting of the company; or

(iv) any other offer which is conditional on acceptance to a given extent,

Disclosure of particulars and approval in general meeting: In connection with above events, a **director of a company** shall not receive any payment **unless** particulars as may be prescribed (refer Rule 17 below) with respect to the payment proposed to be made by the transferee or person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

Subject to the conditions of disclosure and approval as mentioned above, a director of a company may receive payment:

- by way of compensation for loss of office, or
- as consideration for retirement from office, or
- in connection with such loss or retirement from such company, or
- from the transferee of such undertaking or property, or
- from the transferees of shares or
- from any other person, not being such company.

According to Rule 17 (1) of the Companies (Meetings of Board and its Powers) Rules, 2014, the specified particulars which need to be disclosed to the members of the company for approving the proposal by passing a resolution at a general meeting are as under:

(a) name of the director;

(b) amount proposed to be paid;

(c) event due to which compensation becomes payable;

(d) date of Board meeting recommending such payment;

(e) basis for the amount determined;

(f) reason or justification for the payment;

(g) manner of payment - whether payable in cash or otherwise and how;

(h) sources of payment; and

(i) any other relevant particulars as the Board may think fit.

(ii) Payment lawful if within prescribed limits [Section 191 (2)]: Any payment made by a company to a MD or WTD or manager of the company by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement shall be considered as lawful if it is subject to limits or

priorities as prescribed in Rule 17 (2) of the Companies (Meetings of Board and its Powers) Rules, 2014.

According to Rule 17 (2), such payment, to be lawful, shall not exceed the limit as set out under Section 202.

(iii) No compensation payable under specific circumstances: According to Rule 17 (3), no compensation shall be paid to the MD or WTD or manager of the company for the loss of office or as consideration for retirement from office (except 'notice pay' and 'statutory payments' according to the terms of their appointment) or in connection with such loss or retirement if:

(a) the company is in default in repayment of public deposits or payment of interest thereon;

(b) the company is in default in redemption of debentures or payment of interest thereon;

(c) the company is in default in repayment of any liability, secured or unsecured, payable to any bank, public financial institution or any other financial institution;

(d) the company is in default in payment of any dues towards income tax, VAT, excise duty, service tax or any other tax or duty, by whatever name called, payable to the Central Government or any State Government, statutory authority or local authority (other than in cases where the company has disputed the liability to pay such dues);

(e) there are outstanding statutory dues to the employees or workmen of the company which have not been paid by the company (other than in cases where the company has disputed the liability to pay such dues); and

(f) the company has not paid dividend on preference shares or not redeemed preference shares on due date.

(iv) Payment proposal cannot be taken as approved if no quorum present [Section 191 (3)]: If the payment is not approved for want of quorum either in a meeting or an adjourned meeting, the proposal shall not be deemed to have been approved.

(v) Receipt of payment in contravention of Section 191 (1) [Section 191 (3)]: In case a director of a company receives payment of any amount in contravention of Section 191 (1) or the proposed payment is made before it is approved in the

meeting, the amount so received by the director shall be deemed to have been received by him in trust for the company.

In other words, the director shall not own such amount but keep it as trustee of the company.

(vi) **Penalty for non-compliance [Section 191 (5)]:** If a director of the company makes any default in complying with the provisions of Section 191, he shall be liable to a penalty of Rs. 1,00,000.

(vii) **No effect on disclosures [Section 191 (6)]:** Section 191 shall not be taken to prejudice the operation of any law requiring disclosure to be made with respect to any payment received under Section 191 or such other like payments made to a director. In other words, if required by any law, the disclosures regarding any payment of compensation shall be made.

Note: Due to the notifying of Section 247 (1) w.e.f. 18-10-2017, the valuation of stocks, shares, debentures, securities, etc. will be conducted by a Registered Valuer as appointed by the Audit Committee or in its absence by the Board of Directors. Before this, it was being conducted by an independent merchant banker registered with SEBI or an independent chartered accountant in practice having a minimum experience of 10 years.

19. RESTRICTION ON NON-CASH TRANSACTIONS INVOLVING DIRECTORS [SECTION 192]

Section 192 of the Act places restrictions on the non-cash transactions involving directors and the company or vice-versa. The provisions of Section 192 also operate if non-cash transactions involve a person who is a director of the company's holding, subsidiary or 38associate company. A person connected with any such director is also included. These provisions are discussed as under:

(i) **Restriction on acquiring assets for consideration other than cash:** According to Section 192 (1), no company shall enter into an arrangement by which—

(a) **a director of the company or its holding, subsidiary or associate company or a person connected with him acquires** or is to acquire assets for consideration other than cash, from the company; or

(b) **the company acquires** or is to acquire assets for consideration other than cash, from such director or person so connected.

(ii) **Relaxation of restriction:** The above restriction shall be relaxed i.e., the company may enter into an arrangement involving non-cash transactions as stated in clause (i) above, if prior approval for such arrangement is accorded by a resolution of the company in general meeting.

Where the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

(iii) **Contents of notice issued for approval of resolution:** The notice for approval of the resolution in general meeting issued by the company or holding company shall include the particulars of the arrangement. It shall also include the value of the assets involved in such arrangement duly calculated by a registered valuer.

(iv) **What happens if Section 192 is contravened:** Any arrangement entered into by a company or its holding company in contravention of the provisions of Section 192 shall be voidable at the instance of the company. The arrangement shall not be voidable;

(a) if the restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or

(b) if any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section (i.e., Section 192) by any other person.

20. CONTRACTS BY ONE PERSON COMPANY (OPC) [SECTION 193]

Section 193 of Act contains provisions in respect of contracts entered into by a One Person Company (OPC) which is limited by shares or by guarantee. This section becomes applicable when such OPC enters into a contract with its sole member who is also its director. Section 193 operates in the following manner:

(i) Preferably, such contract should be in **writing**.

(ii) If not in writing, the OPC shall ensure that the **terms of the contract or offer are contained in a memorandum or are recorded in the minutes** of the first meeting of the Board of Directors of the company held next after entering into contract.

(iii) **Exception:** If the contracts are entered into by the company in the ordinary course of its business then provisions of Section 193 are not applicable.

(iv) **Submission of information to the registrar:** The company shall inform the Registrar about every such contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors. This shall be done within a period of 15 days of the date of approval by the Board.

CHAPTER- 4: COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

INTRODUCTION

Chapter XV (Section 230 to 240) of the Companies Act, 2013 (the Act) contains provisions on 'Compromise. Arrangements and Amalgamations', that covers compromise or arrangements, mergers and amalgamations, corporate debt restructuring, demergers, fast track merger for small companies, cross border mergers, takeovers, amalgamation of companies in public interest etc. The procedural aspects involved such as format of application to be made to the Tribunal, form of notice and the procedural aspects involved with respect to the substantive law are covered under the Rules made under Chapter XV of the Act.

Compromise and Arrangement are form of corporate restructuring which is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resource, and fulfilment of stakeholders' expectations. It serves different purpose for different companies at different points of time and may take up various forms.

'Compromise' is an amicable agreement between the parties in which they make mutual concessions in order to solve the differences between them. Whereas, 'arrangement' is the process by which the share capital of the company is reorganized either by consolidating or division of the shares or doing both.

The word 'compromise' is nowhere defined in the Companies Act, 2013. It basically connotes the settlement of dispute by mutual consents/agreements or by way of scheme of compromise. Therefore, in case of compromise, there has to be some form of conflict. Following are the situations under which a company may call for a scheme of compromise:

- If a company faces challenge to pay all the creditors in full, in the normal course of business;
- Subsidiaries/units incurring losses etc.

On the other hand the word 'arrangement' has been defined under section 230(1) of the Companies Act, 2013. The arrangement has a wider connotation than compromise. The

arrangement means reorganization of rights and liabilities of the shareholders without existence of dispute. A company may opt for scheme of compromise or arrangement to take itself out from the winding up proceedings. Following are the situations under which a company may call for a scheme of compromise:

- For any variation in property;
- Conversion of one class of share to another etc.

PROVISIONS OF THE COMPANIES ACT, 2013

Power to Compromise or make Arrangements with Members or Creditors

Section 230(1) states that when a compromise or arrangement is proposed –

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the (i) company, or (ii) any creditor or (iii) member of the company, or (iv) in the case of a company which is being wound up, of the liquidator, appointed under the Companies Act, 2013 or under Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both these methods.

Affidavit by the applicant to disclose certain material facts

Section 230(2) states that the company or any other person, by whom an application is made under sub-section (1), shall disclose to the Tribunal by affidavit–

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent of the secured creditors in value, including—

(i) a creditors' responsibility statement in the prescribed form;

The Creditors' Responsibility Statement shall be in Form CAA-1 and be included in the scheme of corporate debt restructuring. A scheme of corporate debt restructuring as referred to in clause

(c) of sub-section (2) of section 230 of the Act shall mean a scheme that restructures or varies the debt obligations of a company towards its creditors.

(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Notice of the meeting

Section 230(3) states that when a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by:

- a statement disclosing the details of the compromise or arrangement,
- a copy of the valuation report, if any, and

- explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders, and
- the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
- such other matters as may be prescribed.

The notice of the meeting pursuant to the order of the Tribunal shall be in Form No. CAA.2 and shall be sent individually to each of the creditors or members. The notice shall be sent by the chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by e-mail or by hand delivery or any other mode as directed by the Tribunal to their last known address at least one month before the date fixed for the meeting. The notice of the meeting to the creditors and members shall be accompanied by a copy of the scheme of compromise or arrangement.

Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed.

When the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

The notice of the meeting shall be advertised in Form No. CAA - 2 in at least one English newspaper and in at least one vernacular newspaper having wide circulation in the state in which the registered office of the company is situated, or such newspaper as may be directed by the Tribunal and shall also be placed, not less than thirty days before the date fixed for the meeting, on the website of the company, of the SEBI and the recognized stock exchange where the securities of the company are listed. Where separate meetings of classes of creditors or members are to be held, a joint advertisement for such meetings may be given.

Notice to provide for voting by themselves or through proxy or through postal ballot

Sub-section (4) of section 230 states that a notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice.

Who can object to the scheme?

Any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.

Notice to be sent to the regulators seeking their representations

Section 230(5) states that a notice under sub-section (3) along with all the documents in Form CAA- 3 as may be prescribed shall also be sent to-

- the Central Government, the Registrar of Companies, the Income-tax authorities, in all cases;
- the Reserve Bank of India, the Securities and Exchange Board, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary; and
- such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement; and

shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

Affidavit of Service

The chairperson appointed for the meeting of the company or other person directed to issue the advertisement and the notices of the meeting shall file an affidavit before the Tribunal not less than seven days before the date fixed for meeting or date of the first of

the meetings, as the case may be, stating that the directions regarding the issue of notices and the advertisement have been duly complied with.

In case of default, the application along with copy of the last order issued shall be posted the Tribunal for such orders as it may think fit to make.

voting

The person who receives the notice may within one month from date of receipt of the notice vote in the meeting either in person of through electronics means to the adoption of the scheme of compromise and arrangement.

Explanation. For the purpose of voting by persons who receive the notice as shareholder of creditor under this rule-

(a) "shareholding" shall mean the shareholding of the members of the class who are entitled to vote on the proposal; and

(b) "outstanding debt" shall mean all debt owed by the company to the respective class or classes of creditors that remains outstanding

as per the latest audited financial statement, or if such statement is more than six months old, as per provisional financial statement not preceding the date of application by more than six months.

Copy of compromise or arrangement to be furnished by the company :-

Every creditor or member entitled to attend the meeting shall be furnished by the company , free of charge , within one day on a requisition being made for the same, with a copy of the scheme of the proposed compromise or arrangement together with a copy of the statement required to be furnished under section 230 of the Act.

Approval and sanction of the scheme

Section 230(6) states that when at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the

creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be and the contributories of the company.

Order of the Tribunal sanctioning the scheme to provide for the following matters [Section 230(7)]

An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:—

(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;

(b) the protection of any class of creditors;

(c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;

(e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

Rule 17 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 stipulates order on petition

Where the tribunal sanctions the compromise or arrangement, the order shall include such directions in regard to any matter or such modifications in the compromise or arrangement as the tribunal may think to fit to make for the proper working of the compromise or arrangement. The order shall direct that a certified copy of the same shall be filed with the registrar of companies within thirty days from the date of the receipt of copy of the order , or such other time as maybe fixed by the tribunal.

The order shall be in Form No. CAA. 6, with such variations as may be necessary.

Accounting treatment proposed in the scheme to be in conformity with accounting standards

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

In the matter of SMS Iron Technology (P.) Ltd Company Petition NO. 937 of 2016 NCLT-New Delhi, it was held that the petition filed by petitioner companies including demerged company seeking their amalgamation with transferee company could not be allowed where statutory auditor of demerged company certified in his report that accounting treatment of investments of company was not in consonance with prescribed Accounting Standards.

Order of Tribunal to be filed with the Registrar

Section 230(8) states that the order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

Tribunal may dispense with calling of meeting of creditors

Section 230(9) states that the Tribunal may dispense with calling of a meeting of creditors or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

In the matter of In Re Visa Bao Ltd. Co. Application No. 106 of 2017, NCLT Kolkata, it was held that where in process of implementing scheme of amalgamation, majority secured creditors of amalgamating companies gave their consent to dispensed with meeting of secured creditors, said meetings were to be dispensed, while shareholders'/unsecured creditors meetings were to be convened.

NCLT is not empowered to dispense with holding of shareholders' meetings under section 230 in case of compromise or arrangements. In Re Quickcalls (P.) Ltd. CA (CAA) - 75 (ND) OF 2020, NCLT-New Delhi

Compromise in respect of buy back is to be in compliance with section 68

As per Section 230(10), no compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

Compromise includes takeover

Section 230(11) states that any compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

Application to the Tribunal by an aggrieved party

Section 230(12) states that an aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

An application under sub-section (12) of section 230 may be made in Form NCLT-1 and shall be accompanied with prescribed documents.

Certain statutory enactments to be considered at the time of Compromise, Arrangement & Amalgamations :

1. INCOME TAx ACT 1961

The Income Tax Act, 1961 covers aspects such as tax reliefs to amalgamating/amalgamated companies, carry forward of losses, exemptions from capital gains tax, etc. For example,

when a scheme of merger or demerger involves the merger of a loss-making company or a hiving off of a loss-making division, it is necessary to check the relevant provisions of the Income Tax Act and the Rules for the purpose of ensuring, inter alia, the availability of the benefit of carrying forward the accumulated losses and setting of such losses against the profits of the Transferee Company. Taxation aspects of the Merger and Amalgamation have more elaborately given under the relevant module.

2. SEBI (LISTING OBLIGATIONS & DISCLOSURE REQUIREMENTS) REQULATIONS, 2015

Regulation 37 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, provides that the listed entity shall not file any scheme of arrangement under sections 391-394 and 101 of the erstwhile Companies Act, 1956 or under Sections 230-234 and Section 66 of Companies Act, 2013, whichever applicable, with any Court or Tribunal unless it has obtained the No-objection letter from the stock exchange(s).

Generally, stock exchanges raise several queries and on being satisfied that the scheme does not violate any laws concerning securities such as the Takeover Code or the SEBI (ICDR) Regulations, Stock Exchanges accord their approval.

The listed entity shall place the No-objection letter of the stock exchange(s) before the Court or Tribunal at the time of seeking approval of the scheme of arrangement. The validity of the No-objection letter of stock exchanges shall be six months from the date of issuance, within which the draft scheme of arrangement shall be submitted to the Court or Tribunal.

In addition to the above, Securities and Exchange Board of India has also provided some compliances with regard to the merger and amalgamation.

Rule 19 of the Securities Contracts (Regulation) Rules, 1957 provides basic compliance requirement for listing of securities on stock exchanges and SEBI has the power to relax listed companies from such compliances.

SEBI has issued Circular No. CFD/DIL3/CIR/2017/21 dated March 10, 2017 which inter-alia regulate the scheme of arrangement/ amalgamation/ merger/ etc. as filed with Stock Exchange (STX) for their NOC/ observation letter and also the provides for certain requirements to be complied with for being eligible to get relaxation under Rule 19 of

Securities Contracts (Regulation) Rules, 1957 and get the specified securities, issued by the transferee company, pursuant to a Scheme, listed on the stock exchange. Circular provides for the format of Detailed Compliance Report (DCR) to be filed with STX at the time obtaining their NOC/ Observation letter duly certified by the Company Secretary, Chief Financial Officer and the Managing Director, confirming compliance with various regulatory requirements specified for schemes of arrangement and all accounting standards.

Upon sanction of the Scheme by the Court or Tribunal, the listed entity shall submit the documents, to the stock exchange(s), as prescribed by the Board and/or stock exchange(s) from time to time.

However, draft schemes which solely provide for merger of a wholly owned subsidiary with its holding company the requirement of No Objection Certification will not be apply.
Provided that such draft schemes shall be filed with the stock exchanges for the purpose of disclosures.

Further, the requirements as specified in regulation 37 and under regulation 94 shall not apply to a restructuring proposal approved as part of a resolution plan by the Tribunal under section 31 of the Insolvency Code, subject to the details being disclosed to the recognized stock exchanges within one day of the resolution plan being approved.

3. THE INDIAN STAMP ACT 1899

It is necessary to refer to the Stamp Act to check the stamp duty payable on transfer of undertaking through a merger or demerger.

The Constitution of India confers the power on the state legislature to make the laws in regard to the matters of stamp duty other than the documents specified in schedule I. The State in exercise of its legislative powers under Article 246 of the Constitution read with Entry 63 of List II (Seventh Schedule) of the Constitution levy the Stamp Duty.

Stamp duty is levied on the instrument evidencing a transfer inter-vivos, i.e., a conveyance. As per Section 2(10) of the Indian Stamp Act, 1899, "Conveyance" includes a conveyance on sale and every instrument by which property whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I.

As per Section 2(14) of the Indian Stamp Act, 1899, "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record.

The term Section 3(18) of the General Clauses Act, 1897, "Document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose or recording that matter.

The definition(s) as reproduced above are inclusive in nature and are not self-explanatory. Hence, to avoid any ambiguity and confusion in this regard, with time, certain States has amended their Stamp Act and included Order of Court approving scheme of arrangement within the meaning of 'conveyance'. Maharashtra, Gujarat, Karnataka, Rajasthan, Chhattisgarh, Madhya Pradesh and Andhra Pradesh are the States which have specifically included an amalgamation order of a High Court as "Conveyance".

Payment of Stamp Duty in various States

Some of the States like Maharashtra, Gujarat, Karnataka, Rajasthan etc. which have enacted their own Stamp Acts have made specific provisions with respect to payment of Stamp Duty on Order of the High Court under the Companies Acts/Schedules, while some other states like Madhya Pradesh, Andhra Pradesh etc. which have adopted the Indian Stamp Act, 1899 have made state amendments to levy Stamp duty on the High Court Order. The remaining states which neither have their own Stamp Act nor have they made any State Amendment in the adopted Indian Stamp Act, 1899, levy Stamp duty as per the decision of High Court, if any, covering their states, or follow the decision of Supreme Court as laid down in the case of Hindustan Lever.

The law relating to payment of Stamp Duty on the Order of High Court in case of Merger lacks uniformity in India and levy of Stamp Duty will depend upon the Stamp Duty Law of the Concerned State. Also, in cases where the Transferor Company has its assets in different states things may get more complicated. The method of arriving at the figure of Stamp Duty also varies from State to State. Non -payment of Stamp Duty can cause legal hurdles at the time of registration of properties in the name of Transferee Company.

Payment of Stamp Duty is an important aspect to be considered before going in for a merger especially in those cases where the asset of the Transferor Company poses a significant value.

If an acquisition is contemplated by way of issue of new shares, or the acquisition of existing shares or voting rights, of a listed company, to or by an acquirer, the provisions of the Takeover Code are applicable. The Takeover Code regulates both direct and indirect acquisitions of shares or voting rights in, and control over a target company. The key objectives of the Takeover Code are to provide the shareholders of a listed company with adequate information about an impending change in control of the company or substantial acquisition by an acquirer, and provide them with an exit option in case they do not wish to retain their shareholding in the company.

The provisions of Competition Act and the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 are to be complied with.

The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 have been notified vide notification no. FEMA 389/ 2018-RB dated 20th March, 2018 and are effective from the date of notification. As per the Regulations, merger transactions in compliance with these regulations shall be deemed to have been approved by RBI, and hence, no separate approval should be required. In other cases, merger transactions require prior RBI approval.

Corporate Restructuring process in India is governed by the Companies Act, 2013, the Companie's (Compromises, Arrangements and Amalgamations) Rules, 2016 and various other regulatory laws such as the Income Tax Act, 1961, the Competition Act, 2002, the Foreign Exchange Management Act, 1999, the Indian and State Stamp Acts and Insolvency and Bankruptcy Code, 2016. Chapter XV of the Companies Act, 2013 (comprising sections 230 to 240) regulates compromises, arrangement and amalgamations.

As per section 231(1), when the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—

(a) shall have power to supervise the implementation of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

Sub-section (2) states that if the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding-up the company and such an order shall be deemed to be an order made under section 273.

MERGER AND AMALGAMATION OF COMPANIES

Merger

The term merger and amalgamation has not been defined under the Companies Act, 2013. Merger & Amalgamation is often known to be a single terminology. However, there is a thin difference between the two. 'Merger' is the fusion of two or more companies, whereby the identity of one or more is lost resulting in a single company whereas 'Amalgamation' signifies the blending of two or more undertaking into one undertaking, blending enterprises loses their identity forming themselves into a separate legal identity.

There may be amalgamation by the transfer of two or more undertakings to a new or existing company. 'Transferor company' means the company which is merging also known as amalgamating company in case of amalgamation and 'transferee company' is the company which is formed after merger or amalgamation also known as amalgamated company in case of amalgamation.

A merger is a legal consolidation of two entities into one entity which can be merged together either by way of amalgamation or absorption or by formation of a new company. The Board of Directors of two companies approve the combination and seek shareholders'

approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company.

Amalgamation

Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or amalgamated company. In other words, property, assets, liabilities of one or more companies, is taken over by another or are absorbed by and transferred to an existing company or a new company. Therefore, the essence of amalgamation is to make an arrangement thereby uniting the undertakings of two or more companies so that they become vested in, or under the control of one company which may or may not be the original of the two or more of such uniting companies. The word "amalgamation" is not defined under the Companies Act 2013 whereas section 2(1B) of Income Tax Act, 1961 defines Amalgamation as:

"Amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge

being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that –

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately

before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company.

Section 232(1) states that when an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal –

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis.

Where the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and the matters involved cannot be dealt with or dealt with adequately on the petition for sanction of the compromise or arrangement, an application shall be made to the tribunal under section 232 of the Act, by a notice of admission supported by an affidavit for directions of the Tribunal as to the proceedings to be taken.

Notice of admission in such cases shall be given in such manner and to such persons as the tribunal may direct.

Circulation of documents for members'/creditors' meeting

Section 232(2) states that when an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

(a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

(b) confirmation that a copy of the draft scheme has been filed with the Registrar;

(c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

(d) the report of the expert with regard to valuation, if any;

(e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

Sanctioning of scheme by Tribunal

Section 232(3) states that the Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

(a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

(b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

A transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any

of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

No transferee company can hold shares in its own name or under any trust;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

(d) dissolution, without winding-up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

(f) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

(g) the transfer of the employees of the transferor company to the transferee company;

(h) when the transferor company is a listed company and the transferee company is an unlisted company,—

(i) the transferee company shall remain an unlisted company until it becomes a listed company;

(ii) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre- determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal.

The amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

(i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out.

Auditor's certificate as to conformity with accounting standards

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

In the matter of Real Image LLP Vs. Qube Cinema Technologies (P.) Ltd. CP NO. 123/CAA/2018 NCLT-Chennai, It was held that where both transferor LLP and transferee company were regularly filing its statutory return and all proposed accounting treatment was in conformity with accounting standards prescribed under section 133 and all statutory compliances had been made under section 232, amalgamation of transferor LLP with transferee company was to be allowed.

Transfer of property or liabilities

Sub-section (4) of Section 232 states that where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

Certified copy of the order to be filed with the Registrar

An order made under section 232 read with section 230 of the act shall be in Form No CAA.7 with such variation as the circumstances may require. [Rule 20 of the Companies (Compromise, Arrangements and Amalgamation) Rules, 2016]

Section 232(5) states that every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

Effective date of the scheme

Section 232(6) states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

For the purpose of section 232(7) of Act , every company in relation to which an order is made under sub section

(3) of section 232 of the act shall until the scheme is fully implemented, file with the registrar of companies, the statement in Form No.CAA.8 along with such fee as specified in the companies (Registration offices and Fees) Rules, 2014 within two hundred and ten days from the end of each financial year.

Punishment

Section 232(8) states that if a company fails to comply with provisions of section 232 (5) i.e.failure to file Certified copy of the order with the Registrar, the company and every officer of the company who is in default shall be

liable to a penalty of twenty thousand rupees, and where the failure is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees.

Explanation under Section 232

For the purpose of the Section, —

(i) in a scheme involving a merger, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a merger by absorption, or

where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, it is a merger by formation of a new company;

(ii) references to merging companies are in relation to a merger by absorption, to the transferor and transferee companies, and, in relation to a merger by formation of a new company, to the transferor companies;

(iii) a scheme involves a division, where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and

(iv) property includes assets, rights and interests of every description and liabilities include debts and obligations of every description.

In the matter of Mohit Agro Commodities & Ors. NCLAT, dated June 28, 2021

When the 'Transferor and Transferee Company' involve a Parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured and Unsecured Creditors can be dispensed with as the rights of the Equity Shareholders of the 'Transferee Company' are not being affected

Fact of the Case

The Appellant Company ('Transferor Company' and 'Transferee Company') filed Applications under Sections 230 to 232 and other relevant provisions of the Companies Act, 2013 seeking dispensation of the meeting of the Equity Shareholders, Secured Creditors and Unsecured Creditors in respect of the scheme of Amalgamation of the 'Transferor Company' with the 'Transferee Company' with effect from the appointed date on the aggrieved terms and conditions has set out in the scheme in accordance with Sections 230 to 232 of the Companies Act, 2013 and other applicable provisions of the Act. It is contented that there

is no change in the capital structure of the 'Transferor Company' till the date of approval of the schemes by the Board of Directors.

It is further stated that the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and that both the Companies are incorporated in similar type of nature of activities and that the 'Transferee Company' had acquired the 'Transferor Company' as a business supportive mechanism for ease of operations.

Judgment

The NCLAT has observed that Section 232(1) of the Companies Act, 2013 uses the word 'may' which introduces an element of discretion to the Tribunal to be exercised in the interest of justice in appropriate situations. Section 232 is a specific provision carved out by the Legislature when both conditions maintained in clauses (a) and (b) of sub-Section (1) of Section 232 are met.

In the instant case the amalgamation sought for is between a Wholly Owned Subsidiary and the Holding Company. The point which needs to be noted is:

- whether such an arrangement alters the rights of the Stakeholders of the Company?
- whether such an amalgamation has any bearing internally on Creditors/Members of both the Companies?
- whether not holding the subject meeting would amount to violation of any of the provisions of the Companies Act, 2013?
- whether the Tribunal can exercise their discretion when the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and financial position of the 'Transferee Company' is positive and the merger is not affecting the rights of the Shareholders or the Creditors?

Therefore, it is held that the rights and liabilities of Secured and Unsecured Creditors were not getting affected in any manner by way of the proposed scheme as no new shares are being issued by the 'Transferor Company' and no compromise is offered to any Secured and Unsecured Creditors of the 'Transferee Company'. Hence, when the 'Transferor and Transferee Company' involve a Parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors can be dispensed with

as the rights of the Equity Shareholders of the 'Transferee Company' are not being affected.

MERGER AND AMALGAMATION OF CERTAIN COMPANIES

Section 233 prescribes simplified procedure for Merger or amalgamation of –

- two or more small companies; or
- between a holding company and its wholly-owned subsidiary company; or
- such other class or classes of companies as may be prescribed.

Merger of small companies/holding and subsidiary companies

Section 233(1) states that notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:-

(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company; Such objections or suggestions from the Registrar and official liquidator or persons affected by the scheme shall be in Form CAA-9;

(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares;

(c) each of the companies involved in the merger files a declaration of solvency, in Form No.CAA-10, with the Registrar of the place where the registered office of the company is situated; and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty- one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

According to Rule 25, of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 for the purpose of clause (b) and (d) of sub-section (1) of section 233 of the Act, the notice of the meeting to the members and creditors shall be accompanied by-

(a) a statement, as far as applicable, referred to in sub section (3) of section 230 of the act read with sub rule (3) of rule 6 hereof;

(b) The declaration of solvency made in pursuance of clause (c) of sub-section (1) of section 233 of the Act in Form No. CAA.10; and

(c) A copy of the scheme.

The declaration of solvency shall be filed by each of the companies involved in the scheme of merger or amalgamation, before convening the meeting of members and creditors for approval of the scheme.

Transferee company to file a copy of scheme approved

Section 233(2) states that the transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

According to Rule 25(4)(a) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, the transferee company shall, within seven days after the conclusion of the meeting of members or class of members or creditors, file a copy of the scheme as agreed to by the members and creditors, along with a report of the result of each of the meetings in Form No. CAA.11 with the central government, along with the fees as provided under the Companies (Registration Offices and Fees) Rules, 2014.

Further, as per Rule 25(4)(b) Copy of the scheme shall also be filed, along with Form No. CAA.11 with –

(i) the registrar of companies in Form No. gNL-1 along with fees provided under the Companies (Registration Offices and Fees) Rules, 2014; and

(ii) the official liquidator through hand delivery or by registered post or speed post.

Section 233(3) states that on the receipt of the scheme, if the Registrar or the official liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

Where no objection or suggestion is received to the scheme from the Registrar of companies and official Liquidator or where the objection or suggestion of registrar and official liquidator is deemed to be not sustainable and the central government shall issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12. [Rule 25(5)]

Section 233(4) provides that if the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days. If no such communication is made, it shall be presumed that he has no objection to the scheme.

Section 233(5) states that if the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under sub-section stating its objections and requesting that the Tribunal may consider the scheme under section 232.

Rule 25(6) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 mandate where objections or suggestions are received from the registrar of companies or official liquidator and the central government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest of creditors , it may file an application before the tribunal in Form No. CAA.13 within sixty days of the receipt of the scheme stating its objections or opinion and requesting that tribunal may consider the scheme under section 232 of the act.

Section 233(6) states that on receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the

Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:

If the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.

Section 233(7) states that a copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.

Rule 25(7) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 states that the confirmation order of the scheme issued by the Central Government or tribunal under sub section (7) of section 233 of the Act, shall be filed, within thirty days of the receipt of the order of confirmation, in Form INC-28 along with the fees as provided under Companies (Registration Offices and Fees) Rules 2014 with the Registrar of companies respectively.

Section 233(8) states that registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

Section 233(9) states that the registration of the scheme shall have the following effects, namely:—

(a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;

(b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;

(c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and

(d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

Section 233(10) states that a transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

Transferee Company to file an application with Registrar along with the scheme registered

Section 233(11) provides that the transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital. The fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.

Section 233(12) provides that the provisions of Section 233 shall mutatis mutandis apply to a company or companies specified in sub-section (1) in respect of a scheme of compromise or arrangement referred to in section 230 or division or transfer of a company referred to clause (b) of subsection (1) of section 232.

The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.

It is clarified that with respect to schemes of arrangement or compromise falling within the purview of section 233 of the Act, the concerned companies may , at their discretion, opt to undertake such schemes under sections 230 to 232 of the Act, including where the condition prescribed in clause (d) of sub-section (1) of section 233 of the Act has not been met.

A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

MERgER OR AMALgAMATION OF A COMPANY WITH A FOREIgN COMPANY

Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

The expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Section 234(1) states that the provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

Rule 25A of the of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on

accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

(4) Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Explanation 1. For the purposes of this rule the term "company" means a company as defined in clause (20) of section 2 of the Act and the term "foreign company" means a company or body corporate incorporated outside India whether having a place of business in India or not.

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.

Offer to dissenting shareholders

Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

For the purposes of sub-section (1) of section 235 of the Act, the transferee company shall send a notice to the dissenting shareholder(s) of the transferor company, in Form No. CAA.14 at the last intimated address of such shareholder for acquiring the shares of such dissenting shareholders.

Meaning of dissenting shareholders [Explanation to Section 235]

As per the explanation to Section 235, dissenting shareholder includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

Acquisition of shares of dissenting shareholders [Section 235(2)]

After the notice under section 235(1) of the Act, the transferee company shall, unless on an application made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

Process of acquisition of shares from dissenting shareholders [Section 235(3)]

Where a notice has been given by the transferee company under Section 235(1) and the tribunal has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given, or, if an application to the Tribunal by the dissenting shareholder is then pending, after that application has been disposed of, send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire, and the transferor company shall—

(a) there upon register the transferee company as the holder of those shares; and

(b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.

Utilization of funds [Section 235(4)]

Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

Illustration:

ABC Ltd, made an offer to acquire share of EFG Ltd on 01.01.2021. 90% shareholders of EFG Ltd agreed but one shareholder has not assented to the scheme or contract. By 01.02.2021 ABC Ltd is entitled to acquire shares. For this ABC Ltd shall send notice along with instrument of transfer and pay for share. EFG Ltd shall keep the consideration received in a separate bank and hall distribute that money within 60 days to the concerned shareholders.

PURCHASE OF MINORITY SHAREHOLDING – SECTION 236

Definition of Acquirer and Person acting in concert

The expressions "acquirer" and "person acting in concert" shall have the meanings respectively assigned to them in clause (a) and clause (q) of sub regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

According to Regulation 2(1)(a) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 "acquirer" means any person who,

directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company;

According to Regulation 2(1)(q) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 "persons acting in concert" means,-

(1) persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

(2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established,-

(i) a company, its holding company, subsidiary company and any company under the same management or control;

(ii) a company, its directors, and any person entrusted with the management of the company;

(iii) directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;

(iv) promoters and members of the promoter group;

(v) immediate relatives;

(vi) a mutual fund, its sponsor, trustees, trustee company, and asset management company;

(vii) a collective investment scheme and its collective investment management company, trustees and trustee company;

(viii) a venture capital fund and its sponsor, trustees, trustee company and asset management company; (viii a) an alternative investment fund and its sponsor, trustees, trustee company and manager;

(ix) a merchant banker and its client, who is an acquirer;

(x) a portfolio manager and its client, who is an acquirer;

(xi) banks, financial advisors and stock brokers of the acquirer, or of any company which is a holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual:

Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;

(xii) an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unitholder having not less than 10 per cent of the paid-up capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10 per cent of the paid-up capital of that investment company or unit capital of that fund:

Provided that nothing contained in this sub-clause shall apply to holding of units of mutual funds registered with the Board;

Explanation. – For the purposes of this clause "associate" of a person means,–

(a) any immediate relative of such person;

(b) trusts of which such person or his immediate relative is a trustee;

(c) partnership firm in which such person or his immediate relative is a partner; and

(d) members of Hindu undivided families of which such person is a coparcener.

As per Section 236(1) of the Act, in the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of ninety per cent or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming ninety per cent majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.

As per Section 236(2) of the Act, the acquirer, person or group of persons under sub-section (1) shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.

For the purposes of sub-section (2) of section 236 of the Act, the registered valuer shall determine the price (hereinafter called as offer price) to be paid by acquirer, person or group of persons referred to in sub-section of section 236 of the Act for purchase of equity shares of the minority shareholders of the company.

Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined as in accordance with Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, which is as under:

The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub- section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days.

Such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement has been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement [Section 236(4)].

In the event of a purchase under this section, company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be [Section 236(5)].

In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by dispatch of such payment [Section 236(6)].

In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not

been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding [Section 236(7)].

Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiates or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis [Section 236(8)].

When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—

(a) the shares of the company of the residual minority equity shareholder had been delisted; and

(b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed [Section 236(9)].

 If the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property,

powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

 The order under sub-section (1) may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

 Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

 Any person aggrieved by any assessment of compensation made by the prescribed authority under sub- section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

 No order shall be made under this section unless—

(a) a copy of the proposed order has been sent in draft to each of the companies concerned;

(b) the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and

(c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

Registration of offer of schemes involving transfer of shares [Section 238]

In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

(a) every circular containing such offer and recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in the manner as prescribed under Rule 28 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 which states that every circular containing the offer of scheme or contract involving transfer of shares or any class of shares and recommendation to the members of the transferor company by its directors to accept such offer, shall be accompanied by such information as set out in Form No. CAA.15. The circular shall be presented to the Registrar for registration.

(b) every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and

(c) every such circular shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered:

Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub- section (1).

Any aggrieved party may file an appeal against the order of the Registrar of Companies refusing to register any circular under sub-section (2) of section 238 of the Act and the said appeal shall be in the Form No. NCLT.9 (appended in the National Company Law Tribunal Rules, 2016) supported with an affidavit in the Form No. NCLT.6 (appended in the National Company Law Tribunal Rules, 2016).

The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be liable to a penalty of one lakh rupees.

The books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the

prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

Notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

The general principle of company law is that every member holds equal rights with other members of the company in the same class. The scale of rights of members of the same class must be held evenly for smooth functioning of the company. In case of difference(s) amongst the members the issue is decided by a vote of the majority. Since the majority of the members are in an advantageous position to run the company according to their command, the minorities of shareholders are often oppressed. The company law provides for adequate protection for the minority shareholders when their rights are trampled by the majority. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company. The court will not usually intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors so long they are acting within the powers conferred on them under the articles of the company. In other words, the articles are the protective shield for the majority of shareholders who compose the Board of directors for carrying out their object at the cost of minority of shareholders. The basic principle of non-interference with the internal management of company by the court is laid down in a celebrated case of Foss v. Harbottle 67 E.R. 189; (1843) 2 Hare 461 that no action can be brought by a member against the directors in respect of a wrong alleged to be committed to a company. The company itself is the proper party of such an action.

In Foss v. Harbottle, two shareholders, Foss and Turton brought an action on behalf of themselves and all other shareholders against the directors and solicitor of the company alleging that by their concerted and illegal transactions they had caused the company's property to be lost to the company. It was also alleged that there was no qualified Board. Foss and Turton claimed damages to be paid by the defendants to the company. It was held by the court that the action could not be brought by the minority shareholders although there was nothing to prevent the company itself, acting through the majority of its shareholders, bringing action. The wrong done to the company was not which could be ratified by the majority of members. The company (i.e., the majority) is the proper plaintiff for wrong done to the company, so the majority of members are competent to decide whether to commence proceedings against the directors. The reasons for rule were nicely stated by Melish L.J. in MacDougall v. Gardiner, (1875) 1 Ch. D. 13 (C.A.) at p. 25 in the following words:

"If the thing complained of is a thing which in substance the majority of company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

In Rajahmundry Electric Supply Co. v. Nageshwara Rao AIR 1956 SC 213, the Supreme Court observed that:

"The courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of the company by its directors so long as they are acting within the powers conferred on them under articles of the company. Moreover, if the directors are supported by the majority shareholders in what they do, the minority shareholders can, in general do nothing about it."

From the above it follows then that a company being a separate legal person from the members who compose it, the company is the proper person to bring an action.

CASE LAWS

In Pavlides v. Jensen (1956) Ch. 565, a minority shareholder brought an action for damages against three directors and against the company itself on the ground that they have been negligent in selling a mine owned by the company for £ 82,000, whereas its real value was about £ 10,00,000. It was held that the action was not maintainable. The judge observed, "It was open to the company, on the resolution of a majority of the shareholders to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of majority to decide that if the directors by their negligence or error of judgement has sold the company's mine at an undervalue, proceedings should not be taken against the directors".

In Edwards v. Halliwell (1950) 2 All. E.R. 1064, Jenkins, L.J. restated the rule in the following terms: "The rule in Foss v. Harbottle comes to no more than this. First, the proper plaintiff in respect of wrong alleged to be done to company is prima facie the company itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company by a simple majority of members, no individual member is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company is in favour of what has been done, then cadit quaestio... (cannot be questioned). If on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company itself should not sue".

Justification and Advantages of the Rule in Foss v. Harbottle

The justification for the rule laid down in Foss v. Harbottle is that the will of the majority prevails. On becoming a member of a company, a shareholder agrees to submit to the will of the majority. The rule really preserves the right of the majority to decide how the company's affairs shall be conducted. If any wrong is done to the company, it is only the company itself, acting, as it must always act, through its majority, that can seek to redress and not an individual shareholder.

Moreover, a company is a person at law, the action is vested in it and cannot be brought by a single shareholder. Where there is a corporate body capable of filing a suit for itself to recover property either from its directors or officers or from any other person then that

corporate body is the proper plaintiff and the only proper plaintiff [Gray v. Lewis, (1873) 8 Ch. Appl. 1035].

The main advantages that flow from the Rule in Foss v. Harbottle are of a purely practical nature and are as follows:

1. Recognition of the separate legal personality of company: If a company has suffered some injury, and not the individual members, it is the company itself that should seek to redress.

2. Need to preserve right of majority to decide: The principle in Foss v. Harbottle preserves the right of majority to decide how the affairs of the company shall be conducted. It is fair that the wishes of the majority should prevail.

3. Multiplicity of futile suits avoided: Clearly, if every individual member were permitted to sue anyone who had injured the company through a breach of duty, there could be as many suits as there are shareholders. Legal proceedings would never cease, and there would be enormous wastage of time and money.

4. Litigation at suit of a minority futile if majority does not wish it: If the irregularity complained of is one which can be subsequently ratified by the majority it is futile to have litigation about it except with the consent of the majority in a general meeting. In Mac Dougall v. Gardiner, (1875) 1 Ch. 13 (C.A.), the articles empowered the chairman, with the consent of the meeting, to adjourn a meeting and also provided for taking a poll if demanded by the shareholders. The adjournment was moved, and declared by the chairman to be carried; a poll was then demanded and refused by the chairman. A shareholder brought an action for a declaration that the chairman's conduct was illegal. Held, the action could not be brought by the shareholder; if the chairman was wrong, the company alone could sue.

Application of Foss v. Harbottle Rule in Indian context — The Delhi High Court in ICICI v. Parasrampuria Synthetic Ltd. SSL, July 5, 1998 has held that an automatic application of Foss v. Harbottle Rule to the Indian corporate realities would be improper. Here the Indian corporate sector does not involve a large number of small individual investors but predominantly financial institutions funding atleast 80% of the finance. It is these financial institutions which provide entire funds for the continuous existence and corporate activities. Though they hold only a small percentage of shares, it is these financial institutions which have really provided the finance for the company's existence and,

therefore, to exclude them or to render them voiceless on an application of the principles of Foss v. Harbottle Rule would be unjust and unfair.

Exception to the Rule in Foss v. Harbottle

The rule in Foss v. Harbottle is not absolute but is subject to certain exceptions. In other words, the rule of supremacy of the majority is subject to certain exceptions and thus, minority shareholders are not left helpless, but they are protected by:

(a) the common law; and

(b) the provisions of the Companies Act.

The cases in which the majority rule does not prevail are commonly known as exceptions to the rule in Foss v. Harbottle and are available to the minority. In all these cases an individual member may sue for declaration that the resolution complained of is void, or for an injunction to restrain the company from passing it. The said rule will not apply in the following case:

The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement. These are the statutory rights of the minority shareholders and find detailed discussion later in the study.

In Bennet Coleman & Co. and Ors. v. Union of India & Ors., (1977) 47 Com Cases 92 (Bom), the Division Bench of the Bombay High Court held that Sections 397 and 398 of the Companies Act, 1956 are intended to avoid winding up of the company if possible and keep it going while at the same time relieving the minority shareholders from acts of oppression and mismanagement or preventing its affairs from being conducted in a manner prejudicial to public interest. Thus, the Court has wide powers to supplant the entire corporate management by resorting to non- corporate management which may take the form of appointing an administrator or a special officer or a committee of advisers etc., who will be in charge of the affairs of the company.

The exceptions to the rule in Foss v. Harbottle are not limited to those covered above. Further exceptions may be admitted where the rules of justice require that an exception to the rule should be made.

It should be noted that the ordinary civil courts are not deprived of the jurisdiction to decide the matters except where the Companies Act expressly excludes it such as matters relating to winding up [Panipat Woollen & General Mills Co.Ltd. v. R.L. Kaushik, (1969) 39 Com Cases 249 (Punj & Har)].

In India, the Companies Act attempts to maintain a balance between the rights of majority and minority shareholders by admitting in the rule of the majority but limiting it at the same time by a number of well-defined minority rights, and thus protecting the minority shareholders.

Chapter XVI of the Companies Act, 2013 deals with the provisions relating to prevention of oppression and mismanagement of a company. Oppression and mismanagement of a company mean that the affairs of the company are being conducted in a manner that is oppressive and biased against the minority shareholders or any member or members of the company. To prevent the same, there are provisions for the prevention and mismanagement of a company.

The Ministry of Corporate Affairs vide its Notification S.O.1934 (E) dated 1st June 2016 notified section 241 to 245 of the Companies Act, 2013. Section 246 was notified vide Notification S.O.2912 (E) dated 9th September, 2016. These provisions are discussed in detail hereunder.

The words "oppression" and "mismanagement" are not defined in the Act. The meaning of these words for the purpose of Company Law should be used in a broad generic sense and not in any strict literal sense.

The meaning of the term "oppression" as explained by Lord Cooper in the Scottish case of Elder v. Elder & Western Ltd., (1952) Scottish Cases 49, which has been cited with approval by Wanchoo, J (afterwards C.J.) of the Supreme Court in Shanti Prasad v. Kalinga Tubes, (1965) 1 Comp. L.J. 193 at 204 is as under :

"The essence of the matter seems to be that the conduct complained of should at the lowest, involve a visible departure from the standards of fair dealing, on which every shareholder who entrusts his money to the company is entitled to rely.

CASE LAWS

An attempt to force new and more risky objects upon an unwilling minority may in circumstances amount to oppression. This was held in Re. Hindustan Co-operative Insurance Society Ltd., AIR. 1961 Cal. 443 wherein the life insurance business of a company was acquired in 1956 by the Life Insurance Corporation of India on payment of compensation. The directors, who had the majority voting power, refused to distribute this amount among shareholders, rather they passed a special resolution changing the objects of the company to utilise the compensation money for the new objects. This was held to be an "Oppression". The court observed: "The majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful. They attempted to force the minority shareholders to invest their money in different kind of business against their will. The minority had invested their money in a life insurance business with all its safeguards and statutory protections. But they were being forced to invest where there would be no such protections or safeguards".

A similar relief was allowed by the House of Lord in Scottish Co-operative Wholesale Society v. Mayer (1959) AC 324. In this case, the society created a subsidiary company to enable it to enter in the rayon industry. Subsequently when the need for the subsidiary ceased to exist, the society adopted a policy of running down its business which depressed the value of its shares. The two petitioners who were managing directors and minority shareholders in the company successfully pleaded "oppression". The court ordered the society to purchase the minority shares at the value at which they stood before the oppressive policy started [This decision has also been followed in Re. H.R. Harmer Ltd., (1959) 1 WLR 62].

Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible, shareholders should try to resolve their differences by mutual readjustment. Moreover, the courts will not allow these special remedies to become a vexatious source of litigation. For example, in Lalita Rajya Lakshmi v. Indian Motor Co.

A.I.R. 1962 Cal 127, the petitioner alleged that the Board of directors were guilty of certain acts detrimental to the minority of the shareholders. The allegations were that the income of the company was deliberately shown less by excessive expenditure; that passengers travelling without ticket on the company's buses were not checked; that petrol consumption was not properly checked; that second hand buses of the company had been

disposed of at low price, that dividends were being declared at too low a figure. It was held that even if each of these allegations were proved to the satisfaction of the court, there would have been no oppression.

A member can complain of oppression only in his capacity as a member and not in his capacity as director or creditor [In Re. Bellador Silk Ltd., (1965) 1 All ER 667].

The legal representatives of a deceased member whose name is still on the register of members are entitled to file a petition under Sections 397 and 398 of the Companies Act, 1956, for relief against oppression or mismanagement, Worldwide Agencies Pvt. Ltd. and Another v. Mrs. Margaret T. Desor and Others, Com Cases Vol. 67 (1990), 807 (S.C.).

A shareholder dies and his heirs apply for transmission of shares while their application for succession certificate was pending before the Civil Court. The legal heirs alleged illegal allotment of shares by respondent to themselves, reducing the legal heirs to minority. It has held that the legal heirs are entitled to file a petition alleging oppression and mismanagement. [Rajkumar Devraj & Aur. v. Jai Mahal Hotels Pvt. Ltd. & Others (CLB) CA. No. 133 of 2006 in C.P. No. 30 of 2006.

It should not, however, be supposed that these special remedies against oppression or mismanagement are available only to minorities. "In an appropriate case, if the court is satisfied about the act of oppression or mismanagement, relief can be granted even if the application is made by a majority, who have been rendered completely ineffective by the wrongful acts of a minority group. "Accordingly, a relief under the section was allowed to a majority group by Mitra, J., of the Calcutta High Court in In Re. Sindhri Iron Foundry (P) Ltd. (1963) 68 CWN 118. His Lordship observed that "if the court finds that the company's interest is being seriously prejudiced by the activities of one or the other group of shareholders, that two different registered offices at two different addresses have been set up, that two rival Boards are holding meetings, that the company's business, property and assets have passed to the hands of unauthorised persons who have taken wrongful possession and who claim to be the shareholders and directors there is no reason why the court should not make appropriate order to put an end to such matters.

Referring to the argument that the majority could always call a meeting and put things in order by passing resolutions, his Lordship said:

"The facts in this case show very clearly, that there is no chance of redress in the domestic forum of the company. If a Board meeting was to be called, one group would contend that

there were five directors, whereas the other group would urge that there were seven. If a meeting of the shareholders was to be convened, according to one group there would be only sixteen shareholders, while according to the other the number would exceed twenty- five ... There would be complete chaos and confusion ... "(Ibid., p. 335).

"This ingenious remedy has not only permitted redressal of many abuses, but its mere availability has had a deterrent effect upon management." [George H. Hornstein: The Future of Corporate Control, (1950) 63 HLR 476].

It was held in the case of Ajit Singh Ahuja v. Saphire (India) (P) Ltd. [(2009) 1 Comp LJ 313 (CLB)] that in a case of oppression, a member has to specifically plead on five facts – (a) what is the alleged act of oppression; (b) who committed the act of oppression; (c) how it is oppressive; (d) whether it is in the affairs of the company; and whether the company is party to the commission of the act of oppression.

Oppression must be a continuous process. This is suggested by the words, 'are being conducted in a manner...' used in Section 397. Hence isolated acts of oppression or mismanagement will not give rise to an action under Section 397 of the Act. In Shanti Pd. Jain's case, the court said:... "events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up-to- date of petition".

However in Tea Brokers P. Ltd. v. Hemendra Prosad Barooah (1998) 5 Comp LJ 963 (Cal.) the Division Bench of Calcutta High Court observed that:

'This is undoubtedly, a right and privilege which a member enjoys in his capacity as a member of the company… such an act may be even a single act done on one particular occasion if the effect of such an act will be of a continuing nature and the member concerned is deprived of his rights and privilege for all time to come in future'.

In Ramshankar Prasad v. Sindu Iron Foundry (P) Ltd., AIR 1966 Cal 512, it was held that a petition under Section 397, would be maintainable even if the oppression was of a short duration and of a singular conduct if its effects persisted indefinitely [followed in Maharashtra Power Development Corporation. Ltd. v. Dabhol Power Co. Ltd. (2003) 56 CLA 263 (Bom.)].

In Bhagirath Agarwala v. Tara Properties P. Ltd. (2003) 51 CLA 57 (Cal.), also the removal of a director and allotment of shares were set aside as they were done at a meeting which was

covered without complying with the requirements of Section 286 and also reflected an oppressive policy. The allotment was made only to one member without simultaneous offer to others on pro rata basis. A single act of issue of additional shares can have a continuous effect. It can constitute oppression. A relief can be had against it. There is no bar of limitation in such a case. [Ashok Kumar Oswal v. Panchsher Textile Mfg. & Trading Co. Ltd. (2002) 110 Com Cases 800 (CLB-PB)].

Past acts of oppression will not entitle a plaintiff to seek the remedy under Section 397. The purpose of this section is not so much to take up the past as to redeem the future. A catalogue of charges of the past alleged misdeeds will not attract the section [Thakur Prem Singh v. Thakur Hotel (Simla) Co. (P) Ltd., AIR 1963 Punj. 63; Raghunath Swarup Mathur v. Har Swarup Mathur, (1970) 40 Com Cases 282 (All)].

PROVISIONS UNDER THE COMPANIES ACT, 2013

A. BY ANY MEMBER OF A COMPANY

Section 241 of the Companies Act, 2013 states that any member of a company, who has right to apply under section 244, may apply to the Tribunal in Form NCLT-1 for complains that—

(a) The affairs of the company have been or are being conducted -

- in a manner prejudicial to public interest, or
- in a manner prejudicial or oppressive to him or any other member or members, or
- in a manner prejudicial to the interests of the company, or

(b) The material change, has taken place in the management or control of the company, whether by -

- an alteration in the Board of Directors, or manager, or
- in the ownership of the company's shares, or
- if it has no share capital, in its membership, or
- in any other manner whatsoever,

And that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members.

However, such material change shall not be a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company.

b. BY CENTRAL GOVERNMENT

The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order [Sec 241(2)].

As per Section 241(3), where in the opinion of the Central Government there exist circumstances suggesting that –

(a) any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust;

(b) the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices;

(c) a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or

(d) the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest.

The Central Government may initiate a case against such person and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

The person against whom a case is referred to the Tribunal under Section 241(3), shall be joined as a respondent to the application. [Section 241(4)]

Illustration:

Mr. A is a director of ABC Ltd. The Central Government is of opinion that Mr. A is guilty of fraud, misfeasance, persistent negligence, or default in carrying out his obligations and functions under the law or of breach of trust and hence cannot continue as director. The Government applied to Tribunal to decide whether or not Mr. A can continue as director. Here Mr. A will be the respondent.

As per Section 241(5), every application under Section 241(3) –

(a) shall contain a concise statement of such circumstances and materials as the Central Government may consider necessary for the purposes of the inquiry; and

(b) shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908, for the signature and verification of a plaint in a suit by the Central Government.

RIGHT TO APPLY UNDER SECTION 241 (SECTION 244)

Sub-section (1) of Section 244 states that following members of a company shall have the right to apply under section 241, namely:—

(a) In the case of a company having a share capital -

(i) not less than one hundred members of the company; or

(ii) not less than one-tenth of the total number of its members, whichever is less; or

(iii) any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

(b) In the case of a company not having a share capital -

(i) not less than one-fifth of the total number of its members shall have the right to apply under section 241.

For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

Where any members of a company are entitled to make an application under sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

In Re Tata Consultancy Services Limited vs. Cyrus Investments Pvt Ltd civil appeal No.440441 of 2020 Supreme Court, in this case Mr. Cyrus Mistry was removed from his position as Executive Chairman of Tata Sons Limited on October 24, 2016, because the company's Majority Shareholders and Board of Directors lost faith in him as Chairman. Cyrus Mistry was terminated from the board of directors of Tata Sons and by vote of the shareholders at a general meeting. Following that, Cyrus Mistry approached the National Company Law Tribunal (NCLT) Mumbai, alleging persecution of minority shareholder rights and operational mismanagement by Tata Sons under Sections 241, 242 and 244 of the Companies Act, 2013.

The Supreme Court observed that unless the removal of a person as a chairman of a company is oppressive or mismanaged or done in a prejudicial manner damaging the interests of the company, its members or the public at large, the Company Law Tribunal cannot interfere with the removal of a person as a Chairman of a Company in a petition under Section 241 of the Companies Act, 2013.

Power of Tribunal

Power of Tribunal to waive requirements to apply specified under Section 244

Proviso to section 244(1) states that the Tribunal may, on an application made to it in this behalf in Form No: NCLT- 9, may waive all or any of the requirements specified in clause (a) or clause (b) of sub – section (1) of Section 244 so as to enable the members to apply under Section 241.

POWER OF TRIBUNAL TO ISSUE ORDERS [SECTION 242(1)]

On any application made under section 241, the Tribunal is of the opinion—

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

In Re Union of India Vs. Infrastructure Leasing and Financial Services Ltd C.P. No. 3638 of 2018, NCLT-Mumbai, Union of India filed petition under section 242 alleging that managerial persons of IL & FS were responsible for negligence and incompetence and affairs of company were conducted in manner prejudicial to public interest, Board of Directors of IL & FS were suspended and Government Directors were directed to take over IL& FS with immediate effect.

Filing of copy of Order of Tribunal [Section 242(3)]

Section 242(3) provides that a certified copy of the order of the Tribunal under section 242(1) shall be filed by the company with the Registrar within 30 days of the order of the Tribunal.

Details in Order passed by Tribunal [Section 242(2)]

An order made by the Tribunal under sub – section (1) shall provide for—

(a) the regulation of conduct of affairs of the company in future;

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) restrictions on the transfer or allotment of the shares of the company;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(h) removal of the managing director, manager or any of the directors of the company;

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

(l) imposition of costs as may be deemed fit by the Tribunal;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

Illustration:

Mr. A is a director of ABC Ltd. The Central Government is of opinion that Mr. A is guilty of fraud, and hence cannot continue as director. The Government applied to Tribunal to decide whether or not Mr. A can continue as director. The Tribunal may pass any order to terminate or modify the agreement or transaction entered into by Mr. A in a fraudulent manner.

Interim Order [Section 242(4)]

The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

In Smruti Shreyans Shah vs. Lok Prakashan Ltd & Ors, C.P. No. 16/241/NCLT/AHM/2017

The court held that the Tribunal can issue interim orders under section 242 if a prima facie case is made out. It observed that the making of an interim order by the Tribunal across the ambit of section 242 (4) postulates a situation where the affairs of the company have not been or are not being conducted in accordance with the provision of law and the Article of Association. For carving out a prima facie case, the member alleging oppression and mismanagement has to demonstrate that he has raised fair questions in the company petition and which require a probe.

Alteration in Memorandum or Articles

Where an order of the Tribunal makes any alteration in the memorandum or articles of a company, then, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles [Section 242(5)].

The alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered [Section 242(6)].

A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same [Section 242(7)].

However, if a company contravenes the provisions of sub-section (5) of Section 242, the company shall be punishable with fine which shall not be less than one lakh rupees but which

may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

CONSEQUENCE OF TERMINATION OR MODIFICATION OF AGREEMENTS (SECTION 243)

1. Where an order made under Section 242 terminates, sets aside or modifies an agreement –

(a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;

(b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company.

(1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:

Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.

(1B) Notwithstanding anything contained in any other provision of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation for the loss or termination of office.

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1) or sub-section (1A) of Section 243,

and every other director of the company who is knowingly a party to such contravention, shall be punishable with fine which may extend to five lakh rupees.

In the matter of Aruna Oswal (Appellant) vs. Pankaj Oswal & Ors. (Respondents) (Supreme Court) (July 06, 2020)

Dispute of Inheritance of Shares is a civil dispute, it cannot be decided under section 241/242 of the Companies Act, 2013

Fact of the case:

The brief facts of the case are that Late Mr. Abhey Kumar Oswal, during his lifetime, held as many as 5,35,3,960 shares in M/s. Oswal Agro Mills Ltd., a listed company. He died on 29.3.2016. Mr. Abhey Kumar Oswal filed a nomination according to section 72 of the Companies Act, 2013 in favour of Mrs. Aruna Oswal, his wife. Two witnesses duly attested the nomination in the prescribed manner. The name of Mrs. Aruna Oswal, the appellant, was registered as a holder on 16.4.2016 as against the shares held by her deceased husband.

Pankaj Oswal (respondent no. 1), son of late Abhay Oswal filed a partition suit in High Court claiming entitlement to 1/4th of the estate of his father including the deceased's shareholdings. The High Court passed an interim order to maintain status quo concerning shares and other immoveable property.

While the suit was pending, respondent no. 1 also moved the NCLT, Chandigarh, alleging 'oppression and mis- management' under Section 241/242 of the Companies Act, 2013 in the affairs of respondent no. 2 company. The appellant challenged the maintainability of the petition. The NCLT directed filing of reply to the petition, without deciding the question of maintainability.

This was challenged before NCLAT, which in turn directed the NCLT to decide the question of maintainability of the petition. The NCLT thereafter dismissed the challenge to maintainability and held that the respondent no. 1, being a legal heir, was entitled to one-fourth of the property/shares. Therefore, the matter eventually reached the Supreme Court of India.

Judgment

Supreme Court observed that the basis of the petition is the claim by way of inheritance of 1/4th shareholding so as to constitute 10% of the holding. This is the right, which cannot be decided in proceedings under Section 241/242 of the Companies Act, 2013. Thus, filing of the petition under sections 241 and 242 seeking waiver is a misconceived exercise as the, respondent no. 1 has to firmly establish his right of inheritance before a civil court to the extent of the shares he is claiming; more so, in view of the nomination made as per the provisions contained in Section 71 of the Companies Act, 2013. In order to maintain the proceedings, the respondent should have waited for the decision of the right title and interest, in the civil suit concerning shares in question. The orders passed by the NCLT as well as NCLAT are set aside, and the appeals are allowed.

CLASS ACTION SUITS (SECTION 245)

The initiation of class action suits is one of the major changes introduced by the Companies Act, 2013. The major objective behind the provision of class action suits is to safeguard the interests of the minority shareholders. So, class action suits are expected to play an important role to address numerous prejudicial and abusive acts committed by the Board of Directors and other managerial personnel as it has been statutorily recognized under the Companies Act, 2013.

What is a class action suit?

A class action suit is a lawsuit where a group of people representing a common interest may approach the Tribunal to sue or be sued. It is a procedural instrument that enables one or more plaintiffs to file and prosecute litigation on behalf of a larger group or class having common rights and grievances.

Application of Class Action and Reliefs [Section 245(1)]

Sub-section (1) of section 245 states that such number of members, depositor or any class of them, as the case may be, may, file an application in Form NCLT-9 before the Tribunal for seeking all or any of the following orders, namely:—

(a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) to restrain the company from committing breach of any provision of the company's memorandum or articles;

(c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against—

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

Such application may be filed by the members, depositor or any class of them, as the case may be, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors.

Sub-section (10) of Section 245 states that subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1).

Liability of Audit Firm and its Partners [Section 245(2)]

Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

Required Number of Applicants [Section 245(3)]

The requisite number of members provided in sub-section (1) of Section 245, shall be as under:—

A. In case, application by Members:

(a) In the case of a company having a share capital -

(i) not less than one hundred members of the company; or

(ii) not less than such percentage of the total number of its members as may be prescribed, whichever is less; or

(iii) any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

(b) In the case of a company not having a share capital -

not less than one-fifth of the total number of its members.

B. In case, application by Depositors:

(i) Not less than one hundred depositors of the company, or

(ii) Not less than such percentage of the total number of depositors as may be prescribed, whichever is less shall have right to apply.

(iii) Any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed shall also have right to apply.

An application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1).

As per Rule 84 of the NCLT Rules, in case of a company having a share capital, the requisite prescribed number of member or members to file an application under sub-section (1) of section 245 shall be -

(i) (a) at least five per cent. of the total number of members of the company; or

(b) one hundred members of the company, whichever is less; or

(ii) (a) member or members holding not less than five per cent. of the issued share capital of the company, in case of an unlisted company;

(b) member or members holding not less than two per cent. of the issued share capital of the company, in case of a listed company.

As per sub-rule (4) The requisite prescribed number of depositor or depositors to file an application under sub- section (1) of section 245 shall be -

(i) (a) at least five per cent. of the total number of depositors of the company; or

(b) one hundred depositors of the company, whichever is less; or;

(ii) depositor or depositors to whom the company owes five per cent. of total deposits of the company.

Requirement for Consideration of Application [Section 245(4)]

In considering an application for class action, the Tribunal shall take into account, in particular—

(a) whether the member or depositor is acting in good faith in making the application for seeking an order;

(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a)to (f) of Sub-section (1) of Section 245;

(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;

(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

In case of admission of application

Section 245(5) provides that if an application filed for class action is admitted, then the Tribunal shall have regard to the following, namely:—

(a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

(c) two class action applications for the same cause of action shall not be allowed;

(d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

Order shall be binding: Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company. [Section 245(6)]

Punishment for non-compliance: Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may

extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees. [Section 245(7)]

Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

This Section is not applicable to Banking Company. Nothing contained in under section 245 of the companies Act, 2013 shall apply to a banking company.

According to Section 246, the provisions of sections 337 to 341 (both inclusive) shall apply mutatis mutandis, in relation to an application made to the Tribunal under section 241 or section 245.

- Penalty for fraud by officers (Section 337):
- Liability for proper account not kept (Section 338):
- Liability for fraudulent conduct of business (Section 339):
- Power of Tribunal to assess damages against delinquent directors, etc. (Section 340):
- Liability under Sections 339 and 340 to extend to partners or directors in Firms or Companies (Section 341).

Section 403 states that any document, required to be submitted, filed, registered or recorded, or any fact or information required or authorised to be registered under the Companies Act, 2013, shall be submitted, filed, registered or recorded within the time specified in the relevant provision on payment of such fee as may be prescribed. The fees is prescribed under the Companies (Registration Offices and fees) Rules, 2014.

However, in case of failure to submit, file or register or record the above stated documents, within the period provided in the relevant section, it may, without prejudice to

any other legal action or liability under the Companies Act, 2013, be submitted, filed, registered or recorded as the case may be :-

(a) In case of documents provided under Section 92 or 137 [First proviso to Section 403]

- after expiry of the period so provided under Section 92 or 137,
- on payment of such additional fee as may be prescribed –

(i) which shall not be less than one hundred rupees per day, and

(ii) different amounts may be prescribed for different classes of companies.

(b) In case of any other documents [Second proviso to Section 403]:-

- after expiry of the period so provided under relevant Section,
- on payment of such additional fee as may be prescribed and different fees may be prescribed for different classes of companies.

Continuous Default

Third proviso to Section 403(1) states that where there is default on two or more occasions in submitting, filing, registering or recording of the document, fact or information, it may, without prejudice to any other legal action or liability under the Companies Act, 2013, be submitted, filed, registered or recorded, as the case may be, on payment of a higher additional fee, as may be prescribed.

Punishment on Failure

Further, sub- section (2) of Section 403 states that where a company fails or commits any default to submit, file, register or record any document, fact or information under Section 403(1) before the expiry of the period specified in the relevant section, the company and the officers of the company who are in default, shall, without prejudice to the liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.

COMPANIES TO FURNISH INFORMATION OR STATISTICS

Power of Central government to Direct Companies to Furnish Information or Statistics

Section 405(1) of the Companies, Act, 2013 states that the Central Government may, by order, require companies or any class of companies, to furnish such information or statistics with regard to their or its constitution or working, and within such time, as may be specified in the order.

Every such order shall be published in the Official Gazette and may be addressed to companies or to any class of companies, in such manner, as the Central Government may think fit and the date of such publication shall be deemed to be the date on which requirement for information or statistics is made on such companies or class of companies, as the case may be.

For the purpose of satisfying itself that any information or statistics furnished by a company or companies in pursuance of any order stated above is correct and complete, the Central Government may by order require such company or companies to produce such records or documents in its possession or allow inspection thereof by such officer or furnish such further information as that Government may consider necessary [Sec 405(3)].

Failure to furnish information or statistics by the companies required by the Central government As per Section 405(4), if any company fails to comply with an order specified above, or furnishes any information or statistics which is incorrect or incomplete in any material respect, the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees and in case of continuing failure, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees.

In case of Foreign Companies

Where a foreign company carries on business in India, all references to a company in Section 405 this section shall be deemed to include references to the foreign company in relation, and only in relation, to such business.

The Central Government vide notification number S.O. 5622(E), dated the 2nd November, 2018 has directed that all companies, who get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of section 9 of the Micro, Small and Medium Enterprises Development Act, 2006 referred to as "Specified Companies", shall submit a half yearly return to the Ministry of Corporate Affairs stating the following:

(a) the amount of payment due; and

(b) the reasons of the delay.

In exercise of the powers conferred by section 405 of the Companies Act, 2013, the Central Government hereby vide MCA Notification No. S.O. 368 (E), dated 22nd January, 2019 has notified the Specified Companies (Furnishing of information about payment to micro and small enterprise suppliers) Order, 2019.

Under this order:

(i) Every specified Company had to file initial return in MSME Form I regarding details of all outstanding dues to Micro or small enterprises suppliers existing on the date of notification of this order (22nd January, 2019) within the prescribed period.

(ii) Every specified company have to file a half-yearly return as per MSME Form I by 31st October for the period from April to September and by 30th April for the period from October to March.

CHAPTER-5: BOARD PROCESS THROUGH SECRETARIAL STANDARDS

INTRODUCTION

Secretarial Standards are a codified set of good governance practices which seek to integrate, harmonize and standardise the diverse secretarial practices followed by companies with respect to conduct of Meetings and play indispensable role in enhancing the corporate culture and governance across the organisations.

According to Section 118 (10) of the Companies Act 2013, 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.

(In case of Specified IFSC Public Company and Private Company- Sub-section (10) of section 118 Shall not apply. - Notification Date 4th January, 2017)

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.

(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.

11.

(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.

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.

Some Good Practices in Convening Board Meetings

Maintaining Annual Calendar: An Annual calendar that schedules the Board and committee meetings and accordingly dates by which action required is accomplished is an effective planner for the year. The planner schedules in advance the events so that both the providers of inputs and receivers of inputs can plan their work systematically.

Directors' Time Commitment: Directors typically should allocate at least as much time for preparation as for the board meeting itself. With strategy retreats or "away days," travel, reading, meeting preparation time, and attendance at ad hoc and committee meetings, directors usually spend three or four days per month for a single, non-executive director position. The time spent to prepare for audit committee meetings is normally longer than that for most other board meetings. Directors should always evaluate the demands on their time before allowing themselves to be considered for an appointment. Directors should disclose any other board or external appointment to the nomination committee before their appointment, and regularly update the board after appointment.

Companies (Meetings of Board and its Powers) Fourth Amendment Rules, 2020

The Central Government notified the Companies (Meetings of Board and its Powers) Fourth Amendment Rules, 2020 to further amend the Companies (Meetings of Board and its Powers) Rules, 2014.

In the Companies (Meetings of Board and its Powers) Rules, 2014, in rule 4, in sub-rule (2), for the word "31st December, 2020", the word "30th June, 2021" shall be substituted.

Impact

MCA provides further relaxation till 30th June, 2021 in the requirement of holding Board meetings with physical presence of directors for approval of the restricted matters under Section 173(2) r/w Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 on account of current scenario due to COVID19 pandemic.

Accordingly, up to 30th June, 2021, following restricted matters can be dealt in board meetings held through video conferencing or other audio-visual means by duly ensuring compliance of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014. –

i. The approval of the annual financial statements;
ii. The approval of the Board's report;
iii. The approval of the prospectus;
iv. The Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the board under Section 134(1) of the Companies Act, 2013; and

The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

CHAPTER-6: ANNUAL REPORT

Transparency is a pivotal feature in the market based monitoring of companies and is central to shareholders' ability to exercise their ownership rights on an informed basis, which can help attract capital and maintain confidence in the capital markets.

Adequate disclosure also helps improve public understanding of the structure and activities of enterprises, corporate policies and performance with respect to environmental and ethical standards, and companies' relationships with the communities in which they operate. Disclosures are made both through the print media and the electronic media. Today corporates have to disclose mandatorily under various legislations such as: —

Disclosures by board

- Disclosures under the Companies Act, 2013 and Rules made thereunder;
- SEBI (LODR) Regulations, 2015 and other regulations applicable for Listed Companies;
- Secretarial Standard on Board's Report-SS4 (Recommendatory);
- Disclosure under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and rules made thereunder;
- Disclosures under other applicable Acts.

1. ANNUAL REPORT

- The annual report is a comprehensive report provided by most public companies to disclose their corporate activities over the past year.
- The report is typically issued to shareholders and other stakeholders who use it to evaluate the firm's performance including both operating and financial highlights.
- An annual report is interactive in nature to its shareholders. It generally starts with the board's message to shareholders in form of dedicated report. Their message intends to brief the shareholders about the key performance angles of the current year.
- It also demonstrates the growth prospects relative to its industry landscape in order to get shareholders' attention to the company's potential for excellence.

- Annual reports also give an account of corporate activities, legal highlights and corporate governance arena. In addition, the management discussion and analysis report emphasizes management commentary on risks and concerns of the business.
- Financial statements give financial details of the current year and the past year by showcasing year-on-year comparisons easier for a shareholder.
- In addition, the notes to financial statements describe the technical anomalies and assumptions taken in preparing the financial statements.
- The annual report also present changes in accounting policies, financial disclosure, capital projects, and other information/disclosures relevant to shareholders.

As per Regulation 34 of the SEBI (LODR), Regulations, 2015, the listed entity shall submit to the stock exchange and publish on its website-

(a) A copy of the annual report sent to the shareholders along with the notice of the annual general meeting not later than the day of commencement of dispatch to its shareholders;

(b) In the event of any changes to the annual report, the revised copy along with the details of and explanation for the changes shall be sent not later than 48 hours after the annual general meeting.

Such annual report shall contain the following:

(a) Audited financial statements i.e. balance sheet, profit and loss account etc, and Statement on Impact of Audit Qualifications as stipulated in regulation 33(3)(d), if applicable;

(b) Consolidated financial statements audited by its statutory auditors;

(c) Cash flow statement presented only under the indirect method as prescribed in Accounting Standard-3 or Indian Accounting Standard 7, as applicable, specified in Section 133 of the Companies Act, 2013 read with relevant rules framed thereunder or as specified by the Institute of Chartered Accountants of India, whichever is applicable;

(d) Directors Report;

(e) Management discussion and analysis report - either as a part of directors report or addition thereto;

(f) For the top one thousand listed entities based on market capitalization, a business responsibility report describing the initiatives taken by the listed entity from an environmental, social and governance perspective, in the format as specified by the Board from time to time.

Further it is provided that the annual report shall contain any other disclosures specified in Companies Act, 2013 along with other requirements as specified in Schedule V of SEBI (LODR) Regulations, 2015.

As per SEBI (LODR) Regulations, 2015, the annual report shall contain the following additional disclosures:

A. Related Party Disclosure

1. The listed entity which has listed its non-convertible securities shall make disclosures in compliance with the Accounting Standard on "Related Party Disclosures".

2. Disclosures of transactions of the listed entity with any person or entity belonging to the promoter/ promoter group which hold(s) 10% or more shareholding in the listed entity, in the format prescribed in the relevant accounting standards for annual results.

3. The above disclosures shall not be applicable to listed banks.

B. Management Discussion and Analysis

1. This section shall include discussion on the following matters within the limits set by the listed entity's competitive position:

(a) Industry structure and developments;

(b) Opportunities and Threats;

(c) Segment-wise or product-wise performance;

(d) Outlook;

(e) Risks and concerns;

(f) Internal control systems and their adequacy;

(g) Discussion on financial performance with respect to operational performance;

(h) Material developments in Human Resources / Industrial Relations front, including number of people employed;

(i) Details of significant changes (i.e. change of 25% or more as compared to the immediately previous financial year) in key financial ratios, along with detailed explanations therefor, including:

(i) Debtors Turnover

(ii) Inventory Turnover

(iii) Interest Coverage Ratio

(iv) Current Ratio

(v) Debt Equity Ratio

(vi) Operating Profit Margin (%)

(vii) Net Profit Margin (%)

or sector-specific equivalent ratios, as applicable.

(j) Details of any change in Return on Net Worth as compared to the immediately previous financial year along with a detailed explanation thereof.

2. Disclosure of Accounting Treatment:

Where in the preparation of financial statements, a treatment different from that prescribed in an Accounting Standard has been followed, the fact shall be disclosed in the financial statements, together with the management's explanation as to why it believes such alternative treatment is more representative of the true and fair view of the underlying business transaction.

C. Corporate governance Report

The following disclosures shall be made in the section on the corporate governance of the annual report.

(1) A brief statement on listed entity's philosophy on code of governance.

(2) Board of Directors:

(a) composition and category of directors (e.g. promoter, executive, non-executive, independent non- executive, nominee director - institution represented and whether as lender or as equity investor);

(b) attendance of each director at the meeting of the board of directors and the last annual general meeting;

(c) number of other board of directors or committees in which a directors is a member or chairperson, and with effect from the Annual Report for the year ended 31st March 2019, including separately the names of the listed entities where the person is a director and the category of directorship;

(d) number of meetings of the board of directors held and dates on which held;

(e) disclosure of relationships between directors inter-se;

(f) number of shares and convertible instruments held by non- executive directors;

(g) web link where details of familiarisation programmes imparted to independent directors is disclosed;

(h) A chart or a matrix setting out the skills/expertise/competence of the board of directors specifying the following:

(i) With effect from the financial year ending March 31, 2019, the list of core skills/expertise/ competencies identified by the board of directors as required in the context of its business(es) and sector(s) for it to function effectively and those actually available with the board; and

(ii) With effect from the financial year ended March 31, 2020, the names of directors who have such skills / expertise/ competence.

(i) confirmation that in the opinion of the board, the independent directors fulfill the conditions specified in these regulations and are independent of the management;

(j) detailed reasons for the resignation of an independent director who resigns before the expiry of his/ her tenure along with a confirmation by such director that there are no other material reasons other than those provided.

(3) Audit Committee:

(a) brief description of terms of reference;

(b) composition, name of members and chairperson;

(c) meetings and attendance during the year.

(4) Nomination and Remuneration Committee:

(a) brief description of terms of reference;

(b) composition, name of members and chairperson;

(c) meeting and attendance during the year;

(d) performance evaluation criteria for independent directors.

(5) Stakeholders' Relationship Committee:

(a) name of the non-executive director heading the committee;

(b) name and designation of the compliance officer;

(c) number of shareholders' complaints received during the financial year;

(d) number of complaints not solved to the satisfaction of shareholders;

(e) number of pending complaints.

(5A) Risk Management Committee:

(a) brief description of terms of reference;

(b) composition, name of members and chairperson;

(c) meetings and attendance during the year;

(6) Remuneration of Directors:

(a) all pecuniary relationship or transactions of the non-executive directors vis-a-vis the listed entity shall be disclosed in the annual report;

(b) criteria of making payments to non-executive directors. Alternatively, this may be disseminated on the listed entity's website and reference drawn thereto in the annual report;

(c) disclosures with respect to remuneration: in addition to disclosures required under the Companies Act, 2013, the following disclosures shall be made:

(i) all elements of remuneration package of individual directors summarized under major groups, such as salary, benefits, bonuses, stock options, pension etc;

(ii) details of fixed component and performance linked incentives, along with the performance criteria;

(iii) service contracts, notice period, severance fees;

(v) stock option details, if any and whether issued at a discount as well as the period over which accrued and over which exercisable.

(7) General body meetings:

(a) location and time, where last three annual general meetings held;

(b) whether any special resolutions passed in the previous three annual general meetings;

(c) whether any special resolution passed last year through postal ballot – details of voting pattern;

(d) person who conducted the postal ballot exercise;

(e) whether any special resolution is proposed to be conducted through postal ballot;

(f) procedure for postal ballot.

(8) Means of communication:

(a) quarterly results;

(b) newspapers wherein results normally published;

(c) any website, where displayed;

(d) whether it also displays official news releases; and

(e) presentations made to institutional investors or to the analysts.

(9) General shareholder information:

(a) annual general meeting - date, time and venue;

(b) financial year;

(c) dividend payment date;

(d) the name and address of each stock exchange(s) at which the listed entity's securities are listed and a confirmation about payment of annual listing fee to each of such stock exchange(s);

(e) stock code;

(f) market price data- high, low during each month in last financial year;

(g) performance in comparison to broad-based indices such as BSE Sensex, CRISIL Index etc;

(h) in case the securities are suspended from trading, the directors report shall explain the reason thereof;

(i) registrar to an issue and share transfer agents;

(j) share transfer system;

(k) distribution of shareholding;

(l) dematerialization of shares and liquidity;

(m) outstanding Global Depository Receipts or American Depository Receipts or warrants or any convertible instruments, conversion date and likely impact on equity;

(n) commodity price risk or foreign exchange risk and hedging activities;

(o) plant locations;

(p) address for correspondence;

(q) list of all credit ratings obtained by the entity along with any revisions thereto during the relevant financial year, for all debt instruments of such entity or any fixed deposit programme or any scheme or proposal of the listed entity involving mobilization of funds, whether in India or abroad.

(10) Other Disclosures:

(a) disclosures on materially significant related party transactions that may have potential conflict with the interests of listed entity at large;

(b) details of non-compliance by the listed entity, penalties, strictures imposed on the listed entity by stock exchange(s) or the board or any statutory authority, on any matter related to capital markets, during the last three years;

(c) details of establishment of vigil mechanism/ whistle blower policy, and affirmation that no personnel has been denied access to the audit committee;

(d) details of compliance with mandatory requirements and adoption of the non-mandatory requirements;

(e) web link where policy for determining 'material' subsidiaries is disclosed;

(f) web link where policy on dealing with related party transactions;

(g) disclosure of commodity price risks and commodity hedging activities;

(h) details of utilization of funds raised through preferential allotment or qualified institutions placement as specified under Regulation 32 (7A);

(i) a certificate from a Company Secretary in practice that none of the directors on the board of the company have been debarred or disqualified from being appointed or continuing as directors of companies by the Board/Ministry of Corporate Affairs or any such statutory authority;

(j) where the board had not accepted any recommendation of any committee of the board which is mandatorily required, in the relevant financial year, the same to be disclosed along with reasons thereof: Provided that the clause shall only apply where recommendation of / submission by the committee is required for the approval of the Board of Directors and shall not apply where prior approval of the relevant committee is required for undertaking any transaction under these Regulations;

(k) total fees for all services paid by the listed entity and its subsidiaries, on a consolidated basis, to the statutory auditor and all entities in the network firm/network entity of which the statutory auditor is a part;

(l) disclosures in relation to the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:

(a) number of complaints filed during the financial year

(b) number of complaints disposed of during the financial year

(c) number of complaints pending as on end of the financial year

(m) disclosure by listed entity and its subsidiaries of 'Loans and advances in the nature of loans to firms/companies in which directors are interested by name and amount'. Provided that this requirement shall be applicable to all listed entities except for listed banks.

(11) Non-compliance of any requirement of corporate governance report of sub-paras (2) to (10) above, with reasons thereof shall be disclosed.

(12) The corporate governance report shall also disclose the extent to which the discretionary requirements as specified in Part E of Schedule II have been adopted.

(13) The disclosures of the compliance with corporate governance requirements specified in regulation 17 to 27 and clauses (b) to (i) of sub-regulation (2) of regulation 46 shall be made in the section on corporate governance of the annual report.

F. Disclosures with respect to demat suspense account/ unclaimed suspense account

The listed entity shall disclose the following details in its annual report, as long as there are shares in the demat suspense account or unclaimed suspense account, as applicable :

(a) aggregate number of shareholders and the outstanding shares in the suspense account lying at the beginning of the year;

(b) number of shareholders who approached listed entity for transfer of shares from suspense account during the year;

(c) number of shareholders to whom shares were transferred from suspense account during the year;

(d) aggregate number of shareholders and the outstanding shares in the suspense account lying at the end of the year;

(e) that the voting rights on these shares shall remain frozen till the rightful owner of such shares claims the shares.

- **Statement of deviation(s) or variation(s):**

As per Regulation 32 of SEBI(LODR) Regulations, 2015, The listed entity shall submit to the stock exchange the following statement(s) on a quarterly basis for public issue, rights issue, preferential issue etc:

(a) indicating deviations, if any, in the use of proceeds from the objects stated in the offer document or explanatory statement to the notice for the general meeting, as applicable;

(b) indicating category wise variation (capital expenditure, sales and marketing, working capital etc.) between projected utilisation of funds made by it in its offer document or explanatory statement to the notice for the general meeting, as applicable and the actual utilisation of funds.

The statement(s) shall be continued to be given till such time the issue proceeds have been fully utilised or the purpose for which these proceeds were raised has been achieved and shall be placed before the audit committee for review and after such review, shall be submitted to the stock exchange(s).

The listed entity shall furnish an explanation for such variation in the directors' report in the Annual Report.

The listed entity shall prepare an annual statement of funds utilized for purposes other than those stated in the offer document/prospectus/notice, certified by the statutory

auditors of the listed entity, and place it before the audit committee till such time the full money raised through the issue has been fully utilized.

Where the listed entity has appointed a monitoring agency to monitor utilisation of proceeds of a public issue or rights issue or preferential issue or qualified institutions placement, the listed entity shall submit to the stock exchange(s) any comments or report received from the monitoring agency within forty-five days from the end of each quarter.

Where the listed entity has appointed a monitoring agency to monitor the utilisation of proceeds of public issue or rights issue or preferential issue or qualified institutions placement, the monitoring report of such agency shall be placed before the audit committee on a quarterly basis, promptly upon its receipt.

Explanation —For the purpose of sub-regulations (6) and (7), "monitoring agency" shall mean the monitoring agency as specified in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Where an entity has raised funds through preferential allotment or qualified institutions placement, the listed entity shall disclose every year, the utilization of such funds during that year in its Annual Report until such funds are fully utilized.

Documents & Information to shareholders

According to Regulation 36 of SEBI (LODR) the listed entity shall send the annual report in the following manner to the shareholders:

(a) Soft copies of full annual report to all those shareholder(s) who have registered their email address(es) either with the listed entity or with any depository;

(b) Hard copy of statement containing the salient features of all the documents, as prescribed in Section 136 of Companies Act, 2013 or rules made thereunder to those shareholder(s) who have not so registered;

(c) Hard copies of full annual reports to those shareholders, who request for the same.

The listed entity shall send annual report to the holders of securities, not less than twenty-one days before the annual general meeting.

2. BOARD'S REPORT

The Board's Report is the most important means of communication by the Board of Directors of a company with its shareholders. It is a comprehensive document which serves to inform the shareholders about the performance and various other aspects of the company, its major policies, relevant changes in management, future programmes of expansion, modernization and diversification, capitalization or reserves, etc. The Board's Report enables not only the shareholders but also the lenders, bankers, government and the public to make an appraisal of the company's performance and provides an insight into the future growth and profitability of the company.

The Companies Act, 2013 is based on enhanced disclosures and transparency. The Board's Report is a document, preparation of which requires thorough understanding of the subject. The Act requires the Board of Directors to disclose on various parameters including the risk management, board evaluation, implementation of Corporate Social Responsibility, a statement of declaration given by independent directors. The Secretarial Audit Report is also required to be annexed to the Board's Report.

It is mandatory for the Board of Directors of every company to present financial statement to the shareholders along with its report, known as the "Board's Report" at every annual general meeting. Apart from giving a complete review of the performance of the company for the year under report, material changes till the date of the report, the report highlights the significance of various national and international developments which can have an impact on the business and indicates the future strategy of the company. The Board's Report enables shareholders, lenders, bankers, government, prospective investors, all the stakeholders and the public to make an appraisal of the company's performance and reflects the level of corporate governance in the company.

Practical Issues

The Board's Report is prepared by Secretarial Department under the supervision and guidance of Company Secretary. It is of utmost importance for Company Secretary of a company that when new financial year begins, he sends to all branches of business, finance, accounts etc.

The Board's Report is prepared by Secretarial Department under the supervision and guidance of Company Secretary. It is of utmost importance for Company Secretary of a company that when new financial year begins, he sends to all branches of business, finance, accounts etc.

A detailed "To Do List" that these branches of business must follow during the financial year. It should also consist of instruction that as and when any significant event or happening takes place that potentially has bearing on company's business, operations, future viability, profits etc, it must be reported forthwith. This will enable to make timely disclosure within 24 hours, if the event is covered u/r 30 of SEBI (LODR), 2015. Else, a noting will go to the AGM folder for reference when the Annual Report is being finalized.

Getting regular inputs and collecting them in AGM folder is important for ensuring preparation of an exhaustive and complete Board's Report without missing any reportable event. Every CS should inculcate the habit and remember that preparation of Annual Report / Board's Report is an ongoing project throughout the year. When the year is about to close or soon thereafter, a reminder should also go.

The matters to be included in the Board's Report have been specified in Section 134 of the Companies Act, 2013 and Rule 8 of the Companies (Accounts) Rules, 2014. Apart from this, under Sections 67, 92, 129, 131, 135,

149, 160, 168, 177, 178, 188, 197, 204 of the Companies Act, 2013, relevant information has to be disclosed in the Board's Report. The Board's Report of companies whose shares are listed on a stock exchange must include additional information as specified in the SEBI (LODR) Regulations, 2015.

Secretarial Standard on Report of the board of Directors" (SS-4)

The "Secretarial Standard on Report of the Board of Directors" (SS-4), formulated by the Secretarial Standards Board (SSB) of the Institute of Company Secretaries of India (ICSI) and issued by the Council of the ICSI, has been effective from 1st October, 2018. Adherence to SS-4 is recommendatory.

SS-4 prescribes a set of principles for making disclosures in the Report of the Board of Directors of a company and matters related thereto. SS-4 is in conformity with the provisions of the Companies Act, 2013.

This Standard is in conformity with the provisions of the Act. However, if due to subsequent changes in the Act, any part of this Standard becomes inconsistent with the Act, the provisions of the Act shall prevail.

For example, SS-4 provides that even if no amount is proposed to be transferred to reserves, or if no dividend has been recommended by the Board, a statement to that effect should be included in the Board's Report.

The purpose of this requirement is to ensure the inclusion of certain important information that should be presented to the stakeholders in a single document.

The lesson sets out the explanations, procedures and practical aspects in respect of the provisions contained in SS-4 to facilitate compliance thereof by the stakeholders.

In addition to the disclosure requirements prescribed in this Standard, some sector specific Regulations/ Guidelines may require additional disclosures to be made in the Board's Report/Annual Report of companies operating in specific sectors such as Public Sector Undertakings (PSUs), Insurance Companies, Non Banking Financial Companies, Housing Finance Companies etc. Hence, such companies should make requisite disclosures in accordance with applicable sector specific Regulations/Guidelines in its Board's Report/Annual Report.

Disclosures under Section 134(3)

Section 134 of the Act enjoins upon the Board a responsibility to make out its report to the shareholders and attach the said report to financial statements laid before the shareholders at the annual general meeting, in pursuance of Section 129 of the Act.

The Board's Report shall be prepared based on the stand alone financial statements 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.

In terms of Sub-section (3) of Section 134, the Board's Report shall include:

(a) The web address, if any, where annual return referred to in sub-section (3) of section 92 has been placed;

(b) Number of meetings of the board: Board's Report should contain total number of Board Meetings held during the year;

(c) Directors' Responsibility Statement: Section 134(5) of the Act specifically provides that the Directors' Responsibility Statement shall set out the following affirmations:

(i) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;

(ii) 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;

(iii) 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;

(iv) the directors had prepared the annual accounts on a going concern basis; and

(v) 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; and

(vi) 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.

Explanation – 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.

(ca) details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central government:

- Nature of Fraud with description;
- Approximate Amount involved;
- Parties involved, if remedial action not taken; and

- Remedial action taken.

The auditor shall report the matter related to details of frauds under sub-section (12) of section 143 to the Central Government involving an amount of Rupees One Crore or above.

(d) A statement on declaration given by independent directors under sub-section (6) of section 149: Every Independent Director shall give a declaration that he meets the criteria of independence laid down in sub- section (6) of section 149, which is to be given by him at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director. The Board's Report should contain a statement to the effect that the independent directors have given such a declaration.

(e) 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: The Board' Report of companies which are required to constitute Nomination and Remuneration Committee shall include:

- criteria for determining qualifications,
- positive attributes and independence of a director, and
- recommend to the Board a policy relating to the remuneration of directors, Key Managerial Personnel and other employees.

Section 178(4) provides that the Nomination and Remuneration Committee shall formulate and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. Such policy shall ensure that –

(a) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;

(b) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and

(c) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

Such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along with the web address of the policy, if any, shall be disclosed in the Board's Report.

(f) Explanations or comments by the board on every qualification, reservation or adverse remark or disclaimer made –

 Auditor's report under section 143: Clause (h) of Section 143(3) provides that the auditor's report shall state any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith.

 Cost Audit Report under section 148: Section 148(5) of the Act and Rule 6 of the Companies (Cost Records and Audit) Rules, 2014 provides that the rights, duties and obligations applicable to the Auditor under Chapter X of the Act shall mutatis mutandis apply to a cost auditor appointed under Section 148 of the Act. It also provides that the cost auditor shall submit his report to the Board of Directors of the company.

 Secretarial Audit Report under Section 204(3): Section 204(3) of the Act provides that the Board of Directors, in their report made in terms of sub-section (3) of section 134, shall explain in full any qualification or observation or other remarks made by the Company Secretary in practice in his secretarial audit report. Thus, the Board should state detailed explanation in its Board's Report for all the observations and qualifications given by the Secretarial auditor in his secretarial audit report including the reasons for such material deviations and reasons that led to such deviations.

(g) Particulars of loans, guarantees or investments under section 186: The particulars of loans given, guarantees provided or investments in securities and acquisition made during the year under section 186 of the Act should be attached to the Board's Report.

(h) Particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the prescribed form; The Report of the Board shall contain the details of contracts or arrangements entered with Related Parties as referred to in Section 188 (1) in Form AOC-2 pursuant to Rule 8(2) of Companies (Accounts) Rules, 2014.

(i) The state of the company's affairs: Information and data which are usually considered pertinent and necessary for the purpose of a proper appreciation of the state of affairs of a company relating to the period for which the financial statements have been prepared must be disclosed in the report. Relevant changes which have occurred, as compared to the

position as stated in the previous year's Board's Report which have a material bearing on the performance of the company should be indicated in the Board's Report.

The figures of the previous year relating to achievement of targets of production and sales should also be given in the Board's Report to facilitate comparison and the reasons for any substantial deviation there from should be explained in brief.

(j) The amounts, if any, which it proposes to carry to any reserves: A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. If no amount is proposed to be transferred to reserves, a statement to that effect shall be included.

(k) The amount, if any, which it recommends should be paid by way of dividend: The Board's Report shall disclose the amount per share and the percentage which the Board recommends to be paid as dividend under section 123 of the Act.

(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: The Board's Report should include material changes and commitments, if any, affecting the financial position of the company and occurring between the date of balance sheet and the date of the report. The Directors' Report should, therefore, contain material changes pertaining to post-financial statement events impacting the operations and performance of the Company.

(m) The conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as prescribed:

Rule 8(3) of the Companies (Accounts) Rules, 2014, prescribes the following details:

A. Conservation of energy

(i) the steps taken or impact on conservation of energy;

(ii) the steps taken by the company for utilising alternate sources of energy;

(iii) the capital investment on energy conservation equipment.

b. Technology absorption

(i) the efforts made towards technology absorption;

(ii) the benefits derived like product improvement, cost reduction, product development or import substitution;

(iii) in case of imported technology (imported during the last three years reckoned from the beginning of the financial year):

(a) the details of technology imported;

(b) the year of import;

(c) whether the technology been fully absorbed;

(d) if not fully absorbed, areas where absorption has not taken place, and the reasons thereof; and

(iv) the expenditure incurred on Research and Development.

C. Foreign exchange earnings and Outgo: The Foreign Exchange earned in terms of actual inflows during the year and the Foreign Exchange outgo during the year in terms of actual outflows.

(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: The company should provide about the overall risk management framework of the company, whether it has constituted risk management committee, the risk management policy of the company, the possible risks and steps taken to mitigate those risks in this section.

(o) Details about the policy developed and implemented by the company on Corporate Social Responsibility initiatives taken during the year: Section 135(4) of the Act provides that the Board of every company having net worth of Rs. 500 Crores or more or turnover of Rs. 1,000 Crores or more or net profit of Rs. 5 Crores or more during the immediately preceding financial year shall disclose contents of Corporate Social Policy in its report and also place it on the company's website.

Further, Section 135(2) requires that the composition of the CSR Committee shall be disclosed in the Board's Report.

The Board of every company referred to in Section 135 (1) of the Companies Act, 2013, 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.

However, 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.

Preparation of CSR Report

It is mandatory to include an Annual Report on CSR in the prescribed format, in the Board's report of the Company The report containing the details of CSR Activities undertaken by the company and contents of CSR policy shall be made available on Company's website.

- Directors Report:

The Company shall annex with its Board Report an annual report on CSR containing particulars specified in Annexure I (for F.Y. Commenced Prior To 1st day of April, 2020) or Annexure II (w.e.f. F.Y. Commencing on or after 1st day of April, 2020), as applicable.

- In case of a Foreign Company:

The Balance sheet filed u/s 381(1) (b) of the Companies Act, 2013 shall contain an annual report on CSR containing particulars specified in Annexure I (for F.Y. Commenced prior to 1st day of April, 2020) or Annexure II (w.e.f. F.Y. Commencing on or after 1st day of April, 2020), as applicable.

Impact Assessment for big CSR projects

- Companies with average CSR obligation of 10 Crore or more in the three immediately preceding financial years shall undertake impact assessment through an independent agency for projects of Rs.1 crore or more which have been completed not less than 1 year before undertaking the impact study.

- The impact assessment reports shall be placed before the Board and shall be annexed to the annual report on CSR.

- 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 ` 50 Lakh, whichever is less.

(p) board evaluation: Section 134 of the Act read with Rule 8(4) of the Companies (Accounts) Rules, 2014 provides that 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 of the performance of the Board, its Committees and of individual directors has been made.

APPROVAL OF THE BOARD'S REPORT

The Board's Report should be considered, approved and signed at a meeting of the Board duly convened or held through video conferencing or other audio visual means.

Note: The MCA vide Notification dated June 15, 2021 has omitted Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 which was related to the matters not to be dealt with in a meeting through video conferencing or other audio-visual means.

Accordingly, with the said amendment, now the approval of the Board's report can be considered in a Board Meeting held through video conferencing or other audio-visual means.

Signing of board's Report - Section 134(6)

The Board's Report and any annexures thereto under section 134(3) shall be signed by the 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.

Circulation of the board's Report

The copy of Board's Report shall be issued, circulated or published along with a signed copy of every financial statement, including consolidated financial statement if any, all the notes annexed to or forming part of such financial statement and the Auditors' Report . [Section 134(7)]

RIGHT OF MEMBERS TO RECEIVE COPIES OF FINANCIAL STATEMENTS, BOARD'S REPORT, ETC.

Section 136 of the Act provides that, a copy of the financial statements, including consolidated financial statements, 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,
- every trustee for the debenture holder of any debentures issued by the company, and
- all persons other than such member or trustee, being the person so entitled, not less than 21 clear days before the date of the meeting.

However, 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

(a) having, if the company has no share capital, not less than ninety five per cent. of the total voting power exercisable at the meeting.

Exceptions:

In case of section 8 companies, the said documents shall be sent to the members not less than fourteen clear days before the date of the annual general meeting.

In the case of a listed company, it 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.

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.

FILING OF THE BOARD'S REPORT

Section 137(1) of the Act provides that copies of financial statement along with all documents required to be annexed should be filed with the Registrar of Companies within 30 days along with the prescribed fees, after the financial statements, including consolidated financial statements have been adopted at the annual general meeting. The Board's Report has to be attached to the financial statements.

In case a company does not hold an annual general meeting in any year, a statement of facts and reasons along with financial statement and attachment shall be filed with Registrar.

Pursuant to the provisions of section 117/ 179 of the Companies Act, and the Rules made thereunder the resolution for approving the Board's Report is also required to be filed to the Registrar within 30 days from the approval by the Board in MGT-14. (The Central Government vide its notification dated 05th June 2015 exempted Private Limited Companies from filing of the above stated approval resolutions with the Registrar of Companies).

Third Proviso of Section 137(1) of the Act also provides that a One Person Company should 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 one hundred eighty days from the closure of the financial year.

Fourth Proviso of Section 137(1) of the Act provides that, 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.

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 of Section 137(1) of the Act, 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.

3. ANNUAL RETURN

Annual Return is a significant document for the stakeholders of a company as it provides in a nutshell, very comprehensive information about various aspects of a company. It is perhaps the most important document required to be filed by every company with the Registrar of Companies. Apart from the Financial Statements, this is the only document to be compulsorily filed with the Registrar every year irrespective of any events / happenings in the company. While the Financial Statements give information on the financial performance of a company, it is the Annual Return which gives extensive disclosure and greater insight into the non-financial matters of the company and the people behind management of the company.

Objective of filing Annual Return

The basic purpose behind filing of Annual Returns with the Registrar is to provide Annual information in respect of company, promoters, members, meetings, remuneration of directors and key managerial persons etc., to the Registrar of Companies/shareholders/other stakeholders. Filing of Annual returns yearly to the Registrar of Companies is the responsibility of the management of the Company. It helps stakeholders to ensure that the company is administered in a proper way in the interest of its members and creditors.

Applicability

As per section 92 of the Companies Act, 2013, every company is required to prepare the 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 containing the particulars as they stood on the close of the financial year.

Annual Return is to be filed with the Registrar within 60 days from the date on which Annual General Meeting (AGM) is actually held or from the last day on which AGM should have been held.

Contents of Annual Return

Annual Return shall contain the following particulars in consonance with the Section 92(1) of the Act:

(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) its indebtedness;

(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 indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them; and

(k) such other matters as may be prescribed.

Signing of Annual Return

Under section 92(1) of the Act, the Annual Return is required to be signed both by a director and the Company Secretary, or where there is no Company Secretary, by a Company Secretary in Practice.

The Annual Return of One Person Company and Small Company shall be signed by the Company Secretary or where there is no company secretary, by the director of the company. The Act authorises the Central Government to prescribe abridged form of annual return for "One Person Company, Small Company and such other class or classes of

companies as may be prescribed. Accordingly, Rule 11(1) has prescribed separate Annual Return for these companies.

Certification of Annual Return

Certification of Annual Return under sub-section (2) of section 92 of the Act read with rule 11(2) of the Companies (Management and Administration) Rules, 2014, the Annual Return of a listed company or of a company having a paid-up share capital of Rs. 10 Crores or more or turnover of Rs. 50 Crores or more shall be certified by a Company Secretary in Practice in the Form No. MgT-8.

The certificate shall state that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of this Act.

For the purpose of certification, PCS should carry out a scrutiny of the data available and check the correctness of the same. The PCS should be prudent in understanding the events and its impact and consequences, while certifying the same. For ensuring the correctness of information contained in the Annual Return, the primary source documents should be looked into. While doing the detailed scrutiny, he may rely on certified copies of the resolutions, forms, agreements and also certificates from the management.

According to Section 92(3), 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 (Notified on 28.08.2020).

Every company is required to file with the Registrar a copy of the annual return, within sixty days from the date on which the AGM is held or where no AGM is held in any year within sixty days from the date on which the AGM should have been held together with the statement specifying the reasons for not holding the AGM in Form MgT-7, with such fees or additional fees as may be prescribed. From the financial year 2020-21 onwards, One Person Company and Small Company shall file return in Form MgT-7A.

For foreign company the filing is to be done in E-Form FC-4.

Active Company Tagging Identities and verification (ACTIVE)-IMPORTANT

Rule 25A of the Companies (Incorporation) Rules, 2014

Every company incorporated on or before the 31st December, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE (Active Company Tagging Identities and Verification) on or before 15.06.2019.

Provided that any company which has not filed its due financial statements under section 137 or due annual returns under section 92 or both with the Registrar shall be restricted from filing e-Form-ACTIVE, unless such company is under management dispute and the Registrar has recorded the same on the register:

Provided further that companies which have been struck off or are under process of striking off or under liquidation or amalgamated or dissolved, as recorded in the register, shall not be required to file e-Form ACTIVE:

Provided also that in case a company does not intimate the said particulars, the Company shall be marked as "ACTIVE-non-compliant" on or after 16th June, 2019 and shall be liable for action under sub-section (9) of section 12 of the Act:

Provided also that no request for recording the following event based information or changes shall be accepted by the Registrar from such companies marked as "ACTIVE-non-compliant", unless "e-Form ACTIVE" is filed –

(i) SH-07 (Change in Authorized Capital);

(ii) PAS-03 (Change in Paid-up Capital);

(iii) DIR-12 (Changes in Director except in case of :

(a) cessation of any director; or

(b) appointment of directors in such company where the total number of directors are less than the minimum number provided in clause (a) of sub-section (1) of section 149 on account of disqualification of all or any of the director under section 164;

(c) appointment of any director in such company where DINs of all or any its director(s) have been deactivated;

(d) appointment of director(s) for implementation of the order passed by the Court or Tribunal or Appellate Tribunal under the provisions of the Companies Act, 2013 or under the Insolvency and Bankruptcy Code, 2016).

(iv) INC-22 (Change in Registered Office);

(v) INC-28 (Amalgamation, de-merger).

Where a company files "e-Form ACTIVE", on or after 16th June, 2019, the company shall be marked as "ACTIVE Compliant", on payment of fee of ten thousand rupees.

CHAPTER-7: INSPECTION, INQUIRY AND INVESTIGATION

1. INTRODUCTION

In case of company, Shareholders and Management are different. The shareholders elect the directors to run the business. The directors are given full power of running the affairs of the company. Sometimes there may be abuse of power by directors or officers of company and it may lead to loss of stakeholders. Therefore, it became imperative for the Central Government to assume certain powers to investigate the affairs of the company in appropriate cases particularly where there was reason to believe that the business of the company was being conducted with the intent to defraud its creditors or members or for a fraudulent or unlawful purpose, or in any manner oppressive to any of its members. Chapter XIV contains Sections 206 to 229 of the Companies Act, 2013 deals with the provisions relating to Inspection, Inquiry and Investigation into the affairs of company.

POWERS GIVEN UNDER COMPANIES ACT, 2013:

Authorities	Powers
Registrar under sections 206, 207, 208 & 209	Section 206 - Call for information and inspection of books of account, papers and explanations and order for inquiry, Section 207 – Conduct of Inspection and Enquiry, The

	Registrar have all the powers as are vested in a civil court. Section 208 – submission of inspection report, Section 209 -Search and seizure,
Inspector under sections 206, 207, 208,209 & 216	Section 206 - Call for information and inspection of books of account, papers and explanations and order for inquiry, Section 207 – Conduct of Inspection and Enquiry, The Registrar have all the powers as are vested in a civil court. Section 208 – submission of inspection report, Section 209 -Search and seizure Section 216 – To investigate on matters relating to company and its membership for determining ownership of company.
Central Government (CG) under sections 206, 210, 211, 212, 216 & 224	Section 206 – CG may authorize any statutory authority to carry out the Inspection of books of accounts of company, Section 210 - Investigate into affairs of company, Appointment of inspectors to investigate into affairs of the company and to report there on. Section 211 - Establishment of Serious Fraud Investigation Office (SFIO), Section 212 - Assignment the investigation into the affairs of company by SFIO Section 216 - Appointment of inspector to investigate on matters relating to company and its membership for determining ownership of company, Section 224 - Actions may be taken in pursuance of inspector's report
Regional director in section 206	Section 206 - Appoint inspector for inspection of books and papers of company
Tribunal under section 213, 221,	Section 213 -Pass an order for investigation into company's affairs in other cases,

222	Section 221 - for freezing of assets of company on inquiry and investigation, Section 222 -for imposing restrictions upon securities

POWER TO CALL FOR INFORMATION, INSPECT BOOKS AND CONDUCT INQUIRIES (SECTION 206 OF THE COMPANIES ACT, 2013)

Section 206 of the Companies Act, 2013 provides for the power to call for information, inspect books and conduct inquiries.

According to this section:

(i) Power of the Registrar to call for information, explanation or documents [Section 206 (1)]: According to section 206(1) of the Companies Act, 2013, where on scrutiny of any document filed by a company or on any information received by him, the Registrar is of the opinion that any further information or explanation or any further documents relating to the company is necessary, he may by a written notice require the company—

(a) to furnish in writing such information or explanation; or

(b) to produce such documents,

within such reasonable time, as may be specified in the notice.

(ii) Duty of the company and its officers [Section 206 (2)]: On the receipt of a notice under sub-section (1) of section 206, it shall be the duty of the company and its officers concerned to furnish such information or explanation to the best of their knowledge and power and to produce the documents to the Registrar within the time specified or extended by the Registrar Duty of past officers of the company: According to the proviso to sub-section (2) of section 206, where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

(iii) Additional written notice by the Registrar [Section 206 (3)]: The Registrar may by another written notice call on the company to produce for his inspection such further books of account, books, papers and explanations as he may require at such place and at such time as he may specify in the notice:

(a) If no information or explanation is furnished to the Registrar within the time specified under Section 206 (1); or

(b) If the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate; or

(c) If the Registrar is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and the information or documents do not disclose a full and fair statement of the information required.

Provided that, before any notice is served under this sub-section, the Registrar shall record his reasons in writing for issuing such notice.

(iv) Inquiry by the Registrar [Section 206 (4)]:

(a) The Registrar may call on the company to furnish in writing any information or explanation on matters specified in the order within such time as he may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard, if the Registrar is satisfied:

(1) on the basis of information available with or furnished to him; or

(2) on a representation made to him by any a person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act; or

(3) the grievances of investors are not being addressed,

(b) Before calling the company to furnish in writing any information or explanations and carrying out the inquiry, the Registrar has to inform the company of the allegations made against it by a written order.

(c) The Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar or an inspector appointed by it for the purpose to carry out the inquiry under this sub-section.

(d) It is further provided that where the business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447.

(v) Inspection by Central Government: The Central Government may, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an inspector appointed by it for the purpose [Section 206 (5)].

(vi) The Central Government may, having regard to the circumstances by general or special order, authorize any statutory authority to carry out the inspection of books of account of a company or class of companies [Section 206 (6)].

(vii) Failure to furnish information: If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company, who is in default shall be punishable with a fine which may extend to 1 lakh rupees and in the case of a continuing failure, with an additional fine which may extend to 500 rupees for every day after the first during which the failure continues [Section 206 (7)].

Note: The said provisions apply to the foreign company also [section 228 of the Companies Act, 2013].

Inquiry under section 206(1) of Companies Act, 2013 is purely fact finding in inquiry. It is only administrative decision and it is not necessary to give hearing to the company before ordering inquiry.

Following section can be summarized as;

Concerned authorities	Under the said circumstances	Have following Powers
Power of Registrar to call for information/explanation/production of documents under section 206 (1)	On scrutiny of any document filed by a company or on any information received by him, he is of the opinion that any further information or explanation or any further documents relating to the company is necessary	He may by a written notice require the company— (a) to furnish in writing such information (b) or explanation; or (c) to produce such documents,

Registrar may serve Additional written notice under section 206 (3)	(a) If no information or explanation is furnished, or (b) If on an examination of the documents furnished, he is of the opinion that the information or explanation furnished is inadequate; or (c) If he is satisfied on scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and the information or documents do not disclose a full and fair statement of the information required.	He may by another written notice call on the company to produce for his inspection such further books of account, books, papers and explanations as he may required.

3. CONDUCT OF INSPECTION AND INQUIRY (SECTION 207 OF THE COMPANIES ACT, 2013)

Section 207 of the Companies Act, 2013 provides for the conduct of inspection and inquiry as follows:

(i) Duty of director, officer or employee [Sub-Section (1)]: Where a Registrar or inspector calls for the books of account and other books and papers under sub section (1) of section 206, it shall be the duty of every director, officer or other employees of the company:

(a) to produce all such documents; and

(b) to furnish with such statements, information or explanations in such form as may require; and

(c) to render all assistance in connection with such inspection.

(ii) Powers of the Registrar or inspector [Sub-section (2) and (3)]:

(a) The Registrar or inspector making an inspection or inquiry under section 206 may, during the course of such inspection or inquiry, as the case may be,—

(1) make or cause to be made copies of books of account and other books and papers; or

(2) place or cause to be placed any marks of identification in such books in token of the inspection having been made.

(b) The Registrar or inspector making an inspection or inquiry shall have all the 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:—

(1) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or inspector making the inspection or inquiry;

(2) summoning and enforcing the attendance of persons and examining them on oath; and

(3) inspection of any books, registers and other documents of the company at any place.

(iii) Penalty for Contravention [sub-section (4)]: If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to 1 year and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees.

If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

4. REPORT ON INSPECTION MADE (SECTION 208 OF THE COMPANIES ACT, 2013)

Section 208 of the Companies Act, 2013 provides for the submission of the report on inspection made. According to this section:

The Registrar or inspector shall, after the inspection of the books of account or an inquiry under section 206 and other books and papers of the company under section 207, submit a report in writing to the Central Government. The registrar or inspector may recommend in report that there is the need of further investigation. The said recommendation has to be given with reasons in support.

After the inspection

- the inspector will submit his report to Central Government with recommendations of further investigations with reasons

Government can take suitable action on the report.

- If nothing serious is found, Government can close the file, or
- take further action as may be deemed fit.

Actually, this report has to be submitted to Regional Director (RD). [Powers delegated vide Notification F No. 3/76/2015-CL-II dated 31-12-2015]

If the punishment is less than two years, RD himself can sanction launching of prosecution. In other cases, he should forward report to Central Government for sanctioning prosecution.

5. SEARCH AND SEIZURE (SECTION 209 OF THE COMPANIES ACT, 2013)

Application to Special Court: Registrar or inspector on reasonable grounds to believe that books and papers relating to the affairs of the company may be destroyed, mutilated, altered, falsified or secreted, he can make an application to Special Court.

Power of special court to search and seize: The Special Court, may, by order, authorize it, to enter into the places or premises where books and papers are placed, to search the place and to seize the books and papers as necessary, after allowing the company to make copies.

Search and seizure must be according to provisions of Code of Criminal Procedure.

Return of seized papers: The seized papers must be returned within 180 days. The Registrar can take copies of any document or place identification marks on them before returning the books and papers. He can ask the papers again, if needed.

According to this section:

(i) Circumstances for seizure [Sub-section (1)]: Where, upon information in his possession or otherwise, the Registrar or inspector has reasonable ground to believe that the books and papers of

(a) a company, or relating to

(b) the key managerial personnel or

(c) any director or

(d) auditor or

(e) company secretary in practice (if the company has not appointed a company secretary),

-are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

(1) enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and

(2) seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

(ii) Period of seizure [Sub-section (2)]:

Original period of seizure: The Registrar or inspector shall return the books and papers seized under sub-section (1), as soon as may be, and in any case not later than 180th day after such seizure, to the company from whose custody or power such books or papers were seized.

Further period of seizure: The books and papers may be called for by the Registrar or inspector for a further period of 180 days by an order in writing if they are needed again.

(iii) Taking of copies, placing identification marks [second proviso to sub-section (2)]: The Registrar or inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

(iv) Applicability of the provisions of the Code of Criminal Procedure, 1973 [Sub-section (3)]: The provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures shall apply, mutatis mutandis, to every search and seizure made under this section.

Example 1: A group of creditors of Mac Trading Limited makes a complaint to the Registrar of Companies, Hyderabad alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records.

Here, according to the provisions, Registrar may enter and search the place where such books or papers are kept and seize them only after obtaining an order from the Special Court.

Since in the given question, Registrar entered the premises for the search and seizure of books of the company without obtaining an order from the Special Court, he is not authorized to seize the books of the Mac Trading Limited.

6. INVESTIGATION INTO AFFAIRS OF COMPANY (SECTION 210 OF THE COMPANIES ACT, 2013)

Section 210 of the Companies Act, 2013 provides for Investigation into affairs of company. According to this section:

(i) Investigation in the opinion of Central Government [Sub-section (1)]: Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company, it may order an investigation into the affairs of the company.

(ii) Investigation on the order by a court or the Tribunal [Sub-section (2)]: Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.

(iii) Appointment of inspectors [Sub-section (3)]: For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct.

According to the Companies (Inspection, investigation and inquiry) Rules, 2014:

(i) Applicant to pay security: The Central Government may before appointing an inspector under sub-section (3) of Section 210, require the applicant to give a security not exceeding 25,000 rupees for payment of the costs and expenses of investigation as per the criteria given in the said rule.

Sr. No.	Turnover as per previous year balance sheet (`)	Amount of security (`)
1	Turnover up to ` 50 crore	` 10,000
2	Turnover more than ` 50 crore and up to 200 crore	` 15,000
3	Turnover more than ` 200 crore	` 25,000

(ii) Refund of security to applicant: Further, the above referred security shall be refunded to the applicant if the investigation results in prosecution.

Example 2: Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture..

Here, the shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors. Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

7. ESTABLISHMENT OF SERIOUS FRAUD INVESTIGATION OFFICE (SECTION 211 OF THE COMPANIES ACT, 2013)

Section 211 of the Companies Act, 2013 provides for the establishment of Serious Fraud Investigation Office as under:

(i) Setting up of Serious Fraud Investigation Office (SFIO) [Section 211 (1)]: The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company.

(ii) Continuation of earlier SFIO: Until the SFIO as mentioned above is established, the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

(iii) Composition of SFIO [Section 211 (2)]: The SFIO shall be:

(a) Headed by a Director, and

(b) Consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in,—

(iv) Appointment of Director [Section 211 (3)]: The Central Government shall, by notification, appoint a Director in the SFIO, who shall be an officer not below the rank of a

Joint Secretary to the Government of India having knowledge and experience in dealing with matters relating to corporate affairs.

(v) Appointment of Experts Officers & Employees [Section 211 (4)]: The Central Government may appoint such experts and other officers and employees in the SFIO as it considers necessary for the efficient discharge of its functions under this Act.

According to Rule 3 of the Companies (Inspection, Investigation and Inquiry) Rules, 2014, the Central Government may appoint persons having expertise in the fields of investigations, cyber forensics, financial accounting, management accounting, cost accounting and any other fields as may be necessary for the efficient discharge of Serious Fraud Investigation Office (SFIO) functions under the Act.

(vi) Terms and conditions of service [Section 211 (5)]: The terms and conditions of service of Director, experts, and other officers and employees of the SFIO shall be such as may be prescribed

The terms and conditions of service of the above mentioned officers have been laid down in the Rule 4 of the Companies (Inspections, Investigations and Inquiry) Rules, 2014.

8. INVESTIGATION INTO AFFAIRS OF COMPANY BY SERIOUS FRAUD INVESTIGATION OFFICE (SECTION 212 OF THE COMPANIES ACT, 2013)

Section 212 of the Companies Act, 2013 provides for Investigation into affairs of Company by the Serious Fraud Investigation Office (SFIO).

(i) Assigning of investigation to SFIO by CG: According to section 212(1), where the Central Government -

(a) on receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government,

is of the opinion that it is necessary to investigate into the affairs of a company by the SFIO, the Central Government may, by order, assign the investigation into the affairs of the said company to the SFIO.

On receipt of such order, the Director, SFIO may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(ii) No other investigating agency of CG/ or any SG shall proceed with investigation where case is assigned to SFIO: Where any case has been assigned by the Central Government to the SFIO for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act. In case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to SFIO [Sub section (2)].

(iii) Submission of Report to CG: Where the investigation into the affairs of a company have been assigned by the Central Government to SIFO, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) and submit its report to the Central Government within such period as may be specified in the order [Sub section (3)]

(iv) Investigation by an investigating officer: The Director, SFIO shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217 [Sub section (4)]

(v) To provide all information, explanation, documents and assistance to the Investigating Officer: The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation [Sub section (5)]

(vi) Offences are cognizable and non-Bailable: As per sub-section (6), offences covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

However, a person, who, is

(a) under the age of sixteen years or

(b) is a woman or

(c) is sick or infirm,

may be released on bail, if the Special Court so directs.

Provided further that the Special Court shall not take cognizance of any offence referred in point (vi) above except upon a complaint in writing made by—

(a) the Director, SFIO; or

(b) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(vii) Granting of Bail: The limitation on granting of bail specified in sub section (6) above is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail [Sub section (7)].

(viii) Power to arrest: If any officer not below the rank of Assistant Director1 of SFIO authorized in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. [Sub section (8)]

(ix) Forward copy of order to SFIO: The officer authorized under sub-section (8) shall, immediately after arrest of such person under such sub-section (8)2, forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the SFIO in a sealed envelope, in such manner as may be prescribed and the SFIO shall keep such order and material for such period as may be prescribed. [Sub section (9)]

(x) Presented before Special Court/JM/MM: Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a Special Court or Judicial Magistrate,3 or a Metropolitan Magistrate as the case may be, having jurisdiction.

The period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Special Court or Magistrate's court. [Sub section (10)]

1Substituted for "If the Director, Additional Director or Assistant Director" by the Companies (Amendment) Act, 2019, w.e.f. 15-8-2019.

2Substituted for "the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (8)" by the Companies (Amendment) Act, 2019, w.e.f. 15-8-2019.

3Substituted for "Judicial Magistrate" by the Companies (Amendment) Act, 2019, w.e.f. 15-8-2019.

(xi) Submission of Interim Report to CG: The SFIO shall submit an interim report to the Central Government, if the Central Government so directs [Sub section (11)].

(xii) Submission of investigation report to CG: The SFIO shall submit the investigation report to the Central Government on completion of the investigation [sub section (12)].

(xiii) Receiving of copy of the investigation report by making an application to the court: Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court [Sub section (13)].

(xiv) CG may direct SFIO to initiate prosecution: On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the SFIO to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company [Sub section (14)].

(14A) Where the report under sub-section (11) or sub-section (12) states that fraud has taken place in a company and due to such fraud, any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property or cash and also for holding such director, key managerial personnel, other officer or any other person liable personally without any limitation of liability.4

Example 3– Mr. A a director of Pappu Ltd., received a car in gift from his supplier for giving him order in bulk quantity with higher rate than market. This fact was reported in the investigation report under sub-section (11) or sub-section (12), there CG may file an application before the Tribunal for appropriate orders to recover this car from Mr. A .

(xv) Filing of investigation Report with the special court: Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation

report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 [Sub section (15)].

(xvi) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by SFIO under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed [Sub section (16)].

(xvii)Providing of all information/documents to SFIO: In case SFIO has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the SFIO [Sub section (17) (a)].

(xviii) Sharing of information by SFIO: The SFIO shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State

4Inserted by the Companies (Amendment) Act, 2019, w.e.f. 15-8-2019.

Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law [Sub section (17) (b)].

Note: According to the Companies (Arrests in Connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 vide Notification G.S.R. 1062(E) dated 24th of August 2017, where any person has been guilty of any offence punishable under section 212 of the Act, he may be arrested as per the respective rules.

9. INVESTIGATION INTO COMPANY'S AFFAIRS IN OTHER CASES (SECTION 213 OF THE COMPANIES ACT, 2013)

Section 213 deals with the Investigation into Company's Affairs in other cases. According to this section, NCLT can order investigation in specified cases. Such order can be passed by NCLT only after giving reasonable opportunity of being heard to the concerned parties.

The Tribunal may, in case of company having a share capital, order for conduct of investigation on an application made by-

- 100 or more members, or

- members holding 1/10th of total voting powers

The Tribunal may, in case of company having no share capital, order for conduct of investigation on an application made by-

not less than one-fifth of the persons on the company's register of members

Tribunal may order on an application made by -

any other person or otherwise on the circumstances suggesting that -

- the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;
- persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or
- the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating

and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company to the calculation of the commission payable to a managing or other director, or the manager, of the company,

After giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector/s appointed by the Central Government and where such an order is passed by the Tribunal, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct.

Punishment in case of guilty: If after investigation, it is proved that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then-

(a) every officer of the company who is in default, and

(b) the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

10. SECURITY FOR PAYMENT OF COSTS AND EXPENSES OF INVESTIGATION (SECTION 214 OF THE COMPANIES ACT, 2013)

Section 214 of the Companies Act, 2013 provides for security for payment of costs and expenses of investigation as under:

Where an investigation is ordered by:

(i) the Central Government in pursuance of clause (b) of sub-section (1) of section 210, or

(ii) made by the Tribunal under section 213,

the Central Government may before appointing an inspector under sub-section (3) of section 210 or clause (b) of section 213, require the applicant to give such security not exceeding 25,000 rupees as may be prescribed5, as it may think fit, for payment of the costs and expenses of the investigation.

Such security shall be refunded to the applicant if the investigation results in prosecution.

11. FIRM, BODY CORPORATE OR ASSOCIATION NOT TO BE APPOINTED AS INSPECTOR (SECTION 215 OF THE COMPANIES ACT, 2013)

Section 215 of the Companies Act, 2013 provides that no firm, body corporate or other association shall be appointed as an inspector.

12. INVESTIGATION OF OWNERSHIP OF COMPANY (SECTION 216 OF THE COMPANIES ACT, 2013)

Section 216 of the Companies Act, 2013 provides for Investigation of ownership of company. Central Government can order investigation into ownership to decide who are

really financially interested and who are in real control of the company. According to the section-

(i) Appointment of inspectors by CG: where it appears to the Central Government that there is a reason so to do, it may appoint one or more inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons—

(a) who are or have been financially interested in the success or failure, whether real or apparent, of the company; or

(b) who are or have been able to control or to materially influence the policy of the company, or

(c) who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company. [Sub-section (1)]

(ii) Appointment of inspectors by CG where Tribunal directs for investigation: the Central Government shall appoint one or more inspectors, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1) [Sub-section (2)]

(iii) To define scope of investigation while appointing an inspector: While appointing an inspector under sub-section (1), the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may limit the investigation to matters connected with particular shares or debentures [Sub-section (3)]

(iv) Power of Inspector: Subject to the terms of appointment of an inspector, his powers shall extend to the investigation of any circumstances suggesting the existence of any arrangement or understanding which, though not legally binding, is or was observed or is likely to be observed in practice and which is relevant for the purposes of his investigation [Sub-section (4)]

Imposition on restrictions during investigation on securities issued or to be issued by company - During investigation under section 216, NCLT can impose certain restrictions upon securities. Such restriction can be upto three years [section 222(1) of Companies Act, 2013].

If despite such order, there is issue or transfer of securities, company as well as every officer who is in default is liable for punishment of fine and imprisonment [section 222(2) of Companies Act, 2013]

Applicability of provisions to foreign company - The provisions of investigation of ownership apply to foreign company also [section 228 of Companies Act, 2013]

13. PROCEDURE, POWERS, ETC., OF INSPECTORS (SECTION 217 OF THE COMPANIES ACT, 2013)

Section 217 of the Companies Act, 2013 provides for procedure, powers, etc., of inspectors as under:

(i) Duty of all officers and other employees and agents including former officers, employees and agents: As per sub- section (1), it shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person—

(a) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(ii) The inspector may require any body corporate, other than a body corporate referred in point (i) to furnish such information to, or produce such books and papers before him or any person authorized by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation [Sub section (2)].

(iii) Period of custody of inspector: The inspector shall not keep in his custody any books and papers produced under point (i) or point (ii) above for more than 180 days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced [Sub section (3)].

However, the books and papers may be called for by the inspector if they are needed again

for a further period of 180 days by an order in writing.

(iv) Examination on oath: As per sub-section (4), an inspector may examine on oath—

(a) any of the persons referred to in point (i); and

(b) any other person with the prior approval of the Central Government,

in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally.

However, in case of an investigation under section 212, the prior approval of Director, SFIO shall be sufficient under point (b) above (instead of the Central Government).

(v) Powers to inspectors similar as are vested in a civil court: As per sub-section (5), notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government making an investigation under this chapter, shall have all the 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:—

(a) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;

(b) summoning and enforcing the attendance of persons and examining them on oath; and

(c) inspection of any books, registers and other documents of the company at any place.

(vi) Punishment: If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees [Sub section (6) (i)].

On Conviction: If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company [Sub section (6) (ii)].

(vii) The notes of any examination under sub section (4) above, shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him [Sub section (7)].

(viii) In case of failure /refusal to produce, furnish, appear and sign : As per sub-section (8), if any person fails without reasonable cause or refuses—

(a) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under point (i) or point (ii) to produce;

(b) to furnish any information which is his duty under point (ii) to furnish;

(c) to appear before the inspector personally when required to do so under point (iv) or to answer any question which is put to him by the inspector in pursuance of that point; or

(d) to sign the notes of any examination referred to in sub section (7) above,

he shall be punishable with imprisonment for a term which may extend to 6 months and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, and also with a further fine which may extend to 2,000 rupees for every day after the first during which the failure or refusal continues.

(ix) Providing of assistance to the inspector: The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require [Sub section (9)].

(x) Provision for reciprocal arrangements: The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State [Sub section (10)].

(xi) Issue of letter of request where evidence is, or may be, available in a country or place outside India by competent court: Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973 if, in the course of an investigation into the affairs of the company, an application is made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to

produce any document or thing, which may be in his possession pertaining to the case, and to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request [Sub section (11)].

Provided that, the letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

Provided further that every statement recorded or document or thing received under this sub- section shall be deemed to be the evidence collected during the course of investigation.

According to Rule 6 of the Companies (Inspection, investigation and inquiry) Rules, 2014, the 'letter of request', in terms of section 217, shall be transmitted in such manner as specified by the Ministry of Corporate Affairs.

(xii) Upon receipt of a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon summon the person before it and record his statement or cause any document or thing to be produced, or send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within 30 days or such extended time as the court may allow for further action [Sub section (12)].

Provided that the evidence taken or collected as above or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.

14. PROTECTION OF EMPLOYEES DURING INVESTIGATION (SECTION 218 OF THE COMPANIES ACT, 2013)

Section 218 of the Act deals with the protection of Employees during Investigation. An employee of company who has disclosed information during investigation is protected against dismissal, discharge or removal or change in terms of his employment to his disadvantage, during investigation, without permission of NCLT.

(1) Approval of tribunal to take action against the employee: Notwithstanding anything contained in any other law for the time being in force, if—

(a) during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or

(b) during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—

(i) to discharge or suspend any employee; or

(ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or

(iii) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

(2) Action against employee: If the company, other body corporate or person concerned does not receive within thirty days of making of application under sub-section (1), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

(3) Appeal: If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal in such manner and on payment of such fees as may be prescribed.

(4) Final and Binding order: The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

(5) Over-riding effect: For the removal of doubts, it is hereby declared that the provisions of this section shall have effect without prejudice to the provisions of any other law for the time being in force.

15. POWERS OF INSPECTOR

1. To conduct investigation into affairs of related companies, etc. (Section 219 of the Companies Act, 2013)

Section 219 of the Companies Act, 2013 provides for power of inspector to conduct investigation into affairs of related companies, etc. as under:

Investigation into affairs of related companies: If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, can also investigate the affairs of—

Report of inspector: The inspector shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

2. Seizure of documents by inspector (Section 220 of the Companies Act, 2013)

Section 220 of the Companies Act, 2013 provides for seizure of documents by inspector as under:

(i) Seizure of books and papers [Sub section (1)]: Where in the course of an investigation under this Chapter, the inspector has reasonable grounds to believe that the books and papers of, or relating to, any company or other body corporate or managing director or manager of such company are likely to be destroyed, mutilated, altered, falsified or secreted, the inspector may—

(a) enter, with such assistance as may be required, the place or places where such books and papers are kept in such manner as may be required; and

(b) seize books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books and papers at its cost for the purposes of his investigation.

(ii) Time period for keeping books and papers [Sub section (2)]: The inspector shall keep in his custody the books and papers seized under this section for such a period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized.

(iii) Extracts of books and papers: The inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such manner as he considers necessary.

(iv) Application of provisions of Cr.PC.: The provisions of the Code of Criminal Procedure, 1973, relating to searches or seizures shall apply mutatis mutandis to every search or seizure made under this section.

3. Freezing of Assets of Company on Inquiry and Investigation (Section 221 of the Companies Act, 2013)

Section 221 of the Act deals with the Freezing of Assets of Company on Inquiry and Investigation. Central Government can make application to NCLT for freezing of assets, funds and properties of the company, if there is reasonable ground to believe that removal or transfer or disposal of funds, assets or properties of company is likely to take place in manner prejudicial to interests of company or its shareholders or creditors or in public interest.

According to this section:

(i) Order of the tribunal: Where it appears to the Tribunal,

(a) on a reference made to it by the Central Government or in connection with any inquiry or investigation into the affairs of a company under this Chapter or

(b) on any complaint made by such number of members as specified under sub-section

(1) of section 244 or

(c) a creditor having one lakh amount outstanding against the company or

(d) any other person having a reasonable ground to believe that the removal, transfer or disposal of funds, assets, properties of the company is likely to take place in a manner that is prejudicial to the interests of the company or its shareholders or creditors or in public interest, it may by order direct that such transfer, removal or disposal shall not take place

during such period not exceeding three years as may be specified in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit.

(ii) Punishment in case of contravention of order of tribunal: In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal under sub-section (1), the company shall be

(a) punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

4. Imposition of Restrictions upon Securities (Section 222 of the Companies Act, 2013)

Section 222 of the Act deals with the Imposition of Restrictions upon Securities. According to this section:

(i) Tribunal may by order put restrictions upon securities: Where it appears to the Tribunal, in connection with any investigation under section 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

(ii) Punishment in case of contravention to an order: Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1),

(a) the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

16. INSPECTOR'S REPORT (SECTION 223 OF THE COMPANIES ACT, 2013)

Section 223 of the Companies Act, 2013 lays down the following provisions in respect of the Inspector's report on investigation conducted under this chapter:

(i) Submission of interim report and final report [Sub section (1)]: An inspector appointed under this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.

(ii) Report to be in writing or printed [Sub section (2)]: Every report made under sub section

(1) above, shall be in writing or printed as the Central Government may direct.

(iii) Obtaining copy or report [Sub section (3)]: A copy of the above report may be obtained by members, creditors or any other person whose interest is likely to be affected by making an application in this regard to the Central Government.

(iv) Authentication of report [Sub section (4)]: The report of any inspector appointed under this Chapter shall be authenticated either—

(a) by the seal, if any, of the company whose affairs have been investigated; or

(b) by a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872,

and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

(v) Exceptions [Sub section (5)]: Nothing in this section shall apply to the report referred to in section 212 of the Companies Act, 2013.

17. ACTIONS TO BE TAKEN IN PURSUANCE OF INSPECTOR'S REPORT (SECTION 224 OF THE COMPANIES ACT, 2013)

Section 224 of the Companies Act, 2013 provides the following provisions in respect of the actions to be taken in pursuance of inspector's report:

(i) On basis of report , if person appears to be guilty of offence: If, from an inspector's report, made under section 223, it appears to the Central Government that any person has, in relation to the company or in relation to any other body corporate or other person whose affairs have been investigated under this Chapter been guilty of any offence for which he is criminally liable, the Central Government may prosecute such person for the offence and it shall be the duty of all officers and other employees of the company or body corporate to

give the Central Government the necessary assistance in connection with the prosecution [Sub section (1)].

(ii) Filing of petition by person authorized by the Central Government: As per sub-section (2), if any company or other body corporate is liable to be wound up under this Act or under the Insolvency and Bankruptcy Code, 2016 and it appears to the Central Government from any such report made under section 223 that it is expedient so to do by reason of any such circumstances as are referred to in section 213, the Central Government may, unless the company or body corporate is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorized by the Central Government in this behalf—

(a) a petition for the winding up of the company or body corporate on the ground that it is just and equitable that it should be wound up;

(b) an application under section 241; or

(c) both.

(iii) Initiation of winding up proceeding suo moto by the Central Government: As per sub-section (3), if from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated under this Chapter—

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate; or

(b) for the recovery of any property of such company or body corporate which has been misapplied or wrongfully retained, the Central Government may itself bring proceedings for winding up in the name of such company or body corporate.

(iv) Indemnification to the Central Government: The Central Government, shall be indemnified by such company or body corporate against any costs or expenses incurred by it in, or in connection with, any proceedings brought by virtue of sub-section (3) [Sub section (4)].

(v) Where fraud has been committed: Where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other

manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property, or cash, as the case may be, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability. (Refer example given in section 212)

18. EXPENSES OF INVESTIGATION (SECTION 225 OF THE COMPANIES ACT, 2013)

Section 225 of the Companies Act, 2013 lays down the following provisions in respect of expenses of investigation:

(i) Reimbursement of expenses: The expenses of, and incidental to, an investigation by an inspector appointed by the Central Government under this Chapter (Chapter XIV-Inspection, Inquiry and Investigation) other than expenses of inspection under section 214 (Security for payment of costs and expenses of investigation) shall be defrayed in the first instance by the Central Government, but shall be reimbursed by the following persons to the extent mentioned below, namely:—

Extent of reimbursement: Reimbursement to the extent that he may in the same proceedings be ordered to pay the said expenses as may be specified by the court convicting such person, or ordering him to pay such damages or restore such property, as the case may be;

Any company or body corporate in whose name proceedings are brought, to the extent of the amount or value of any sums or property recovered by it as a result of such proceedings;

Where a prosecution is instituted: unless, as a result of the investigation, a prosecution is instituted under section 224,—

(1) any company, body corporate, managing director or manager dealt with by the report of the inspector; and

(2) the applicants for the investigation, where the inspector was appointed under section 213,to such extent as the Central Government may direct.

(ii) Extent of liability: Any amount for which a company or body corporate is liable, shall be a first charge on the sums or property mentioned in that clause.

19. VOLUNTARY WINDING UP OF COMPANY, ETC., NOT TO STOP INVESTIGATION PROCEEDINGS (SECTION 226 OF THE COMPANIES ACT, 2013)

Section 226 of the Companies Act, 2013 provides that an investigation under this Chapter may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—

(a) an application has been made under section 241 (Application to Tribunal for relief in cases of oppression, etc.);

(b) the company has passed a special resolution for voluntary winding up; or

(c) any other proceeding for the winding up of the company is pending before the Tribunal.

Where a winding up order is passed by the Tribunal in a proceeding referred to in clause (c), the inspector shall inform the Tribunal about the pendency of the investigation proceedings before him and the Tribunal shall pass such order as it may deem fit.

Nothing in the winding up order shall absolve any director or other employee of the company from participating in the proceedings before the inspector or any liability as a result of the finding by the inspector.

20. LEGAL ADVISERS AND BANKERS NOT TO DISCLOSE CERTAIN INFORMATION (SECTION 227 OF THE COMPANIES ACT, 2013)

Section 227 of the Companies Act, 2013 provides for non-disclosure of certain information by certain persons.

Nothing in this Chapter shall require the disclosure to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government—

(a) by a legal adviser, of any privileged communication made to him in that capacity, except as respects the name and address of his client; or

(b) by the bankers of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person.

21. INVESTIGATION ETC. OF FOREIGN COMPANIES (SECTION 228 OF THE COMPANIES ACT, 2013)

Section 228 of the Companies Act, 2013 provides for Investigation etc. of foreign companies. According to this section:

The provisions of this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) shall apply mutatis mutandis to inspection, inquiry or investigation in relation to foreign companies.

22. PENALTY FOR FURNISHING FALSE STATEMENT, MUTILATION, DESTRUCTION OF DOCUMENTS (SECTION 229 OF THE COMPANIES ACT, 2013)

Section 229 of the Companies Act, 2013 lays down the following penalty for furnishing false statement, mutilation, destruction of documents:

Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation, shall be punishable for fraud in the manner as provided in section 447, if he—

(a) destroys, mutilates or falsifies, or or conceals tampers or unauthorizedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorized removal of, documents relating to the property, assets or affairs of the company or the body corporate;

(b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or

(c) provides an explanation which is false or which he knows to be false,