

FINAL
Paper 13

CORPORATE AND ECONOMIC LAWS

Study Notes
SYLLABUS 2022



The Institute of Cost Accountants of India

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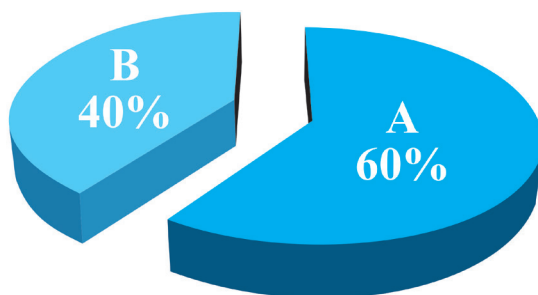
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PAPER 13: CORPORATE AND ECONOMIC LAWS

Syllabus Structure:

The syllabus in this paper comprises the following topics and study weightage:

Module No.	Module Description	Weight
Section A : Corporate Laws		60%
1	The Companies Act, 2013	40%
2	Insolvency and Bankruptcy Code, 2016	10%
3	Corporate Governance and Social Responsibility and Sustainability	10%
Section B: Economic Laws and Regulations		40%
4	SEBI Regulations	10%
5	The Competition Act, 2002	5%
6	Foreign Exchange Management Act, 1999	5%
7	Laws and Regulations related to Banking Sector	5%
8	Laws and Regulations related to Insurance Sector	
9	Specific Legal Provisions related to MSME Sector	5%
10	Laws and Regulations related to Cyber Security and Data Privacy	5%
11	Laws and Regulations related to Anti-Money Laundering	5%



The Learning Environment - Paper 13

Subject Title	CORPORATE AND ECONOMIC LAWS
Subject Code	CEL
Paper No.	13
Course Description	The subject offers a detailed coverage of the whole of Companies Act, right from the inception to winding up. It also includes various other laws directly relating to business, other than tax and labour laws. The laws relating to competition, foreign exchange, banking and insurance etc, have been considered in fair amount of detail. The insolvency and bankruptcy law which is of paramount importance given the present NPA problem in Indian banking sector, also features in the course. Regulations relating to corporate governance, sustainability and CSR have also found a place. Thus, the course is a comprehensive compilation of all corporate as well as economic legislations which a professional accountant is expected to be aware of.
CMA Course Learning Objectives (CMLOs)	1. Interpret and appreciate emerging national and global concerns affecting organizations and be in a state of readiness for business management. a. Identify emerging national and global forces responsible for enhanced/varied business challenges. b. Assess how far these forces pose threats to the status-quo and creating new opportunities. c. Find out ways and means to convert challenges into opportunities 2. Acquire skill sets for critical thinking, analyses and evaluations, comprehension, syntheses, and applications for optimization of sustainable goals. a. Be equipped with the appropriate tools for analyses of business risks and hurdles. b. Learn to apply tools and systems for evaluation of decision alternatives with a 360-degree approach. c. Develop solutions through critical thinking to optimize sustainable goals. 3. Develop an understanding of strategic, financial, cost and risk-enabled performance management in a dynamic business environment. a. Study the impacts of dynamic business environment on existing business strategies. b. Learn to adopt, adapt and innovate financial, cost and operating strategies to cope up with the dynamic business environment. c. Come up with strategies and tactics that create sustainable competitive advantages. 4. Learn to design the optimal approach for management of legal, institutional, regulatory and ESG frameworks, stakeholders' dynamics; monitoring, control, and reporting with application-oriented knowledge. a. Develop an understanding of the legal, institutional and regulatory and ESG frameworks within which a firm operates. b. Learn to articulate optimal responses to the changes in the above frameworks. c. Appreciate stakeholders' dynamics and expectations, and develop appropriate reporting mechanisms to address their concerns. 5. Prepare to adopt an integrated cross functional approach for decision management and execution with cost leadership, optimized value creations and deliveries. a. Acquire knowledge of cross functional tools for decision management. b. Take an industry specific approach towards cost optimization, and control to achieve sustainable cost leadership. c. Attain exclusive knowledge of data science and engineering to analyze and create value.

Subject Learning Objectives [SLOB(s)]	A. CORPORATE LAWS 1. To develop a clear understanding of rationale behind various provisions particularly on accounts, audit and dividends and its effect on the company; (CMLO 4a) 2. To obtain in-depth knowledge of various provisions of the Companies Act and Rules that govern the operations of a company at; (CMLO 4b, 4c) 3. To have fair idea about insolvency procedures to be undergone by a company; (CMLO 4c) 4. To have a detailed understanding of the concepts of corporate governance, CSR and sustainability and regulations associated with them. (CMLO 2c, 4b) B. ECONOMIC LAWS AND REGULATIONS 1. To have an overview of important SEBI regulations relating to the fund mobilisation through capital market, trading in securities market and takeover of target companies; (CMLO 4a, b) 2. To acquire operations oriented knowledge of laws regulating the competitive landscape of businesses in India. (CMLO 4a) 3. To develop detailed and application oriented knowledge of provisions relating to management of foreign exchanges. (CMLO 4a, b) 4. To obtain an outline of multiple specialised laws and regulations governing banking and insurance sectors in India; (CMLO 4a, b) 5. To obtain an application oriented knowledge of special provisions relating to MSME sector; (CMLO 4b, c) 6. To understand the role of cyber laws in ensuring data security and privacy issues. (CMLO 4a, b) 7. To obtain an overview of the laws and regulations associated with prevention of money laundering in India. (CMLO 4a, b)
Subject Learning Outcomes (SLOC) and Application Skills (APS)	A. Company Law: <u>SLOC(s):</u> 1. Students will be able to guide the management by providing reference to appropriate provisions of Companies Act while making various operational and financial decisions. 2. Students will be able to identify the documents to be prepared and submitted to appropriate authorities to ensure compliance. 3. They will be able to guide the management in improving the standard of corporate governance and corporate social responsibility and help them to avoid penal provisions due to non-compliances. 4. Students will equip themselves to deal with insolvency cases of customers, and business associates. <u>APS:</u> 1. Students will develop appropriate skill to prepare documents to be submitted to various regulators in order to achieve compliance. 2. They will be skilled to draft para legal documents with accuracy and fairness. B. Economic Laws and Regulations: <u>SLOC(s):</u> 1. Students will be able to assist the management by providing reference to appropriate provisions of general economic laws and regulations while making various operational and financial decisions. 2. They will be able to guide the management of entities belonging to specialised sectors by providing appropriate reference to the sector specific legal guidelines and thus improve the compliance. 3. They will be able to identify possible threat to data security and privacy and guide the management to take appropriate legal measure to curb the same. <u>APS:</u> 1. Students will develop appropriate skills to assist management in ensuring legally sustainable operations, ensure compliance with legal and regulatory provisions, prepare documents and reports to be submitted to various regulators in order to achieve compliance.

Module wise Mapping of SLOB(s)			
Module No.	Topics and Sub-topics	Additional Resources (Research articles, case studies, blogs)	SLOB Mapped
Section A: Corporate Laws			
1	The Companies Act, 2013	https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/acts.html?act=NTk2MQ==	1. To obtain in-depth knowledge of various provisions of the Companies Act and Rules that govern the operations of a company at each and every stage; 2. To develop a clear understanding of rationale behind various provisions particularly on accounts, audit and dividends and its effect on the company.
2	Insolvency and Bankruptcy Code, 2016	https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia . https://ibbi.gov.in/en/pdfTheInsolvencyandBankruptcyofIndia.pdf https://ibbi.gov.in/en	To have fair idea about insolvency procedures to be undergone by a company.
3	Corporate Governance, Social Responsibility and Sustainability	https://www.sebi.gov.in/legal/regulations/apr-2022/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-fourth-amendment-regulations-2022_58408.html	To have a detailed understanding of the concepts of corporate governance, CSR and sustainability and regulations associated with them.
Section B: Economic Laws and Regulations			
4	SEBI Laws and Regulations	https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListing=yes&sid=1&ssid=3&smid=0	To have an overview of important SEBI regulations relating to the fund mobilisation through capital market, trading in securities market and takeover of target companies;
5	The Competition Act, 2002	https://www.mca.gov.in/Ministry/actsbills/pdf/The_competition_Act_2002.pdf	To acquire fair knowledge of laws regulating the competitive landscape of businesses in India.
6	Foreign Exchange Management Act, 1999	https://legislative.gov.in/sites/default/files/A1999-42_0.pdf	To develop detailed understanding of provisions relating to management of foreign exchanges
7	Laws and Regulations related to Banking Sector	https://financialservices.gov.in/act-rule/Banking/Banking-Acts	To obtain an overview of multiple specialised laws and regulations governing banking and insurance sectors in India
8	Laws and Regulations related to Insurance Sector	https://financialservices.gov.in/act-rule/Insurance/Insurance-Acts	
9	Specific Legal Provisions related to MSME Sector	https://msme.gov.in/circulars/msme-development-act-2006-rules-26-september-2006	To obtain an overview of special provisions relating to MSME sector;
10	Laws and Regulations related to Cyber Security and Data Privacy	https://www.meity.gov.in/content/information-technology-act-2000-0	To understand the role of cyber laws in ensuring data security and privacy issues.
11	Laws and Regulations related to Anti-Money Laundering	https://dea.gov.in/sites/default/files/moneylaunderingact.pdf	To obtain an overview of the laws and regulations associated with prevention of money laundering in India.

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SECTION - A

CORPORATE LAWS

The Companies Act, 2013

1

This Module includes:

- 1.1 Company Formation and Conversion**
- 1.2 Investment and loans**
- 1.3 Dividends**
- 1.4 Accounts and Audit**
- 1.5 Board of Directors and Key Managerial Personnel**
- 1.6 Board Meetings and Procedures**
- 1.7 Inspection, Inquiry and Investigation**
- 1.8 Compromises, Arrangements and Amalgamations**
- 1.9 Prevention of Oppression and Mismanagement**

The Companies Act, 2013

SLOB Mapped against the Module

- ✦ To obtain in-depth knowledge of various provisions of the Companies Act and Rules that govern the operations of a company at each and every stage;
- ✦ To develop a clear understanding of rationale behind various provisions particularly on accounts, audit and dividends and its effect on the company.

Module Learning Objectives:

After studying this module, the students will be able to -

- ✦ Perform their job based on the understanding of the company law procedures;
- ✦ Relate accounting job with other functions of the company particular Board functioning;
- ✦ Aware of the penal provisions and shall be serious about their work to avoid non compliances;

Company Formation and Conversion

1.1

1.1.1. Incorporation of private companies, public companies, company limited by guarantee and unlimited companies and conversions/reconversion/re-registration.

1.1.1.1. Introduction

Companies Act, 1913, was the first structured law on company form of organisation. Some of the concepts of 1913 Act are still present in 2013 Act. This Act continued till 1956, when the first Companies Act of independent India was passed in 1956 and this Act has regulated the most eventful years of growth and stabilisation of corporate India. Govt. made many attempts to introduce a new companies Act and various committees were set up. Replacing an Act of such large magnitude was not small task and many facets were to be seen. After 57 years, the new companies were drafted and passed in 2013.

The Companies Act, 2013 consisting of 29 Chapters, 470 Sections and 7 Schedules as against 658 Sections under 13 Parts and 15 schedules in the Companies Act, 1956, was notified partially on 12th September 2013 (55 sections) and partially again on 26th March, 2014 (168 sections with effect from 1.4.2014). Part of the provisions related to National Company Law Tribunal have been notified with effect from 1st June, 2016.

The Companies Act, 2013 (hereafter 'The Act') consolidates and amends the law relating to the companies in India and replaces the Companies Act, 1956 in phases, which is 56 years old. The new Act intends to improve corporate governance and to further strengthen regulations for the corporate sector with the introduction of key provisions as to Duties and Liabilities of Directors/Independent Directors, Auditor Rotation, Establishment of Serious Fraud Investigation Office (SFIO), Constitution of National Financial Reporting Authority (NFRA), Class Action Suit, Corporate Social Responsibility (CSR) etc.

The Companies Act, 2013 is administered by the Central Government through the Ministry of Corporate Affairs (MCA) and the Offices of Registrar of Companies, Official Liquidators, Public Trustee, Director of Inspection, National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), etc. The Registrar of Companies (ROC) controls the task of incorporation of new companies and the administration of running companies.

The Ministry of Corporate Affairs, was primarily concerned with administration of the Companies Act, 2013, other allied Acts and rules & regulations framed there under, mainly for regulating the functioning of the corporate sector in accordance with law.

The structural shift is that while in 1956 Act, only 16% was delegated to CG, in 2013 Act. 74 % is Delegated legislation. This has resulted to frequent changes in the Rules.

The Act was amended in May, 2015, 2017 (modified in January 2018) July, 2019 and September, 2020. Relevant provisions of the amendments to the extent covered under syllabus have been incorporated in this study material.

1.1.1.2. Definition and Features of Company

Definition

Company is an artificial, legal and juristic person, separate from its members having perpetual existence.

“In terms of the Companies Act, 2013 ‘company’ means a company incorporated under the Act, or under the previous company law” [Sec. 2(20)].

A company may be an incorporated company or a Corporation, or an unincorporated company. An incorporated company is a single and legal (artificial) person distinct from the individuals constituting it, whereas an unincorporated company, such as a partnership, is a mere collection or aggregation of individuals. Therefore, unlike a partnership, a company is a corporate body and a legal person having status and personality distinct and separate from that of the members constituting it.

Features of Company

Independent corporate existence

The outstanding feature of a company is its independent corporate existence. It is a distinct legal person existing independent of its members. By incorporation under the Act, the company is vested with a corporate personality which is distinct from the members who compose it.

A well-known illustration of this principle is the decision of the House of Lords in *Salomon v. Salomon & Co.* [(1898) AC 22].

Limited Liability

The privilege of limiting liability for business debts is one of the principal advantages of doing business under the corporate form of organization. Where the subscribers exercise the choice of registering the company with limited liability, the members' liability becomes limited or restricted to the nominal value of the shares taken by them or the amount guaranteed by them. No member is bound to contribute anything more than the nominal value of the shares held by him. In the normal course, a shareholder is liable to pay for the shares as and when it is called up by the company. In case of default, the unpaid shares may be forfeited and the shareholder no more remains a shareholder.

Perpetual succession

Perpetual succession, means that the membership of a company may keep changing from time to time, but that does not affect the company's continuity. The death or insolvency of individual members does not, in any way affect the corporate existence of the company. [*Gopalpur Tea Co. Ltd. v. Penhok Tea Co. Ltd.* (1982) 52 Comp. Cas. 238 (Cal.)] “Members may come and go but the company can go on forever”.

There are many companies in India which were formed 100 years before not the people who have formed are no more there but the company remains.

Separate property as separate owner

A company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The company becomes the owner of its capital and assets. The shareholders are not the several or joint owners of the company's property. The company is the real person in which all its property is vested, and by which is controlled, managed and disposed of [*Bacha F Guzdar v. C.I.T.* AIR 1955 SC 74.]. The property is vested in the company as a body corporate, and no changes of individual membership affect the title. The property, however much, the shareholders may come and to remains vested in the company, and the company can convey, assign, mortgage, or otherwise deal with it irrespective of these mutations.

Transferability of Shares

In case of companies, shares should be capable of being easily transferred. Accordingly, the Companies Act, 2013 in Section 44 declares: 'The shares or debentures or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company'. Thus incorporation enables a member to sell his shares in the open market and to get back his investment without having to withdraw the money from the company. This provides liquidity to the investor and stability to the company.

Common seal

Prior to the Companies (Amendment) Act, 2015 the common seal is a seal used by a corporation as the symbol of its incorporation and also a statutory requirement for a company. As a departure from this concept, the Companies (Amendment) Act, 2015 has deleted the requirement of having Common Seal compulsorily now it is optional. However, where the company has opted to have a common seal, the same shall be used as provided under the Act or the Articles.

After this amendment, in case a company does not have a common seal, the authorisation shall be made by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.

Lifting of the 'Corporate Veil'

The phrase 'lifting the veil' is looking behind the company as a legal person, i.e., disregarding the corporate entity and paying regard, instead, to the realities behind the legal facade. Where the law ignores the company and concern themselves directly with the members or managers, the corporate veil may be said to have been lifted. Only in appropriate circumstances, the Courts are willing to lift the corporate veil and that too, when questions of control are involved rather than merely a question of ownership.

The following are the cases where company law disregards the principle of corporate personality or the principle that the company is a legal entity distinct and separate from its shareholders or members:

- (a) In the law relating to trading with the enemy where the test of control is adopted.
- (b) In certain matters concerning the law of taxes, duties and stamps particularly where question of the controlling interest is in issue.
- (c) Where companies form other companies as their subsidiaries to act as their agent. The application of the doctrine may operate in favour of such companies depending upon the facts of a particular case. Suppose, a company acquires a partnership concern and registers it as a company, which becomes subsidiary of the acquiring company. In an action for compulsory acquisition of the business premises of the subsidiary, it was held that the parent company (which through itself and nominees held all the shares) was entitled to compensation, maintain action for the same [Smith, Stone and Knight Ltd. vs. Lord Mayor, etc., of Birmingham [1939] 4, All. 116].
- (d) Where the courts find that there is avoidance of welfare legislation, it will be free to lift the corporate veil. (Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd; AIR 1986 SC 1).
- (e) The Court tend the lift the corporate veil in order to find the realities of situation in case of commission of fraud or improper conduct.
- (f) The corporate veil is lifted where the company has abused the corporate personality for an unjust and unequitable purpose.
- (g) The Courts invariably lift the corporate veil or disregard the corporate personality of a company to protect the public policy and prevent transactions contrary to public policy. [Connors v. Connors Ltd; (1939) S.C.R. 162].
- (h) Under the law relating to exchange control. The courts pierce the corporate veil in quasi-criminal cases in order to look behind the legal person and punish the real persons who have violated the law.

- (i) Where the use of an incorporated company is being made to avoid legal obligations, the Court may disregard the legal personality of the company and proceed on the assumption as if no company existed.
- (j) In a latest judgment, the Hon'ble Supreme Court of India in the case of Estate Officer UT Chandigarh v. Esys Information Technologies Limited [2016] 136 SCL 513 held that lifting of corporate veil could be done in the case of transfer of shares of company which actually was sale of land which the original allottee (company) was prohibited to do so.

1.1.1.3. Nature of Business Organization in India

There are various types of organization doing business in India. Profit may not be motive or objective where there is substantial Govt. investment. This sector is also called social sector as it cater to the needs of the society. We may categorize Public Sector as follows on the basis of Government ownership.

- (i) **Public Sector:** This sector comprises of the following.
 - (a) Govt. Departments like Railways, Ordnance Factories, Postal services etc.
 - (b) statutory corporations set up and run by the Govt. i.e. Reserve Bank of India created by Reserve Bank of India Act, 1934.
 - (c) companies with majority holding by Central Government/State Government having independent management by Board of directors.
- (ii) **Joint Sector:** where Govt. have investment between 26 to 50%.

Companies may be classified on the basis of their incorporation, number of members, size, basis of control and motive. On the basis of incorporation of the companies, it may be classified into Charter Companies, Statutory Companies and Registered Companies. On the basis of liability, it may be Companies limited by shares/guarantee and unlimited liability companies. Further, on the basis of number of members, they may be classified into One Person Company, private company and public company. On the basis of size, they may be divided into small companies and other companies. On the basis of control, they may be classified into holding company, subsidiary company and associate company. Companies may also under other categories like non profit companies licensed under Section 8, Government companies, foreign companies, Dormant Company and Nidhi Companies, investment companies, producer companies etc.

1.1.1.4. Promotion of a Company:

As per Companies Act, 2013 persons whose name appears in the prospectus or identified by the company in the annual return, has control directly or indirectly over the affairs of the company either as a shareholder or a director and according to whose direction, advice or instructions the Board of Directors are accustomed to act. A person should not be regarded as a promoter if he/she acts in its personal capacity.

As per the Securities Exchange Board of India (SEBI) persons who are in control of the issuer or are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to the public. The persons whose name appears in the offer document are known as promoters.

Promoters' Agreement/ Memorandum of Understanding (MOU):

When promoters decide to do a business in the nature of a company, they will be meeting and deciding on various issues and ultimately they will choose to make a Memorandum of Understanding (MOU) though it is not mandatory. Promoters or any of the promoters can make contracts in his own name for the benefit of the proposed company. Once registered, promoter will disclose the contracts. Promoter is also duty bound to disclose any interest in the company to any interested person and will not make any secret profit.

Promoters can also make an agreement which will mention various issues relating to formation of the company and rights and liabilities of the company inter se.

Promoters may decide to prepare and sign a Memorandum of Understanding or Memorandum of Agreement (also called Promoters Agreement) while MOU is not enforceable under the law. Having an MOU or MOA is not mandatory and promoters may decide to prepare two initial documents.

- ⦿ Memorandum of Association (MOA)
- ⦿ Articles of Association (AOA)

A company may be incorporated as a One Person Company (OPC) a new concept all together in the Companies Act, 2013. Private Company or a Public Company, depending upon the number of members joining it. Again it may either be an unlimited company, or may be limited by shares or by guarantee or by both.

The memorandum and articles of association of a company are the most important documents for the formation of a company and for its functioning thereafter.

The memorandum of association contains the name, situation of registered office, objects, capital and liability and subscription clauses. The articles are its bye-laws or rules and regulations that govern the management and internal affairs and the conduct of its business. Both the documents are required to be registered with the Registrar of Companies at the stage of incorporation of the company. Before dealing with a company, it is advisable to read the memorandum and articles of the company to understand aspects, such as powers of Board, scope of company's activities etc. and its relationship with the outside world. Since Memorandum sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world. Company Secretary in employment should work within the four walls of the MOA and also subject to the provisions of AOA.

1.1.1.5. Classification of Companies

Companies may be classified into various classes on the following basis:

1.1.1.5.1. On the Basis of Incorporation

(a) Statutory Companies

These are the companies which are created by a special Act of the Legislature, e.g., the Reserve Bank of India, the State Bank of India, the Life Insurance Corporation, the Industrial Finance Corporation, the Unit trust of India and State Financial Corporations. These are mostly concerned with public utilities, e.g. railways, tramways, gas and electricity companies and enterprises of national importance. The provisions of the Companies Act, 2013 do not apply to them unless the special act specifies such application. Banking Regulation Act, 1949 is a special legislation concerning banking companies.

(b) Registered companies

These are the companies which are formed and registered under the Companies Act, 2013, or were registered under any of the earlier Companies Acts. Many statutory companies has converted into companies when they public issue

1.1.1.5.2. On the basis of liability

(a) Company limited by shares

Section 2 (22) of the Companies Act, 2013, defines that when the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares. The shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings. His separate property cannot be encompassed to meet the company's debts unlike proprietorship or partnership.

(b) Company limited by guarantee

Section 2 (21) of the Companies Act, 2013 defines it as the company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up. Thus, the liability of the member of a guarantee company is limited up to a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum. This is similar to LLP.

(c) Unlimited company

Section 2 (92) of the Companies Act, 2013 defines unlimited company as a company not having any limit on the liability of its members. In such a company the liability of a member ceases when he ceases to be a member. The liability of each member extends to the whole amount of the company's debts and liabilities but he will be entitled to claim contribution from other members.

1.1.1.5.3. On the basis of members**(A) One Person Company (OPC)****(1) The Concept of One Person Company (OPC)**

The concept of One Person Company (OPC) has now been introduced in India, through Section 2 (62) of Companies Act, 2013 thereby enabling Entrepreneur(s) carrying on the business in the Sole Proprietor form of business to enter into a Corporate Framework. Though this concept is new in India but it is already a part of many other countries like China, Australia, Pakistan and UK etc.

According to Section 2 (62) of the Companies Act, 2013 'One Person Company' means a company which has only one person as a member. A company formed under one person company may be either:

- a) A company limited by shares, or
- b) company limited by guarantee, or
- c) An unlimited company.

One Person Company is a hybrid of Sole-Proprietor and Company form of business, and has been provided with concessional/relaxed requirements under the Act.

(2) Features of One Person Company (OPC)

- (a) **Only One Shareholder:** Only a natural person, who is an Indian citizen and resident in India, shall be eligible to incorporate a One Person Company.
- (b) **Nominee for the Shareholder:** The Shareholder shall nominate another person who shall become the shareholders in case of death/incapacity of the original shareholder. Such nominee shall give his/her consent and such consent for being appointed as the Nominee for the sole Shareholder. Only a natural person, who is an Indian citizen and resident in India, shall be a nominee for the sole member of a One Person Company.
- (c) **Director:** Must have a minimum of One Director, the Sole Shareholder can himself be the Sole Director. The Company may have a maximum number of 15 directors.
- (d) A Given that the liability is limited, the OPC is meant for solo entrepreneurs. There must be a nominee, it enabled perpetual existence of the OPC. Various exemptions has been given by the Central Government to OPC such as: exemption from holding the Annual General Meeting of the company, financial statement and Board's report can be signed only by one director, it does not need to include Cash Flow Statement as part of its financial statement etc. There are some industry-specific advantages. But taxes are to be paid at a flat rate on profits.

(B) Private Company [Section 2 (68)]

According to Section 2 (68) of Companies Act, 2013 a ‘private company’ means a company having a minimum paid-up share capital as may be prescribed, and which by its articles:

- (1) restricts the right to transfer its shares.
- (2) except in case of One Person Company, limits the number of its members to two hundred: Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member;

Provided further that:

- (a) persons who are in the employment of the company, and
- (b) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members, and
- (3) prohibits any invitation to the public to subscribe for any securities of the company.

Exception to limited liability: Section 3A provides that if the number of members of a private company is reduced below two, and the business is carried on for more than six months, while the number of members is so reduced, every person who is a member of the company during this period shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor provided the members are cognizant of the fact that the company is carrying business with such less number of members.

(C) Public Company [Section 2 (71)]

According to Section 2 (71) of Companies Act, 2013 a ‘public company’ means a company which:

- (1) is not a private company and
- (2) has a minimum paid-up share capital, as may be prescribed:
- (3) Seven or more members are required to form the company.

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

A tabular difference between a private and public company is placed below.

Serial No.	Points of difference	Private	Public
1	Shareholders	Min-2,-Max-200	Min 7- no Max.
2	Directors	Min-2-Max.-15	Min.-3, Max.-15 (may be increased with special resolution)
3	Finance	Cannot raise from public	Can raise
4	Transfer of shares	May be restricted	Cannot be restricted
5.	Name	Use the Suffix “Pvt. Ltd”.	Use suffix “ Ltd”.

(D) Small Company

According to Section 2(85) of Companies Act, 2013 a “small company” means a company, other than a public company:

- (1) paid-up share capital of which does not exceed ₹4 crores or such higher amount as may be prescribed which shall not be more than ₹10 crores and turnover of which as per its profit and loss account for the immediate preceding financial year. does not exceed ₹40 crores or such higher amount as may be prescribed which shall not be more than ₹100 crores.

Provided that nothing in this clause shall apply to:

- a) a holding company or a subsidiary company.
- b) a company registered under Section 8, or
- c) a company or body corporate governed by any special Act.

1.1.1.5.4. On the basis of control

Holding company and Subsidiary company

‘Holding’ and ‘Subsidiary’ Companies are relative terms. A company is a holding company of another if the other is its subsidiary.

According to Section 2 (46) of the Companies Act, 2013 ‘holding company’, in relation to one or more other companies, means a body corporate of which such companies are subsidiary companies.

According to Section 2 (87) of the Companies Act, 2013 ‘subsidiary company’ or ‘subsidiary’, in relation to any other body corporate (that is to say the holding company), means a body corporate in which the holding company:

- a) controls the composition of the Board of Directors, Or
- b) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

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

1.1.1.5.5. On the basis of Listing in the recognised Stock Exchange

(A) Listed Company (also widely held)

According to Section 2 (52) of the Companies Act, 2013, a ‘listed company’ means a company which has any of its securities listed on any recognised stock exchange. Whereas the word securities as per the Section 2 (81) of the Companies Act, 2013 has been assigned the same meaning as defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

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

For the purposes of the proviso to clause (52) of section 2 of the Companies Act, 2013, the following classes of companies shall not be considered as listed companies, namely:-

- a) Public companies which have not listed their equity shares on a recognized stock exchange but have listed their –
 - (i) non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008; or
 - (ii) non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013; or
 - (iii) both categories of (i) and (ii) above.

- b) Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;
- c) Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a jurisdiction as specified in Section 23(3) of the Companies Act, 2013.

(B) Unlisted Company

Unlisted Company means company other than listed company. They are also called closely held companies. It may be mentioned here that out of a substantial number of companies registered as Public companies, who can approach the capital market, a very small percentage of companies have issued shares to public and are listed. It means although promoters are forming public limited companies, they are not interested or ready for public issue. Few promoters don't want to dilute their stake to public.

1.1.1.5.6. Other Types of Companies

(A) Government Company

According to Section 2 (45) of the Companies Act, 2013, a 'Government company' means any company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

Example: Coal India Limited is Govt. company, whereas Coal India has many subsidiaries, which are also Govt. companies.

(B) Foreign Company

According to Section 2 (42) of the Companies Act, 2013, 'foreign company' means any company or body corporate incorporated outside India which:

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode. and
- (b) conducts any business activity in India in any other manner.

(C) Associate Company

According to Section 2 (6) of the Companies Act, 2013, 'associate company' in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

As per the Explanation given under the Section, the clause, 'significant influence' means control of at least twenty per cent of total share capital, or of business decisions under an agreement.

(D) Dormant Company

Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction during the last two financial years or has not filed financial statements and annual returns during the last two financial years, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

(E) Nidhi Companies

Company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift (cost cutting) and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefits and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. [Section 406 of the Companies Act, 2013]

(F) Public Financial Institutions

According to Section 2 (72) of the Companies Act, 2013 the following institutions are to be regarded as public financial institutions:

- (1) The Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956.
- (2) The Infrastructure Development Finance Company Limited,
- (3) Specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002.
- (4) Institutions notified by the Central Government under Section 4A (2) of the Companies Act, 1956 so repealed under Section 465 of this Act.
- (5) Such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

Provided that no institution shall be so notified unless:

- a) it has been established or constituted by or under any Central or State Act. Or
- b) not less than 51% of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.

(G) Joint Venture Company: The term “joint venture” has also been defined to mean “joint arrangement” where the parties who have joint control of the arrangements have rights to the net assets or the arrangement. It is formed on the basis of a JV agreement between two or more companies and registered as a company with the JV partners share the responsibilities and involvement. There may be an arrangement of venturing a business jointly without forming a company. This is called “non corporate joint venture” or “contractual joint venture”

(H) Nonprofit Company: Section 8 company is a company established for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object, provided the profits, if any, or other income is applied for promoting only the objects of the company and no dividend is paid to its members. Section 8 Companies are registered under the Companies Act, 2013.

(I) Sectoral Companies

Sectoral companies are companies registered under the Companies act but specialising in particular sector which is regulated by a registry authority of the Govt.. These are the companies which are required to follow the provisions of Companies Act, as because they are registered companies and have to follow sectoral legislation, a law applies to the sector. Therefore, we have banking company, which has to follow Banking Regulation Act as well as Companies Act and are also subject to RBI directives, RBI being the regulator. Same is the case in case for companies dealing in Insurance, electricity, etc.

(J) Non-Banking Financial Company (NBFC): With the growth in financial sector during last three decades, NBFCs have been recognised a large sector of business. A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, It engaged in the business of loans and advances, acquisition of shares/ stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or A non-banking institution is a company and has principal business of receiving deposits.

(K) Banking Companies: A company registered under Companies Act and engaged in banking business as stipulated under banking Regulation Act. In India, no company can commence banking operation without having a banking license to be issued by Reserve Bank of India. Banking companies to have a name where the “banking” word shall feature so that public in general know it is bank.

(L) Insurance Company: A company registered under Companies Act and engaged in insurance business as stipulated under the Insurance Act. In India, no company can commence insurance business without having a license to be issued by Insurance Regulatory and Development Authority (IRDA). Insurance companies to have a name where the “insurance” word shall feature so that public in general know it is bank. Details are available elsewhere in this study material.

1.1.1.6. Conversion of a Public Company into Private Company or vice-versa

(a) Conversion of public company into private company

A public company can be converted into a private company by passing a special resolution, after altering its articles so as to include therein the restrictions contained in Section 2(68) of the Act.

A special resolution passed to convert a public company into a private company is binding on dissenting shareholders provided it is bona fide, is in the interest of the company as a whole, and is consistent with the objects in the Memorandum of Association. Under Section 14 (1), any alteration made in the articles to convert a public company into a private company shall take effect only with the approval of the Tribunal which shall make such order as it may deem fit.

(b) Conversion of private company into public company

Similarly where a private company alters its articles by passing special resolution in such a manner that they no longer includes the restrictions and limitations which are required to be included in the articles of a private company, then such company shall cease to be a private company from the date of such alteration.

(c) Filing with the Registrar

Every alteration of the articles and a copy of the order of the Tribunal approving the alteration of articles in respect of conversion of public company into private company or private company into public company shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally in the articles.

1.1.1.7. Large partnership to be registered as company or when companies must be registered

According to Section 464 of the Companies Act, 2013, no association or partnership consisting of more than 50 as per Rule 10 of Companies (Miscellaneous) Rules, 2014, shall be, formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force:

Above stated provision shall not apply to:

- (a) Hindu undivided family carrying on any business. Or
- (b) an association or partnership, if it is formed by professionals who are governed by special Acts.

Every member of an association or partnership carrying on business in contravention of above law, shall be punishable with a fine that may extend upto one lakhs rupees and shall also be personally liable for all liabilities incurred in such business which will be an illegal association. Such a body will have no legal existence and it cannot be wound up under the Act, or even as an unregistered company. Neither a member of it would be able to sue it, nor would it be able to sue the member. Nevertheless, a member who has paid any money to the association would be able to recover it from the director or agents or the association before the money so paid has been applied to an illegal purpose.

1.1.1.8. Incorporation of Company

(A) Formation of Company

Persons who form the company are known as promoters. It is they, who conceive the idea of forming the company. They take all necessary steps for its registration.

Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company.

(1) Public Company: In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration.

(2) Private Company: In exactly the same way, 2 or more persons can form a private company.

(3) One Person Company (OPC): One person, where the company to be formed is to be One Person Company.

If number of members reduce below above stipulation and the company carries on business for more than 6 months, every member severally shall be liable to pay debts of the company.

(B) Procedural aspects of incorporation of Company

Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company. These provision are to be read with Companies(Incorporation) Rules as amended.

(1) Filing of the documents and information with the registrar: For the registration of the company following documents and information are required to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated:

- a) the memorandum and articles of the company duly signed by all the subscribers to the memorandum.
- b) a declaration by person who is engaged in the formation of the company (an advocate, a chartered accountant, cost accountant or company secretary in practice), and by a person named in the articles (director, manager or secretary of the company), that all the requirements of this Act and the rules made there under in respect of registration and matters precedent or incidental thereto have been complied with.
- c) a declaration from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles stating that:
 - 1) he is not convicted of any offence in connection with the promotion, formation or management of any company, or
 - 2) he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years,
 - 3) and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.
- d) the address for correspondence till its registered office is established.
- e) the particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.
- f) the particulars (names, including surnames or family names, the Director Identification Number, residential address, nationality) of the persons mentioned in the articles as the first directors of the company and such other particulars including proof of identity as may be prescribed, and

- g) the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Particulars provided in this provision shall be of the individual subscriber and not of the professional engaged in the incorporation of the company [The Companies (Incorporation) Rules, 2014].

- (2) **Issue of certificate of incorporation on registration:** The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.
- (3) **Allotment of corporate identity number (CIN):** On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.
- (4) **Maintenance of copies of all documents and information:** The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its dissolution under this Act.
- (5) **Furnishing of false or incorrect information or suppression of material fact:** If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under Section 447. Same provision also applicable for promoter and first director in this regard.

1.1.1.8.1. Steps for formation of Company

The Companies (Incorporation) Amendment Rules, 2020 w.e.f 23rd February, 2020 introduced new web form SPICe+ for incorporation of the Companies replacing the old e-form SPICe.

SPICe+ is an integrated Web form offering 11 services by various concerned Central Government Departments. and three State Government (Maharashtra, Karnataka & West Bengal), thereby saving as many procedures, time and cost for Starting a Business in India.

As per Rule 38 of the Companies (Incorporation) Rules, 2014, the Application for incorporation of a company shall be made in SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32) along with e-Memorandum of Association (e-MOA) in Form No. INC-33 and e-Articles of association (e-AOA) in Form no. INC-34.

The application under shall be accompanied by form AGILE-PRO-S (INC-35) containing an application for registration of the following numbers, namely:-

- (a) GSTIN with effect from 31st March, 2019
- (b) EPFO with effect from 8th April, 2019
- (c) ESIC with effect from 15th April, 2019
- (d) Profession Tax Registration with effect from the 23rd February, 2020
- (e) Opening of Bank Account with effect from 23rd February, 2020.
- (f) Shops and Establishment Registration.

Spice is an online service platform. Service Services offered through SPICe+ are: Name Reservation, Incorporation, DIN allotment, Mandatory issue of PAN, Mandatory issue of TAN, Mandatory issue of EPFO registration, Mandatory issue of ESIC registration, Mandatory issue of Profession Tax registration (Maharashtra, Karnataka & West Bengal), Mandatory Opening of Bank Account for the Company and Allotment of GSTIN (if so applied for), Shops and Establishment Registration. After deployment of SPICe+ web form, RUN is applicable only for change of name of existing companies.

Establishment of Central Scrutiny Centre

The Central Government has established a Central Scrutiny Centre (CSC) for carrying out scrutiny of Straight Through Processes (STP) e-forms filed by the companies under the Companies Act, 2013 and the rules made thereunder which has come into force from March 23, 2021.

The CSC shall function under the administrative control of the e-governance Cell of the Ministry of Corporate Affairs.

Establishment of Central Scrutiny Centre (CSC) (Notification No: S.O.1257 (E), Dated March 18, 2021)

The Central Government has established a Central Scrutiny Centre (CSC) for carrying out scrutiny of Straight Through Processes (STP) e-forms filed by the companies under the Companies Act, 2013 and the rules made thereunder which has come into force from March 23, 2021.

The CSC shall function under the administrative control of the e-governance Cell of the Ministry of Corporate Affairs.

1.1.1.8.2. Formation of One Person Company (OPC)

- a) The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- b) The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
- c) Such other person may be given the right to withdraw his consent
- d) The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar
- e) Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- f) No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- g) No minor shall become member or nominee of the OPC or can hold share with beneficial interest. Such Company cannot be incorporated or converted into a company under Section 8 of the Act.

Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the Rules 6 & 7 of the Companies (Incorporation) Rules, 2014.

- h) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.
- i) OPC cannot convert voluntarily into any kind of company unless 2 years have expired from the date of incorporation, except where the paid up share capital is increased beyond ₹50 lakh or its average annual turnover during the relevant period exceeds ₹2 crore.

- j) If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to ₹10,000 and with a further fine which may extend to ₹1,000 for every day after the first during which such contravention continues.

Rule 3 of the Companies (Incorporation) Rules 2014 says, only a natural person who is an Indian citizen whether resident in India or otherwise:-

- (a) shall be eligible to incorporate a One Person Company;
- (b) shall be a nominee for the sole member of a One Person Company. Where a natural person, being member in One Person Company accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in rule 3(2) within a period of 180 days. Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in rule 3(2) within a period of 180 days.

1.1.1.8.3. Effect of registration

On incorporation, the company, shall be a body corporate by the name contained in the memorandum. Such a registered Company shall be capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name. It will be an artificial juristic person

1.1.1.8.4. Certificate as Conclusive Evidence

Section 35 of the 1956 Act, provided for a Certificate of Incorporation given by the Registrar on registration. Tough 2013 Act do not have a section to replace the earlier section, Certificate of incorporation is accepted as conclusive evidence of existence of the company, by all judicial and administrative authorities.

1.1.1.8.5. Effect of Memorandum and Articles

As per Section 10 of the Companies Act, 2013, where the memorandum and articles when registered, shall bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and an agreement to observe all the provisions of the memorandum and of the articles. All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

As a result, a number of legal relationships are formed between different parties and the company which are described below:

- (1) Between the members and company: The memorandum and articles constitute a contract between the members and the company. In consequence, the members are bound to the company under a statutory covenant.
- (2) Between member inter se: In the case of *Wood vs. Odessa Water Works Co.* [1989] 42 Ch. D. 363, *Sterling J. Observed:* The articles of Association constitute a contract not merely between the shareholders and the company but between each individual shareholder and every other.
- (3) Between the company and the outsiders: The memorandum and the articles do not constitute a contract between the company and outsiders. Neither the company nor the members are bound by the articles to outsiders, since these constitute a contract between members, inter se, and the outsider is not a party to the articles although he may be named therein.

Nonetheless, an outsider is entitled to assume that in respect of contract entered into with him all the formalities required to be carried out under the articles or memorandum have been duly complied with [*Royal British Bank vs. Turquand* (1956) 6 E.B. 327].

1.1.1.9. Doctrine of ultra vires

Directors of the company cannot perform something which is beyond the scope of the Memorandum. A transaction may be good in law but may not be within the powers of the company and hence ultra vires, the company. Shareholders, while drafting the Memorandum, have already decided the outer boundaries both for themselves and also for the Board of Directors. Shareholders can decide to change or modify the objects and other clauses of the memorandum but as long as it is not done, they cannot overshoot the existing memorandum provisions with which the company is registered. There may be an action taken by Board of Directors but is permissible by the company. In such situation, company may ratify the action of the Board, However, ultra vires action by the company cannot be ratified even when all members agree to do that.

1.1.1.10. Commencement of business, etc.

As per Section 10A read with Rule 23A of the Companies (Incorporation) Rules, 2014, every company incorporated after the commencement of the Companies (Amendment) Act, 2019 and having a share capital shall not commence any business or exercise any borrowing powers unless:

- (a) a declaration in form INC-20A is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company in such form and verified by a Company Secretary or a Chartered Accountant or a Cost Accountant. in practice, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration;
- (b) The company has filed with the Registrar a verification of its registered office in form INC-22 as provided in sub-section (2) of section 12 of the Companies Act, 2013;
- (c) If case of default the company shall be liable to a penalty of ₹50,000 and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues but not exceeding an amount of ₹1 lakh; and
- (d) Where no declaration has been filed with the Registrar under clause (a) of sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

1.1.1.11. Registered office of a company

Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the company for the communication and serving of necessary documents, notices letters etc. The domicile and the nationality of a company are determined by the place of its registered office. This is also important for determining the jurisdiction of the court.

- (1) **Registered office:** From the 15th day of its incorporation and at all times thereafter a company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.
- (2) **Verification of registered office:** The Company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation. The form to be filed in INC-22. Authorities can ask for any documents which gives right to possession of the office space.
- (3) **Labelling of company:** Every company shall:
 - a) paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.

- b) have its name engraved in legible characters on its seal (the Companies (Amendment) Act, 2015 has deleted the requirement of having Common Seal compulsorily).
 - c) get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications, and
 - d) have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed.
- (4) **Name change by the company:** Where a company has changed its name/s during the last two years, it shall paint or affix or print, along with its name, the former name or names so changed during the last two years.
- (5) **In case of OPC:** The words “One Person Company” shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.
- (6) **Notice of change to registrar:** Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar within 15 days of the change, who shall record the same. This is applicable to change in the registered address of the company within the local limits of the village, town or city and remaining within the jurisdiction of the same Registrar of Companies.
- (7) **Change by passing of special resolution:** The registered office of the company shall be changed only by passing of special resolution by a company:
- a) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company, and
 - b) in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company.
- (8) **Change of registered office outside the jurisdiction of registrar:** Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to confirmed by the Regional Director on an application made by the company.
- (9) **Communication and filing of confirmation:** The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be:
- a) communicated within 30 days from the date of receipt of application by the Regional Director to the company, and
 - b) the company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation who shall register the same, and
- The Registrar of Companies of the new jurisdiction shall certify the registration within a period of thirty days from the date of filing of such confirmation. As of now, Tamil Nadu and Maharashtra are the two states where there are two Registrars of Companies are operating. The jurisdictions of the respective Registrars of Companies are notified.
- (10) **Certificate, a conclusive evidence of compliance of requirements of this Act:** The certificate shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.

(11) In case of default: If any default is made in complying with the requirements of this Section, the company and every officer who is in default shall be liable to a penalty of ₹1,000 for every day during which the default continues but not exceeding ₹1 lakh.

In case, the Registrar is convinced with evidence that company is not carrying on any business, he may initiate action to strike off the name of the company.

1.1.1.12. Act to override Memorandum, Articles, etc.

According to Section 6 of the Companies Act, 2013, the provisions of this Act shall have overriding effect on provisions contained in memorandum or articles or in an agreement or in resolution passed by the company in the general meeting or by its board of directors, whether they are registered, executed or passed before or after the commencement of this Act.

Any provision contained in any of the above mentioned document, shall be void, to the extent to which it is inconsistent to the provisions of this Act.

1.1.1.13. Memorandum of Association

The Memorandum of Association of company is in fact its charter. It defines its constitution and the scope of the powers of the company with which it has been established under the Act.

A memorandum is a public document under Section 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

Section 4 of the Companies Act, 2013 seeks to provide for the requirements with respect to memorandum of a company.

Contents of Memorandum of Association

The memorandum of a company shall state:

- (1) the name of the company with the last word 'Limited' in the case of a public limited company, or the last words 'Private Limited' in the case of a private limited company.
- (2) the State in which the registered office of the company is to be situated.
- (3) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.
- (4) the liability of members of the company, whether limited or unlimited, and also state:
 - a) in the case of a company limited by shares, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them. And
 - b) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute:
 - 1) To the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be, and
 - 2) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves.

- (5) in the case of a company having a share capital:
 - a) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share, and
 - b) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name.
- (6) in the case of OPC, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

1.1.1.14. Applying for the name of the Company

The name stated in the memorandum shall not:

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law. or
- (b) be such that its use by the company:
 - (1) will constitute an offence under any law for the time being in force, or
 - (2) is undesirable in the opinion of the Central Government.
- (3) Registration of name of the company: Without effecting the above provisions, a company shall not be registered with a name which contains:
 - a) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force, or
 - b) such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

Various guidelines have been issued on viability and use of names and are stipulated in Companies (incorporation) Rules.

- (4) Requirement for the reservation of the name of the company:
 - a) A person may make an application, for reservation of name through web service to the Registrar, Central Registration Centre, which may either be approved or rejected for -
 - 1) the name of the proposed company. or
 - 2) the name to which the company proposes to change its name.
 - b) The name shall be reserved for 20 days from the date of approval in case of new company and sixty days in case of existing company.
 - c) Where after reservation of name it is found that name was applied by furnishing wrong or incorrect information, then:
 - 1) if the company has not been incorporated, the reserved name shall be cancelled and the person making application shall be liable to a penalty extending to one lakh rupees.
 - 2) if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard:
 - i. either direct the company to change its name within a period of 3 months, after passing an ordinary resolution.
 - ii. take action for striking off the name of the company from the register of companies, or
 - iii. make a petition for winding up of the company.

1.1.1.14.1. Extension of Reservation of name in certain cases

Upon payment of fees provided below through the web service available at www.mca.gov.in, the Registrar shall extend the period of a name reserved under rule 9 by using web service SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32), upto:

- (a) 40 days from the date of approval under rule 9, on payment of fees of rupees of one thousand rupees made before the expiry of twenty days from the date of approval under rule 9;
- (b) 60 days from the date of approval under rule 9 on payment of fees of ₹2,000 made before the expiry of forty days referred to in clause (a) above;
- (c) 60 days from the date of approval under rule 9 on payment of fees of ₹3,000 made before the expiry of twenty days from the date of approval under rule 9:

However, the Registrar shall have the power to cancel the reserved name in accordance with sub-section (5) of section 4 of the Companies Act, 2013.

1.1.1.15. Alteration of the Memorandum

It is likely that with the passage of time, the company will grow or diversify. Shareholders, therefore, have the right to modify nay issues which they cloud not foresee initially. This is done by alternation of the Memorandum and Articles, as and when needed. Section 13 of the Companies Act, 2013 provides the provisions that deal with the alteration of the memorandum. The provision says that:

- (1) Company may alter the provisions of its memorandum with the approval of the members by a special resolution.
- (2) Any change in the name of a company shall be effected only with the approval of the Central Government in writing:

However, no such approval shall be necessary where the change in the name of the company is only the deletion there from, or addition thereto, of the word 'Private', on the conversion of any one class of companies to another class.

The change of name shall not be allowed to a company which has defaulted in filing its annual returns or financial statements or any document due for filing with the Registrar or which has defaulted in repayment of matured deposits or debentures or interest on deposits or debentures.

- (3) On any change in the name of a company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.
- (4) The alteration of the memorandum changing the place of the registered office from one State to another shall not have any effect unless it is approved by the Central Government.
- (5) The Central Government shall dispose of the above shifting within 60 days, satisfying itself that:
 - a) the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or
 - b) the sufficient provision has been made by the company either for the due discharge of all its debts and obligations,
- (6) A company shall file with the Registrar such orders of CG, along with the shareholders' resolution.
- (7) Where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be

filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same.

- (8) The Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.
- (9) Change in the object of the company: A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution through postal ballot is passed by the company and:
 - a) the details, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change.
 - b) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.
- (10) The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution.
- (11) No alteration made under this Section shall have any effect until it has been registered in accordance with the provisions of this Section.
- (12) Only member have a right to participate in the divisible profits of the company: Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, intending to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

Rectification of name of memorandum

(1) Central government to issue direction

According to Section 16 of the Companies Act, 2013, the Central Government is empowered to give direction to the company to rectify its name (Where the name is identical with or too nearly resembles the name by which a company in existence had been previously registered, or the name is identical with or too nearly resembling to a registered trade mark) within a period of 3 months from the issue of such direction by passing an ordinary resolution.

(2) Notice of change to the Registrar

Where a company changes its name or obtains a new name, it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

1.1.1.16. Articles of Association

Definition of AoA

The articles of association are the bye-laws of the company according to which director and other officers are required to perform their functions as regards the management of the company. Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association as follows:

- (a) **Regulations for management:** The articles of a company shall contain the regulations for management of the company.
- (b) **Inclusion of matters:** The articles shall also contain such matters, as are prescribed under the rules.
However, a company may also include such additional matters in its articles as may be considered necessary for its management.

- (c) **Contain provisions for entrenchment:** The articles may contain provisions for entrenchment (to protect something) to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.
- (d) **Manner of inclusion of the entrenchment provision:** The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.
- (e) **Notice to the registrar of the entrenchment provision:** Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.
- (f) **Model articles:** A company may adopt all or any of the regulations contained in the model articles applicable to such company.
- (g) **Company registered after the commencement of this Act:** In case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.
- (h) **Section not apply on company registered under any previous company law:** Nothing in this Section shall apply to the articles of a company registered under any previous company law, unless amended under this Act.

1.1.1.17. Alteration of Articles

Section 14 of the Companies Act, 2013 vests companies with power to alter or add to its articles. The law with respect to alteration of articles is as follows:

- (a) Alteration by special resolution: Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.
- (b) Alteration to include conversion of companies: Alteration of articles include alterations having the effect of conversion of:
 - (1) a private company into a public company, or
 - (2) a public company into a private company:

Even where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, then such company shall, as from the date of such alteration, cease to be a private company:

However, any such alteration having the effect of conversion of a public company into a private company, then such conversion shall not take effect except with the approval of the Central Government on an application.

- (c) Every alteration of the articles and a copy of the order of the CG approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.
- (d) Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally contained in the articles.
- (e) Every alteration made in articles of a company shall be noted in every copy of the articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of ₹1,000 for every copy of the articles issued without such alteration. [Section 15]

1.1.1.18. Copies of memorandum, articles, etc., to be given to members

Copies of memorandum and articles of association, every agreement and every resolution referred in Section 117 shall, on being so requested by a member, be sent within 7 days of the request on the payment of fees:

- (a) the memorandum.
- (b) the articles, and
- (c) every agreement and every resolution referred in Section 117 (Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum or articles.

In case of default, the company and every officer who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

1.1.1.19. Privacy in management of companies

Doctrines of constructive notice

In consequences of the registration of the memorandum and articles of association of the company with the Registrar of Companies, a person dealing with the company is deemed to have constructive notice of their contents. This is because these documents are construed as 'public document' under Section 399 of the Companies Act, 2013. Accordingly, if a person deals with a company in a manner incompatible with the provisions of the aforesaid documents or enters into transaction, which is ultra vires to these documents, he must do so at his peril. Where the articles provide that a bill of exchange must be signed by two directors, if the bill is actually signed by one director only the holder thereof cannot claim payment thereon. However, the doctrine of constructive notice is not a positive one but a negative one like that of estoppel of which it forms parts. It operates only against the person who has been dealing with the company but not against the company itself. Persons in charge of management cannot be prevented from wrong doing on the pretext that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires. Thus, the doctrine is a 'cloud' for the strangers. The doctrine of indoor management has been recognized in the case of *Royal British Bank v. Turquand* (1856) 6 E&B 327 All ER Rep (435). While an ordinary person dealing with a company is bound to assume that the requisite compliance or delegation of powers to the person dealing on behalf of the company has been made, he need not probe beyond what is ostensible and evident from the actions.

1.1.1.20. Doctrine of Indoor Management

The aforesaid doctrine of constructive notice do not assume that outsiders are deemed to have notice of the internal affairs of the company. For instance, if an act is authorised by the articles or memorandum, an outsider is entitled to assume that all the detailed formalities for doing that act have been observed. For example, the directors of the *Royal British Bank Ltd. (R.B.B)* gave a bond to *Turquand (T)*. The articles empowered the directors to issue such bonds under the authority of a proper resolution. In fact, no such resolution was passed. Notwithstanding that, it was held that T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed [*The Royal British Bank vs. Turquand* (1956) 6E & B 327.] This is the doctrine of indoor management, which is the only limitation to the doctrine of constructive notice discussed above.

Exceptions to Doctrine of Indoor Management: The aforementioned rule of Indoor Management is important to persons dealing with a company through its directors or other persons. They are entitled to assume that the acts of the directors or other officers of the company are validly performed, if they are within the scope of their apparent authority. So long as an act is valid under the articles, if done in a particular manner, an outsider dealing with the company is entitled to assume that it has been done in the manner required. The above mentioned doctrine of Indoor Management has limitations of its own. The law will assume that those information which an outsider has reasonable access to and should have known with minimal efforts before dealing, cannot be a basis of indoor management case in his favour.

1.1.1.21. Conversion of companies already registered

According to Section 18 of the Companies Act, 2013, a company may convert itself in some other class of company by altering its memorandum and articles of association. Following is the law with respect to the conversion of the companies already registered.

- (a) By alteration of memorandum and articles: A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.
- (b) File an application to the Registrar: Wherever such conversion of companies is required to be done, the company shall file an application to the Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, close the former registration of the company.
- (c) Issue a certificate of incorporation: After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.
- (d) No effect on the debts, liabilities etc. incurred before conversion: The registration of a company under this Section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

1.1.2. Formation of Not-for-Profit making Companies

For various reasons and objectives, people form companies not for profit. The surplus generated in the company, if any, is used for the fulfilment of the objectives of the company and no profit is distributed to the shareholders. A not-for-Profit organization also known as a non-business entity or social enterprise. In economic terms, a Not-for-Profit organization uses its surplus revenues to further achieve its purpose or mission, rather than distributing its surplus income to the organization's shareholders (or equivalents) as profit or dividends. Such company-

- (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object.
- (b) intends to apply its profits, if any, or other income in promoting its objects, and
- (c) prohibit the payment of any dividend to its members.

The Central Government may, by licence on such conditions as it deems fit, allow that association of persons to be registered as a limited company under this Section without the addition to its name of the word 'Limited', or as the case may be, the words 'Private Limited', and thereupon the Registrar shall, on application, in the prescribed form, register such association of persons as a company under Section 8 of the Act, with following features.

- (1) The company shall enjoy all the privileges and be subject to all the obligations of limited companies.
- (2) A firm may be a member of the company registered under this Section.
- (3) A company shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.
- (4) A company may convert itself into company of any other kind only after complying with such conditions as may be prescribed.
- (5) where the Central Government is convinced that a limited company registered under this Act or under any previous company law has been formed with any of the objects specified in clause (a) of Sub-Section (1) and with the restrictions and prohibitions as mentioned respectively in clauses (b) and (c) of that Sub-Section, it may, by license, allow the company to be registered under this Section subject to such conditions and to change its name by omitting the word 'Limited', or as the case may be, the words 'Private Limited' from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company.

- (6) The Central Government may, by order, revoke such licence on being convinced the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, direct the company to convert its status and change its name to add the word 'Limited' or the words 'Private Limited', as the case may be.
- (7) Where a licence is revoked under Sub-Section (6), the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this Section.
- (8) order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.
- (9) If on the winding up or dissolution of a company registered under this Section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this Section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to the Rehabilitation and Insolvency Fund formed under Section 269 of the Companies Act, 2013.
- (10) A company registered under this Section shall amalgamate only with another company registered under this Section and having similar objects. Certificate of incorporation under this section shall mention permanent account number.
- (11) If a company makes any default in complying with any of the requirements laid down in this Section, the company shall, without prejudice to any other action under the provisions of this Section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with fine which shall not be less than ₹25,000 but which may extend to ₹25 lakh.

Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under Section 447.

1.1.2.1. License Under Section 8 for Existing Companies

Persons desirous of getting a licence under section 8, shall make an application in form INC-12. The MOA shall be in form INC 13 and declaration by professionals shall in in INC-14.

An estimated income and expenditure statement for next 3 years, shall also have to be furnished.

An existing company can also be converted into a non profit company. Application can be made in INC-12 with. MOA and AA. Declaration. Financial statement and audit report of previous years.

1.1.3. Procedure relating to Foreign Companies carrying on Business in India

According to Section 2 (42) 'foreign company' means any company or body corporate incorporated outside India and which:

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode, and
- (b) conducts any business activity in India in any other manner.

The Companies Act, 2013 provides detailed provisions for compliance by the foreign companies carrying on business in India. Section 379 provides that provisions of section 380 to 386, 392 and 393 shall apply to foreign companies with or without exemption.

1.1.3.1. Inspection, Inquiry or Investigation [Section 228]

The provisions as to inspection, inquiry or investigation under Chapter XIV of the Act shall apply 'mutatis mutandis' to foreign companies.

1.1.3.2. Merger into a company registered under this Act or vice versa [Section 234(2)]

Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the 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.

Explanation: For the purposes of sub-section (2), the expression “foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not.

1.1.3.3. Winding up as an unregistered company [Section 376]

Where a body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India, it may be wound up as an unregistered company under this Part, notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

1.1.3.4. Foreign Company shall be deemed to be an Indian Company for this purpose [Section 379]

Where not less than fifty per cent of the paid-up share capital, equity or preference, or combination thereof, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII of the Act and such other provisions of the Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

1.1.3.5. Registration with the Registrar of Companies [Section 380(1)]

- (a) Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration:
 - (1) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language.
 - (2) the full address of the registered or principal office of the company.
 - (3) a list of the directors and secretary of the company containing such particulars as may be prescribed.
 - (4) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company.
 - (5) the full address of the office of the company in India which is deemed to be its principal place of business in India.
 - (6) particulars of opening and closing of a place of business in India on earlier occasion or occasions.
 - (7) declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad, and
 - (8) any other information as may be prescribed.

Any alteration of the above documents shall be informed to Registrar within 30 days of alteration.

1.1.3.6. Balance sheet and profit and loss account [Section 381(1)]

- (a) Every foreign company shall, in every calendar year:

- (1) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents as may be prescribed, and
- (2) deliver a copy of those documents to the Registrar, unless exempted.

Provided that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in that notification.

- (b) If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof in the English language.
- (c) Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out.

1.1.3.7. Display of Name of Foreign Company [Section 382]

Every foreign company shall:

- (a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate.
- (b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, billheads and letter paper, and in all notices, and other official publications of the company, and
- (c) if the liability of the members of the company is limited, cause notice of that fact:
 - (1) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and
 - (2) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.

1.1.3.8. Service of documents [Section 383]

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under Section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

- (a) The provisions of section 71 shall apply mutatis mutandis to a foreign company [Section 384(1)].
- (b) The provisions of section 92 shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.
- (c) The provisions of section 128 shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.
- (d) The provisions of Chapter VI shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.

- (e) The provisions of Chapter XIV shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

1.1.4. Conversion of LLPs into Private Limited Companies and vice versa.

Choosing form of business is voluntary for the entrepreneur subject to restrictions of law. The provisions of the Companies Act, 2013 read with rules made thereunder provides for the conversions of companies from one type of company to other another type of Company.

The company can convert in to following type of companies:

Conversion of a private company into a public company

Conversion of a public company into a private company

Conversion of one person company to private company/ public company

Conversion of private company to one person company

Conversion of section 8 company into any other kind of company

Conversion of LLP into company

Conversion from private company into limited liability partnership

Conversion from unlisted public company into limited liability partnership

we will discuss only two types of conversion i.e. from LLP to company and vice versa.

1.1.4.1. Conversion of LLP into Company.

An LLP can be converted into a Pvt. Ltd. company as per the provisions contained in Section 366 of the Companies Act, 2013 and the Companies (Authorised to Registered) Rules, 2014.

This step can be initiated in 2 ways as enumerated below:

- (i) Incorporation of a new corporate entity.
- (ii) Conversion of existing entity (e.g. LLP/ Partnership Firm) into a Company.

The process of conversion is a step by step procedure, which is a technical process but if handled with expert knowledge may be time and cost saving, as well. Ministry of Corporate Affairs has passed a notification on 31st May, 2016 in such notification its allowed conversion of LLP into Company. These rules called as “the Companies Authorized to register Amendment Rules, 2016.

However, there are various requirements which need to be satisfied for converting an LLP into a Private Limited Company, for instance, an LLP must have at least 7 partners (however as per Companies Amendment Act, 2017 LLP with 2 partners can be convert into Company), approval from all the partners is required, advertisement in newspaper is to be done in a local and a national newspaper, a No Objection Certificate (NOC) is required from the ROC where such LLP is registered and then all the incorporation process has to be undertaken which includes:

The following process is to be followed:

Approval of Name

Hold a meeting of the partners to decide the name of the company summoned for the purpose of registering the LLP under Section 366 of the Companies Act, 2013. To authorize partners to take all steps necessary and to execute all papers, deeds, documents etc. pursuant to registration of the LLP as a Company.

One of the major advantages is that the business can be run under the same name as that of the LLP except that in addition to the name of the LLP the words ‘limited’ or ‘private limited’ has to be added. The name once accepted by the authority will be valid for 60 days.

Securing DSC and DIN

In case all 2 or 7 members, as the case may be, who are future directors of the company after conversion, do not have the Digital Signature Certificate (DSC) and Director Identification Number (DIN) for all the future directors of the company must be obtained. For obtaining the DIN, an application form must be filed on MCA portal. DIN application is processed & approved by central government via the office of regional director, the ministry of corporate affairs.

Filing form no. URC – 1

For the purposes of sub-section (2) of section 366 of the Companies Act, 2013, the provision of Chapter II of the Act relating to incorporation of company and matters incidental thereto shall be applicable mutatis mutandis for such registration:

Provided that there shall be two or more members for the purposes of registration of a company under this sub-rule:

Provided further that a company with less than seven members shall register as a private company.

A company shall attach and provide the required documents and information to the Registrar along with Form No. URC. 1 in the following manner, namely:-

(a) In case of an application by a Limited Liability Partnership or firm for registration as a company limited by shares-

- (i) a list showing the names, addresses, and occupations of all persons named therein as partners with details of shares held by them respectively, showing separately shares allotted for consideration in cash and for consideration other than cash along-with the source of consideration and distinguishing, in cases where the shares are numbered, each share by its number, who on a day, not being more than six clear days before the day of seeking registration, were partners of the Limited Liability Partnership or firm as the case may be;
- (ii) a list showing the particulars of persons proposed as the first directors of the company, along with Director Identification Number (DIN), passport number, if any, with expiry date, residential addresses and their interests in other firm or body corporate along with their consent to act as directors of the company;
- (iii) in case of a firm, deed of partnership, bye-laws or other instrument constituting or regulating the firm and in case the deed of partnership was revised at any time in the past, copies of the principal and all subsequent deeds including the latest deed, along with the certificate of the registration issued by the Registrar of Firms, in case the firm is registered;
- (iv) written consent or No Objection Certificate from all the secured creditors of the applicant;
- (v) written consent, from the majority of members whether present in person or by proxy at a general meeting, agreeing for such registration, provided that there shall be two or more members for the purposes of registration of a company under this sub-rule:

Provided further that a company with less than seven members shall register as a private company.

(b) Conversion of company into LLP

Any existing private company or existing unlisted public company can be converted into LLP by complying with the Provisions of clause 58 and Schedule III and IV of the LLP Act.

Board Meeting

Pass Resolution for Conversion of Company into LLP and to authorize any director to file all the necessary forms with MCA. Take the written consent of all the shareholders for conversion of Company into LLP.

Name Availability approval

File web based Form RUN-LLP with ROC. Board Resolution Board resolution passed by the Company approving the conversion into LLP shall be attached with the aforesaid form.

Agreement

Limited liability partnership agreement shall have the following issues:

Name of LLP

- ✧ Name of Partners & Designated Partners
- ✧ Form of contribution
- ✧ Profit Sharing ratio
- ✧ Rights & Duties of Partners
- ✧ Proposed Business
- ✧ Rules for governing the LLP

It is not necessary to have the LLP Agreement signed at the time of incorporation, as the details of the same needs to field in e-form 3 within 30 days of incorporation but in order to avoid any dispute between the partners as to the terms & conditions of the agreement after the conversion into LLP, it is required to be drafted various documents to authenticate registered office and other statements etc. are to be filed.

Filling of application for conversion:

File E-FORM- 18 with ROC along with following Attachments:

Statement of shareholders. It is the document given by each shareholders giving their consent and statement.

Statement of Assets and Liabilities of the company duly certified as true and correct by the auditor.

In case all 2 or 7 members, as the case may be, who are future directors of the company after conversion, do not have the Digital Signature Certificate (DSC) and Director Identification Number (DIN) for all the future directors of the company must be obtained. For obtaining the DIN, an application form must be filed on MCA portal. DIN application is processed & approved by central government via the office of regional director, the ministry of corporate affairs.

Filing form no. URC – 1

For the purposes of sub-section (2) of section 366 of the Companies Act, 2013, the provision of Chapter II of the Act relating to incorporation of company and matters incidental thereto shall be applicable mutatis mutandis for such registration:

Provided that there shall be two or more members for the purposes of registration of a company under this sub-rule:

Provided further that a company with less than seven members shall register as a private company.

A company shall attach the following manner, namely:-

- (a) In case of an application by a Limited Liability Partnership or firm for registration as a company limited by shares-
 - (i) a list showing the names, addresses, and occupations of all persons named therein as partners with details of shares held by them respectively, showing separately shares allotted for consideration in cash and for consideration other than cash along-with the source of consideration and distinguishing, in cases where

the shares are numbered, each share by its number, who on a day, not being more than 6 clear days before the day of seeking registration, were partners of the Limited Liability Partnership or firm as the case may be;

- (ii) a list showing the particulars of persons proposed as the first directors of the company, along with Director Identification Number (DIN), passport number, if any, with expiry date, residential addresses and their interests in other firm or body corporate along with their consent to act as directors of the company;
- (iii) in case of a firm, deed of partnership, bye-laws or other instrument constituting or regulating the firm and in case the deed of partnership was revised at any time in the past, copies of the principal and all subsequent deeds including the latest deed, along with the certificate of the registration issued by the Registrar of Firms, in case the firm is registered;
- (iv) written consent or No Objection Certificate from all the secured creditors of the applicant;
- (v) written consent, from the majority of members whether present in person or by proxy at a general meeting, agreeing for such registration;

Provided that there shall be two or more members for the purposes of registration of a company under this sub-rule:

Provided further that a company with less than seven members shall register as a private company.

1.2.1. Procedure for Inter-Corporate Loans, Investments, giving of Guarantee and Security

1.2.1.1. Loan and Investment by Company (Section 186)

Like individuals, companies also have some surplus money from time to time and they make short term/long term investment. However, “investment” here denotes long term.

In the present context the term ‘Investments’ is used in a limited sense to mean the investment of money in shares, stock, debentures, or other securities.

The power to invest the funds of the company is the prerogative of the Board of Directors. This power is derived by the Board under Section 179 of the Companies Act, 2013. However, the Act contains provisions for restrictions on investments that a company can make and loans it can provide. Moreover, giving corporate guarantee or security is also as good as giving a loan, because the person to whom guarantee or security is given can decide to enforce the guarantee or security in certain conditions and in such a situation, the company will have to pay the amount.

Thus apart from loan and investments, restrictions are also placed on the guarantees which the company can give or security it can provide for a loan. Provisions in respect of giving of loans, making investments, giving guarantee or providing securities have been considerably modified under Section 186 of the Companies Act, 2013.

Section 186 of the Act provides Loan and Investment by a Company.

- (a) A company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:

It shall not affect:

- (1) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country.
- (2) 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.

- (b) No company shall directly or indirectly:

- (1) give any loan to any person or other body corporate.
- (2) give any guarantee or provide security in connection with a loan to any other body corporate or person, and
- (3) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate exceeding sixty per cent of its paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more, without prior approval by means of a special resolution. This requirement will not apply in case of holding company in relation to its wholly owned subsidiary or joint venture company.

- (c) Where the giving of any loan or guarantee or providing any security or the acquisition under Sub-Section (2) exceeds the limits specified in that Sub-Section, prior approval by means of a special resolution passed at a general meeting shall be necessary.
- (d) The company shall disclose to the members in the financial statement the full particulars of the loans given, investment made or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.
- (e) No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained:
 Provided that prior approval of a public financial institution 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 Sub-Section (2) 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.
- (f) No company, which is registered under Section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits.
- (g) No loan shall be given under this Section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.
- (h) No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting.
- (i) Every company giving loan or giving a guarantee or providing security or making an acquisition under this Section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed.
- (j) The register referred to in Sub-Section (9) shall be kept at the registered office of the company and:
 - (1) shall be open to inspection at such office, and
 - (2) extracts may be taken there from by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed.
- (k) Nothing contained in this Section, except Sub-Section (1) shall apply:
 - (1) to a loan made, guarantee given or security provided by a banking company or an insurance company or a housing finance company in the ordinary course of its business or a company engaged in the business of financing of industrial establishment or of providing infrastructural facilities.
 - (2) to any investment: (i) made by an investment company (ii) subscription to right issue (iii) by NBFC (iv) made by a company whose principal business is the acquisition of securities. (v) of shares allotted in pursuance of clause (a) of Sub-Section (1) of Section 62.
- (l) The Central Government may make rules for the purposes of this Section.
- (m) If a company contravenes the provisions of this Section, the company shall be punishable with fine which shall not be less than ₹25,000 but which may extend to ₹25 lakh and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than ₹25,000 but which may extend to ₹1 lakh.

1.2.1.2. Investments of Company to be held in its own name [Section 187]

- (a) All investments made or held by a company in any property, security or other asset shall be made and held by it in its own name:

Provided that the company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

Example : ABC Ltd. holds 100% of XYZ Ltd. which is a private limited company, where at least two members shall be there. ABC Ltd. is one member. ABC Ltd can, therefore, nominate someone as shareholder but only one, since this is the minimum requirement of members which it will fall below to statutory limit of two members.

- (b) Nothing in this Section shall be deemed to prevent a company:

- (1) from depositing with a bank, any shares or securities for the collection of any dividend or interest payable thereon.
- (2) from depositing with, or transferring to, or holding in the name of, the State Bank of India or a scheduled bank, being the bankers of the company, shares or securities, in order to facilitate the transfer thereof:
- (3) from depositing with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan.
- (4) from holding investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.

- (c) Where any shares or securities in which investments have been made by a company are not held by it in its own name, the company shall maintain a register which shall contain such particulars as may be prescribed and such register shall be open to inspection by any member or debenture-holder of the company without any charge during business hours.

1.2.2. Acceptance of Deposits, Renewal, Repayment, Default and Remedies

‘Deposit’ includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Section 2 (31) of the Companies Act, 2013.

Provisions as to acceptance of deposits by companies have been considerably modified and made more stringent from Sections 73 to 76 under Chapter V of the Companies Act, 2013. Deposits used to be a very good source for short term capital. It used to be a regular course of income of for retired persons. However, with series of defaults by companies, investors lost faith on the companies. Presently, few companies are trusted for keeping deposits. Companies, now, have various alternate sources.

1.2.2.1. Prohibition on Acceptance of Deposits from Public [Section 73]

- (a) No company can invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter.

Provided that nothing in this Sub-Section shall apply to a banking company and non-banking financial company and to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

- (b) A company may, with the mandate of a resolution in general meeting and subject to such rules as may be prescribed accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and

its members, subject to the fulfilment of the following conditions, namely:

- (1) issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed.
- (2) filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular.
- (3) depositing on or before 30th April each year such sum which shall not be less than twenty per cent of the amount of its deposits maturing during a financial year, and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account.
- (4) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits, and where the default has occurred, the company made good the default and five years have elapsed since then.
- (5) providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.

Provided that in case where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as 'unsecured deposits' and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

- (c) Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions.
- (d) Where a company fails to repay the deposit or part thereof or any interest thereon under Sub-Section (3) the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.
- (e) The deposit repayment reserve account referred to in clause (c) of Sub-Section (2) shall not be used by the company for any purpose other than repayment of deposits. The detailed procedure is mentioned under Companies (Acceptance of Deposits) Rules, 2014. Some of the Rules are summarised and placed below for understanding.

1.2.2.2. Terms and Conditions of Acceptance of Deposits by Companies (Rule 3)

- (a) On and from the commencement of these rules:

- (1) No company shall accept or renew any deposit, whether secured or unsecured, which is repayable on demand or upon receiving a notice within a period of less than 6 months or more than 36 months from the date of acceptance or renewal of such deposit.

However, a company may, accept or renew such deposits for repayment earlier than 6 months:-

- a) not exceeding 10% of the aggregate of the paid up share capital and free reserves of the company, but shall be repayable not earlier than three months.
- (b) Maximum limit of deposit outstanding at any point of time shall be 35%, of the aggregate of the paid-up share capital reserves and security premium of the company.
- (c) No eligible company shall accept or renew:
 - a) any deposit from its members, up to 10%.
 - b) any other deposit, up to 25%.

(d) Rate of brokerage shall as per RBI guidelines.

Eligible company for acceptance of deposits: Rule 2(a) of Companies (AD) Rules defines “eligible company” which means a public limited company with net worth ₹100 cr. and turnover of minimum ₹500 cr. and have consent of shareholders through special resolution to accept public deposits.

- (2) Where depositors so desire, deposits may be accepted in joint names not exceeding three, with or without any of the clauses, namely, ‘Jointly’, ‘Either or Survivor’, ‘First named or Survivor’, ‘Anyone or Survivor’.
- (b) No company referred to in Sub-Section (2) of Section 73 shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds thirty five per cent, of the aggregate of the paid-up share capital reserves and security premium of the company.
- (c) No eligible company shall accept or renew:
- any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds ten per cent, of the aggregate of the paid-up share capital and free reserves of the company.
 - any other deposit, if the amount of such deposit together with the amount of such other deposits, other than the deposit referred to in clause (a), outstanding on the date of acceptance or renewal exceeds twenty-five per cent, of aggregate of the paid-up share capital free reserves and security premium of the company.
- (d) No Government company eligible to accept deposits under Section 76 shall accept or renew any deposit, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds thirty five per cent, of the aggregate of its paid up share capital free reserves and security premium of the company.
- (e) No company referred to in Sub-Section (2) of Section 73 or any eligible company shall invite or accept or renew any deposit in any form, carrying a rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.
- (f) The company shall not reserve to itself either directly or indirectly a right to alter, to the prejudice or disadvantage of the depositor, any of the terms and conditions of the deposit, deposit trust deed and deposit insurance contract after circular or circular in the form of advertisement is issued and deposits are accepted.

1.2.2.3. Creation of Security (Rule 6)

- (a) Every eligible company inviting secured deposits shall provide for security by way of a charge on its assets for the due repayment of the amount of deposit and interest thereon for an amount which shall not be less than the amount remaining unsecured by the deposit insurance.
- (b) The security (not being in the nature of a pledge) for deposits as specified in sub-rule (1) shall be created in favour of a trustee for the depositors on:
- specific movable property of the company, or
 - specific immovable property of the company wherever situated, or any interest therein.

1.2.2.4. Appointment of Trustee for Depositors (Rule 7)

- (a) No eligible company shall issue a circular or advertisement inviting secured deposits unless the company has appointed one or more trustees for depositors for creating security for the deposits. Trustees shall not be related to the directors and shall not have pecuniary interest on the company.

- (b) The company shall execute a deposit trust deed in Form DPT-2 at least seven days before issuing the circular or circular in the form of advertisement.
- (c) No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the depositors, if the proposed trustee:
 - (1) is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company.
 - (2) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company.
 - (3) has any material pecuniary relationship with the company.
 - (4) has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon.
 - (5) is related to any person specified in clause (a) above.
- (d) No trustee for depositors shall be removed from office after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting of the board.

Provided that in case the company is required to have independent directors, at least one independent director shall be present in such meeting of the Board.

1.2.2.5. Duties of Trustees (Rule 8)

It shall be the duty of every trustee for depositors to:

- (a) ensure that the assets of the company on which charge is created together with the amount of deposit insurance are sufficient to cover the repayment of the principal amount of secured deposits outstanding and interest accrued thereon.
- (b) satisfy himself that the circular or advertisement inviting deposits does not contain any information which is inconsistent with the terms of the deposit scheme or with the trust deed and is in compliance with the rules and provisions of the Act.
- (c) ensure that the company does not commit any breach of covenants and provisions of the trust deed.
- (d) take such reasonable steps as may be necessary to procure a remedy for any breach of covenants of the trust deed or the terms of invitation of deposits.
- (e) take steps to call a meeting of the holders of deposits as and when such meeting is required to be held.
- (f) supervise the implementation of the conditions regarding creation of security for deposits and the terms of deposit insurance.
- (g) do such acts as are necessary in the event the security becomes enforceable.
- (h) carry out such acts as are necessary for the protection of the interest of depositors and to resolve their grievances.

1.2.2.6. Meeting of Depositors (Rule 9)

The trustee for depositors shall call a meeting of all the depositors on:

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

1.2.2.7. Repayment of Deposits, etc., Accepted before Commencement of this Act [Section 74]

- (a) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall:
 - (1) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law, and
- (b) repay within three years from such commencement or on or before expiry of the period for which the deposits were accepted, whichever is earlier:
- (c) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.
- (d) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in Sub-Section (1) or such further time as may be allowed by the Tribunal under Sub-Section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to 2 crore rupees or with both.

1.2.2.8. Maintenance of Liquid Assets and Creation of Deposit Repayment Reserve Account

Every company referred to in Sub-Section (2) of Section 73 and every eligible company shall on or before the 30th day of April of each year deposit the sum as specified in clause (c) of the said Sub-Section with any scheduled bank and the amount so deposited shall not be utilised for any purpose other than for the repayment of deposits.

Provided that the amount remaining deposited shall not at any time fall below fifteen per cent, of the amount of deposits maturing, until the end of the current financial year and the next financial year.

1.2.2.9. Registers of Deposits

- (a) Every company accepting deposits shall maintain at its registered office one or more separate registers for deposits accepted or renewed, in which there shall be entered separately in the case of each depositor the following particulars, namely:
 - (1) name, address and PAN of the depositor/s.
 - (2) particulars of guardian, in case of a minor
 - (3) particulars of the nominee.
 - (4) deposit receipt number.
 - (5) date and the amount of each deposit.
 - (6) duration of the deposit and the date on which each deposit is repayable.
 - (7) rate of interest or such deposits to be payable to the depositor.
 - (8) due date for payment of interest.
 - (9) mandate and instructions for payment of interest and for non-deduction of tax at source, if any.

- (10) date or dates on which the payment of interest shall be made.
- (11) details of deposit insurance including extent of deposit insurance.
- (12) particulars of security or charge created for repayment of deposits.
- (13) any other relevant particulars.
- (b) The entries specified in sub-rule (1) shall be made within seven days from the date of issuance of the receipt duly authenticated by a director or secretary of the company or by any other officer authorised by the Board for this purpose.
- (c) The register referred to in sub-rule (1) shall be preserved in good order for a period of not less than eight years from the financial year in which the latest entry is made in the register.

Acceptance of Deposits without compliance of the Act, Rules and notifications could attract penalty and prosecution as per the Act.

1.2.2.10. Damages for Fraud [Section 75]

- (a) Where a company fails to repay the deposit or part thereof or any interest thereon referred to in Section 74, and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in Sub-Section (3) of that Section and liability under Section 447, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.
- (b) Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon.

1.2.2.11. Acceptance of Deposits from Public by Certain Companies [Section 76]

- (a) Notwithstanding anything contained in Section 73, a public company, having such net worth of ₹100 cr. or turnover of ₹500 cr. as may be prescribed, may accept deposits from persons other than its members

Provided that such a company shall be required to obtain the rating (including its net worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits.

Provided further that every company accepting secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders in accordance with such rules as may be prescribed.

- (b) The provisions of this Chapter shall, mutatis mutandis, apply to the acceptance of deposits from public under this Section.

Acceptance of deposits without compliance of the Act Rules and notifications would attract penalty and prosecution as per the Act.

1.2.12. Punishment for contravention of Section 73 or Section 76 [Section 76A]

Where a company accepts or invites or allows or cause any other person to accept or invite on its behalf any deposit in contravention of the manner or the conditions prescribed under Section 73 or Section 76 or rules made thereunder or if a company fails to repay the deposit or part thereof or any interest due thereon within the time specified under Section 73 or Section 76 or rules made thereunder or such further time as may be allowed by the Tribunal under Section 73:

- (a) The company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than ₹1 crore or twice the amount of deposit whichever is lower.
- (b) Every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years and fine which shall not be less than ₹25 lakhs but which may extend to ₹2 crores.

Provided that if it is proved that the officer of the company who is in default, has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action under Section 447.

1.2.3. Public Deposits and Debt Instruments

A company needs take loan while running the company which is very common. There are many sources of loan. However, the most common instrument is debenture or bonds. We will discuss in brief, the types of debentures and matters relating to issue of debentures.

Debentures

Definition as per Companies Act, 2013?

A debenture is a type of long term debt instrument which acknowledges debt. Debentures are backed only by the general creditworthiness and reputation of the issuer. Both corporations and governments frequently issue this type of bond to secure capital. Debentures may be secured or unsecured.

As per Section 2(30) of The Companies Act, 2013 “Debenture” includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether consisting a charge on the assets of the company or not.

Types of Debenture:

The major types of debentures are redeemable, irredeemable, convertible, non-convertible, fully, partly, secured, unsecured, fixed, floating rate, zero coupon, deep discount. Following are the various types of debentures vis-a-vis their basis of classification:

Redeemable and Irredeemable (Perpetual) Debentures

Redeemable debentures carry a specific date of redemption on the certificate. The company is legally bound to repay the principal amount to the debenture holders on that date. On the other hand, irredeemable debentures, also known as perpetual debentures, do not carry any date of redemption. This means that there is no specific time of redemption of these debentures. They are redeemed either on the liquidation of the company or when the company chooses to pay them off to reduce their liability by issues a due notice to the debenture holders beforehand.

Convertible and Non-Convertible Debentures

Convertible debenture holders have to convert their holdings into equity shares. The rate of conversion and the period after which the conversion will take effect are declared in the terms and conditions of the agreement of debentures at the time of issue. On the contrary, non-convertible debentures are simple debentures which will continue to be debentures till redemption. However, if option is given to the investor to convert or not to convert the debenture into shares, this kind of debenture is called optionally convertible debentures.

Fully and Partly Convertible Debentures/Optionally Convertible Debentures

Convertible Debentures are further classified into two – Fully and Partly Convertible. Fully convertible debentures are completely converted into equity whereas the partly convertible debentures have two parts. Convertible part is converted into equity as per agreed rate of exchange based on terms of issue. Non-convertible part remains as redeemable debenture which is repaid after the expiry of the agreed period.

However, option may also be given to the debenture holder either to continue as debenture holder or convert into shareholder. If such option exists in the terms of issue. This will amount to optionally convertible debenture.

Example: ABC Ltd. issues debenture of ₹100 which will be repaid after 10 years with annual interest rate of 9%. This is non convertible denture. Alternatively, ABC Ltd. converts ₹100 into 10 shares of ₹10 each after 5 years. This is fully convertible denture. Alternatively, out of ₹100, ₹50 is converted into 5 shares of ₹10 each after 5 years and the balance remain as debenture, which will be repaid after 10 years. This is partly convertible debenture. Alternatively, AB ltd. gives an option to the debenture holder either to convert or not to convert the debenture into shares after 5 years. This is a optionally convertible debenture.

Secured and Unsecured Debentures

When the debenture is secured by the charge on some asset or set of assets it is known as secured or mortgage debenture and when it is issued solely on the credibility of the issuer is known as the naked or unsecured debenture. In case of unsecured debenture, the Debenture holder is like any other unsecured creditor. In case of secured debenture, there is a security created by the company on its assets. In case of issue of debenture on private placement basis, the security can be decided by the issuer company and the investor. Public issue of debentures has to be secured, if the maturity period is more than 18 months. In such case, a SEBI registered debenture trustee is appointed, to whom the security is mortgaged with a condition that if the company fails to repay interest or principal, the debenture trustee shall have right to sale off the property and satisfy the claims of debenture holders both interest and principal.

Fixed and Floating Rate Debentures

Fixed rate debentures have fixed interest rate over the life of the debentures. The floating rate debentures have the floating rate of interest which is dependent on some benchmark rate and goes on fluctuating depending on market conditions.

Zero Coupon Debentures

Zero coupon debentures do not carry any coupon rate (interest) or we can say that there is zero coupon rate. The debenture holder will not get any interest on these types of debentures. In such case a warranty is issued with a debenture which may have entitlement to get a share at discount. This compensates the interest foregone. However, zero coupon rate debentures may be issued at discount and are normally called “discounted bonds”. If the maturity period is long it is called “deep discount bond”.

1.3.1. Profits and Ascertainment of Divisible Profit

Investors remain invested in a company for capital appreciation, i.e., increase in the value of shares and dividend. Dividend in literal terms means the profit of a company which is not retained in the business and is distributed among the shareholders in proportion to the amount paid up on the shares held by them. It determines the attraction for a particular company.

Chapter VIII of the Companies Act, 2013 deals with the Declaration and Payment of Dividend.

‘Divisible profits’ means the profits which the law allows the company to distribute to the shareholders by way of dividend. According to Palmer’s Company Law, the terms ‘divisible profits’ and ‘profits in the legal sense’ are synonymous. Many companies pay major part of the profits as dividend whereas some companies retain the profit as reserves. The former is called good payout company and later is bad payout company. Share prices, many times, depend on dividend payout policy of the company.

Meaning of Dividend

The term ‘dividend’ has been defined under Section 2(35) of the Companies Act, 2013. The term “Dividend” includes any interim dividend. It is an inclusive and not an exhaustive definition. According to the generally accepted definition, “dividend” means the profit of a company, which is not retained in the business and is distributed among the shareholders in proportion to the amount paid-up on the shares held by them.

Dividends are usually payable for a financial year after the final accounts are ready and the amount of distributable profits is available and are related as percentage of the face value of shares.

Dividend for a financial year of the company (which is called ‘final dividend’) are payable only if it is declared by the company at its annual general meeting on the recommendation of the Board of directors. Sometimes dividends are also paid by the Board of directors between two annual general meetings without declaring them at an annual general meeting (which is called ‘interim dividend’). This interim dividend is regularized in AGM. SEBI has introduced disclosure of dividend policy. A note on the same is annexed to this chapter.

Nonprofit companies under Section 8 of the Act are prohibited by their constitution from paying any dividend to its members.

Dividends are normally declared as percentage to the face value of shares. However, in recent times, absolute amount, i.e. ₹7.50 per share, is also used. Reason being variation in face value of various companies, which sometimes, the shareholder is not aware of.

1.3.2. Declaration and Payment of Dividend

According to Section 123 (1) of the Act No dividend shall be declared or paid by a company for any financial year except :

- (a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or out of the profits of the company for any previous financial year or years

arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both, or

[“Provided that in computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or”]

(b) out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both, or

No Dividend shall be declared or paid by a company from its reserves other than free reserves.. The carried over previous losses and accumulated depreciation has to be set off against current year's profit. Further, companies failing to repay interest or principal of public deposits under Section 73 and 74 of the Act, shall not declare dividend.

The above proviso 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. [Inserted vide Notification dated 5th June, 2015]

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.

Dividend shall be departed out of current year's profit only. The carry over accumulated depreciation and losses, if any, shall be adjusted with current years profit. Further, companies failing to repay interest or principal of public deposit under section 73 and 74 of the Act, shall not declare dividend.

1.3.2.1. Declaration of Dividend out of Reserves

There may be a situation when a constantly paying dividend company, owing to inadequacy or absence of profits in any financial year, the company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred to the free reserves, such declaration of dividend shall be made in compliance of Rules as discussed below.

For declaration of dividend out of accumulated profits, the Ministry of Corporate Affairs has provided Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014. Thereby, when there is inadequacy or absence of profits in any year, a company may declare dividend out of free reserves. However, the following conditions shall be fulfilled before declaring dividend out of reserves:

(1) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the 3 years immediately preceding that year:

Provided that this sub-rule shall not apply to a company, which has not declared any dividend in each of the three preceding financial year.

(2) The total amount to be drawn from such accumulated profits shall not exceed one -tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.

(3) The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

(4) The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

1.3.2.2. Depositing of amount of Dividend

In terms of section 123(4), the amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within 5 days from the date of declaration of such dividend.

This sub-section 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.

1.3.2.3. Interim Dividend [123(3)]

The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of AGM out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profit generated in Financial Year till the quarter preceding the date of declaration of dividend.

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

The Board of directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a separate bank account within five days from the date of declaration of such dividend. The interim dividend shall be ratified in AGM, along with any further dividend to be called as final dividend.

Interim dividend has become very common now, with few blue chip companies declaring interim dividend almost every year. Finance Ministry has issued a guideline to Central PSUs to declare dividend each quarter after the quarterly result, if there is adequate profit.

1.3.2.4. Payment of Dividend [123(5)]

Procedure for treatment of payment of interim and final dividend is same. Dividend, once declared in AGM, cannot be revoked.

- (a) Dividends are payable in cash. Dividends that are payable to the shareholder in cash may be paid by cheque or warrant or in any electronic mode.
- (b) Dividend shall be payable only to the registered shareholder of the share or to his order or to his banker.
- (c) Capitalization of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares should not be confused with payment of dividend as both are separate issues.

1.3.2.5. Punishment for failure to distribute Dividends (Section 127)

- (a) On non-compliance of provisions of payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues
- (b) The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.
- (c) However, the following are the exceptions under which no offence shall be deemed to have been committed.
 - (1) where the dividend could not be paid by reason of the operation of any law.
 - (2) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him.
 - (3) where there is a dispute regarding the right to receive the dividend.
 - (4) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder, or

- (5) where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

1.3.3. Unpaid and unclaimed Dividend- Treatment and Transfer to Investor Education and Protection Fund.

It has been observed that in many cases, few shareholders are not traceable. The documents sent to them is returned to the company. Before IEPF, the unpaid dividend used to be with the company for three years and thereafter was transferred to Central Govt. wherefrom shareholders can claim. This rule has been modified with establishment of IEPF.

- (a) As per section 125 of the Act, the following amounts which have remained unclaimed and unpaid for a period of seven years from the date they became due for payment shall be credited to the IEPF:
- (1) Unpaid dividend accounts of the companies.
 - (2) The application money received for allotment of any securities and due for refund.
 - (3) Matured deposits for allotment of any securities
 - (4) Matured debentures.
 - (5) The interest accrued on the amounts referred to in clauses (1) to (4).
 - (6) Grants and donations by the Central Govt., State Govt., companies or any other institutions.
 - (7) The interest or other income received out of the investments made from the Fund.

The Fund has been established with a view to support the activities relating to investor education, awareness and protection.

The Act provides for setting up of a Committee for taking decisions regarding spending money out of the Fund for carrying out the objects.

For the purpose of administration of IEPF, the Investor Education and Protection Fund, Rules were notified which contain provisions relating to constitution and functions of the Committee, activities relating to investors' education, awareness and protection to be undertaken with the recommendation of the Committee, conditions for utilization of Funds by the Committee, proforma for applications for registration of associations, institutions or organizations and also for seeking financial assistance under IEPF, etc.

- (b) As per Sub Section (2) of the Act, there shall be credited to the Fund:
- (1) the amount given by the Central Government by way of grants.
 - (2) donations given to the Fund by the Central Government, State Governments, companies or any other Institution.
 - (3) the amount in the Unpaid Dividend Account of companies transferred to the Fund under sub-section (5) of section 124.
 - (4) the amount in the general revenue account of the Central Government which had been transferred to that account under sub-section (5) of section 205A of the Companies Act, 1956, as it stood immediately before the commencement of the Companies (Amendment) Act, 1999, and remaining unpaid or unclaimed on the commencement of this Act.
 - (5) the amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956.
 - (6) the interest or other income received out of investments made from the Fund.

- (7) the amount received as penalty under sub-section (4) of section 38.
 - (8) the application money received by companies for allotment of any securities and due for refund.
 - (9) matured deposits with companies other than banking companies.
 - (10) matured debentures with companies.
 - (11) interest accrued on the amounts referred to in clauses (8) to (10).
 - (12) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years.
 - (13) redemption amount of preference shares remaining unpaid or unclaimed for seven or more years, and
 - (14) such other amount as may be prescribed.
- (c) According to Sub-Section 3, the fund shall be utilised for:
- (1) the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon.
 - (2) promotion of investors' education, awareness and protection.
 - (3) distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement.
 - (4) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 of the Act by members, debenture-holders or depositors as may be sanctioned by the Tribunal, and
 - (5) any other purpose incidental thereto, in accordance with such rules as may be prescribed.
- (d) Transfer to IEPF and claim by shareholder
- The following procedure should be followed by the company while transferring unpaid or unclaimed dividend from unpaid dividend account to IEPF:
- (1) Any money transferred to the unpaid dividend account of a company which remains unpaid or unclaimed for a period of seven years from the date of such transfer is required to be transferred by the company along with interest accrued, if any, thereon to the Investor Education and Protection Fund (IEPF).
 - (2) The amount shall be remitted within a period of 90 days of such amount becoming due to be credited to the IEPF.
 - (3) The company shall send a statement of amount credited to Investor Education and Protection Fund in Form DIV 5 to the authority which administer the fund.
 - (4) The company shall keep a record consisting of names, last known addresses of the persons entitled to receive the same, the amount to which each person is entitled, folio number/ client ID, certificate number, beneficiary details etc. of the persons in respect of whom amount has been remain unpaid or unclaimed for 7 years and transferred to IEPF. Such record shall be maintained for a period of 8 years from the date of such transfer to IEPF and authority shall have the powers to inspect such records (shareholder or his legal representative)
- (e) Any person claiming to be entitled to the amount referred in sub-section (2) may apply to the authority constituted under Sub-Section (5) for the payment of the money claimed.
- (f) The Central Government shall constitute, by notification, an authority for administration of the Fund consisting of a Chairperson and such other members, not exceeding seven and a chief executive officer, as the Central Government may appoint.

- (g) The manner of administration of the Fund, appointment of chairperson, members and chief executive officer, holding of meetings of the authority shall be in accordance with such rules as may be prescribed.
- (h) The Central Government may provide to the authority such offices, officers, employees and other resources in accordance with such rules as may be prescribed.

Dividend Distribution policy

On the 8th July, 2016 SECURITIES AND EXCHANGE BOARD OF INDIA has notified amendment in (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) by inserting “Dividend Distribution Policy as 43A.

- (1) The top one thousand listed entities based on market capitalization (calculated as on March 31 of every financial year) shall formulate a dividend distribution policy which shall be disclosed in their annual reports and on their websites.
- (2) The dividend distribution policy shall include the following parameters:
 - (a) the circumstances under which the shareholders of the listed entities may or may not expect dividend;
 - (b) the financial parameters that shall be considered while declaring dividend;
 - (c) internal and external factors that shall be considered for declaration of dividend;
 - (d) policy as to how the retained earnings shall be utilized; and
 - (e) parameters that shall be adopted with regard to various classes of shares: Provided that if the listed entity proposes to declare dividend on the basis of parameters in addition to clauses (a) to (e) or proposes to change such additional parameters or the dividend distribution policy contained in any of the parameters, it shall disclose such changes along with the rationale for the same in its annual report and on its website. it shall disclose such changes along with the rationale for the same in its annual report and on its website.
- (3) The listed entities other than those specified at sub-regulation (1) of these regulation may disclose their dividend distribution policies on a voluntary basis in their websites and provide a web-link in their annual reports. .”

Draft Dividend Policy Statement of Listed Company

Preamble

The board of directors (the “board”) of ABC Ltd. understands the importance of shareholders’ confidence and trust in the company. in order to preserve the same with transparency and to ensure that there is no conflict of interest or any apprehension in the minds of its shareholders, the board of the company, has adopted the dividend distribution policy (“policy”) and procedures with respect to dividends declared/ recommended by the company in accordance with the provisions of Regulation 43A of The Securities and Exchange Board of India (listing obligations and disclosure requirements) regulations, 2015 (“listing regulations”) as amended from time to time. this policy has been adopted by the board of the company at its meeting held on the policy shall also be displayed in the annual report and also on the website of the company.

Purpose of the Policy

The purpose of this policy is to facilitate the process of dividend recommendation or declaration and its pay-out by the company which would ensure a regular dividend income for the shareholders and long term capital appreciation for all stakeholders of the company. The profits earned by the company can either be retained in business or used for acquisitions, expansion or diversification, or it can be distributed to the shareholders. The company may choose to retain a part of its profits and distribute the balance among its shareholders as dividend.

The company would ensure to strike the right balance between the quantum of dividend paid and amount of profits retained in the business. The board will refer to the policy while declaring/ recommending dividends on behalf of the company.

Types of Dividends

(a) Interim dividend

The interim dividend may be declared by the board one or more times in the financial year as may be deemed fit.

(b) Final dividend

The final dividend is paid once for the financial year after the annual accounts are prepared. The board of directors of the company has the power to recommend the payment of final dividend to the shareholders for their approval at the annual general meeting of the company. The declaration of final dividend shall be included in the ordinary business items that are required to be transacted at the annual general meeting.

(c) Special dividend

The board may declare/recommend special dividend as and when it deems fit.

Basis

The dividend will be declared on per share basis only in percentage terms to face value.

Dividend Declaration and Distribution

Dividend shall be declared or paid only out of –

- 1) current financial year's profit:
 - a. after providing for depreciation in accordance with law;
 - b. after transferring to reserves such amount as may be prescribed or as may be otherwise considered appropriate by the board at its discretion and as per applicable law.

or
- 2) the profits for any previous financial year(s) after providing for depreciation in accordance with law and remaining undistributed;

or
- 3) out of 1) & 2) both.

In case of inadequacy or absence of profits in any financial year, the company may also declare/ pay dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, provided such declaration/payment of dividend shall be made only in accordance with the provisions of the Companies Act, 2013 and rules specified therein.

The Board of Directors shall endeavor to take a decision for dividend distribution with an objective to enhance shareholders value. However, the decision regarding pay-out is subject to several parameters which form part of this policy.

The dividend once declared or approved will be paid/ distributed within the statutory period permitted by law.

Financial parameters considered while declaring dividend

The financial parameters that may be considered before declaring dividend are profitability, cash flow and future requirement of fund and profitability of the company.

- a. due to operation of any other law in force;
- b. due to losses incurred by the company and the board considers it appropriate not to declare dividend for any particular year;
- c. due to any restrictions and covenants contained in any agreement as may be entered with the lenders;
- d. uncertainty of the earnings/financial results of the company; and
- e. the availability of opportunities for reinvestments of surplus funds;
- f. any other corporate action resulting in cash outflow.

Chapter IX and Chapter X of the Companies Act, 2013 contain the provisions as to Accounts of Companies (Section 128 to 138); and Audit and Auditors (Section 139 to 148) respectively.

1.4.1. Maintenance of Books of Accounts; Safe Preservation of Records and Accounting Policies

According to Section 2(13) of the Companies Act, 2013, “Books of Account” includes records maintained in respect of:

- (i) All sums of money received and expended by a company and matters in relation to which receipts and expenditure take place;
- (ii) All sales and purchases of goods and services by the company ;
- (iii) The assets and liabilities of the company; and

The items of costs as may be prescribed under Section 148 in the case of a company which belongs to any class of companies specified under that section.

Maintenance of Books of Accounts

Section 128 of the Companies Act, 2013 provides for Books of account, etc., to be kept by the company. This provision came into force from 1st April, 2014. This Section provides:

- (a) Every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any.

Financial Year: means period ending on 31st march of every year and where it has been incorporated on or after the 1st day of January of a year, the period ending on 31st march of the following year, provided that Central Government may allow different financial year for subsidiary, joint venture or associate company registered out of India.

- (b) The company shall be in a position to explain the transactions effected both at the registered office and its branches.
- (c) Such books of Account shall be kept on accrual basis and according to the double entry system of accounting.

1.4.1.1. Place of maintenance of books of account [Section 128 (1)]

- (a) The books of account and other relevant papers are required to be kept at the registered office of the company.
- (b) The company may also keep all or any of the books of account at any other place in India as the Board of directors may decide. In such a case, the company shall file with the Registrar of Companies, a notice in writing giving the full address of that other place within 7 days of the Board’s decision.

1.4.1.2. Electronic form of Books of account [Section 128 (1)]

- (a) Rule 3 of the Companies (Accounts) Rules, 2014 provides that the company may keep its books of account or other relevant papers in electronic mode.
- (b) The books of account and other relevant books and papers maintained in electronic mode shall:
 - (1) remain accessible in India so as to be usable for subsequent reference.
 - (2) be retained completely in the format in which they were originally generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered.
 - (3) The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches.
 - (4) The information in the electronic record of the document shall be capable of being displayed in a legible form.
 - (5) There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law.
 - (6) The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a periodic basis.
- (c) The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement:
 - (1) the name of the service provider.
 - (2) the internet protocol address of service provider.
 - (3) the location of the service provider (wherever applicable).
 - (4) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.

1.4.1.3. Proper books of account in relation to a branch of the company [Section 128(2)]

Where company has a branch office in India or outside India, proper books of account relating to the transactions effected at the branch office may be kept at that branch office.

Provided, proper summarised returns periodically must be sent by the branch office to the company at its registered office or the other place as decided by the Board of directors.

1.4.1.4. Persons who can inspect [Section 128 (3) and (4)]

- (a) The books of account and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by any director during business hours.
- (b) In the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as prescribed under the Rule 4 of the Companies (Accounts) Rules, 2014 which provides that:
 - (1) The summarised returns of the books of account of the company kept and maintained outside India shall be sent to the registered office at quarterly intervals, which shall be kept and maintained at the registered office of the company and kept open to directors for inspection.

- (2) Where any other financial information maintained outside the country is required by a director, the director shall furnish a request to the company setting out the full details of the financial information sought, the period for which such information is sought.
- (3) The company shall produce such financial information to the director within 15 days of the date of receipt of the written request.
- (4) The financial information required under Sub-rules (2) and (3) above shall be sought for by the director himself and not by or through his power of attorney holder or agent or representative.
- (c) The inspection in respect of any subsidiary of the company shall be done only by the person authorised in this behalf by a resolution of the Board of Directors.
- (d) The officers and other employees of the company shall give to the person making such inspection all assistance in connection with the inspection which the company may reasonably be expected to give.

1.4.1.5. Period of Maintenance [Section 128 (5)]

- (a) The books of account of every company together with the vouchers relevant to any entry in such books of account shall be kept in good order by the company for a minimum period of 8 financial years immediately preceding a financial year.
- (b) Where the company had been in existence for a period of less than 8 years, it shall maintain the books of account in respect of all such preceding years in good order.
- (c) Where an investigation has been ordered in respect of the company, the Central Government may direct that the books of account may be kept for such longer period as it may deem fit.

1.4.1.6. Persons responsible for Maintenance & Penalty [Section 128 (6)]

- (a) The following persons are responsible for the maintenance of proper books of account:
 - (1) The managing director, the whole-time director in charge of finance, the Chief Financial Officer, or
 - (2) any other person of a company charged by the Board.
- (b) If any of the persons mentioned above contravenes provisions of this Section, they shall be punishable with:
 - (1) Fine which shall not be less than ₹50,000 but which may extend to ₹5 lakh.

1.4.1.7. Financial Statement [Section 129]

- (a) As per the definition of Financial Statement under Section 2(40), 'financial statement' in relation to the company includes:-
 - 1) A balance sheet as at the end of the financial year
 - 2) A profit & loss account, or in case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
 - 3) Cash Flow Statement for the financial year;
 - 4) A statement of changes in equity, if applicable; and
 - 5) Any explanatory note annexed to or forming part of any document referred above.

Provided that the financial statement, with respect to One Person Company, small company and dormant company, may not include Cash Flow Statement.

- (b) Section 129(1) provides that the financial statements shall:

- (1) give a true and fair view of the state of affairs of the company or companies,
 - (2) comply with the accounting standards notified under Section 133 and,
 - (3) shall be in the form or forms as may be provided for different class or classes of companies in Schedule III.
 - (4) However, the items contained in such financial statements shall be in accordance with the accounting standards.
- (c) The above provisions relating to form and content of financial statement shall not apply to following companies:
- (1) Insurance Companies, or
 - (2) Banking companies, or
 - (3) Company engaged in the generation or supply of electricity, or
 - (4) Any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company.
- (d) If the following disclosures are not made, the financial statements shall not be treated as not disclosing a true and fair view of the state of affairs of the company:
- (1) In case of Insurance Company, matters which are not required to be disclosed by the Insurance Act, 1938, or the Insurance Regulatory and Development Authority Act, 1999.
 - (2) In case of Banking Company, matters which are not required to be disclosed by the Banking Regulation Act, 1949.
 - (3) In case of Company engaged in the generation or supply of electricity, matters which are not required to be disclosed by the Electricity Act, 2003.
 - (4) In case of company governed by any other law, matters which are not required to be disclosed by that law.
- (e) Here, any reference to the financial statement shall include any notes annexed to or forming part of such financial statement, giving information required to be given and allowed to be given in the form of such notes under this Act.

1.4.1.8. Laying of financial statements at Annual General Meeting [Section 129(2)]

At every annual general meeting of a company, the Board of directors of the company shall lay before such meeting the financial statements for the financial year.

1.4.1.9. Consolidated Financial Statements [Section 129(3) & (4)]

- (a) Where a company has one or more subsidiaries, it shall, in addition to its own financial statements prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own.
- (b) The Consolidated financial statements shall also be laid before the annual general meeting of the company along with the laying of its own financial statement.
- (c) The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in Form AOC-1.
- (d) For the purposes of consolidated financial statements, subsidiary shall include associate company.
- (e) According to Rule 6 of the Companies (Accounts) Rules, 2014, the consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III to the Act and the applicable accounting standards. However, a company which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions on consolidated

financial statements provided in Schedule III of the Act. (Proviso to Rule 6)

‘Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statements by a company if it meets the following conditions:-

- (i) It is a wholly owned subsidiary, or is a partially owned subsidiary of another company and all its other members, including those who are not otherwise entitled to vote, having been intimated in writing and for which proof of delivery of such intimation is available with the company, do not object to the company not presenting consolidated financial statements;
- (ii) it is a company whose securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India; and
- (iii) its ultimate or any intermediate holding company files consolidated financial statements with the Registrar which are in compliance with applicable Accounting Standards.’

Nothing contained in this rule shall, subject to any other law or regulation, apply for the financial year commencing from the 1st day of April, 2014 and ending on the 31st March, 2015, in case of a company which does not have a subsidiary or subsidiaries but has one or more associate companies or joint ventures or both, for the consolidation of financial statement in respect of associate companies or joint ventures or both, as the case may be.

Provided also that nothing in this rule shall apply in respect of consolidation of financial statement by a company having subsidiary or subsidiaries incorporated outside India only for the financial year commencing on or after 1st April, 2014.

- (f) The provisions applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, also apply to the consolidated financial statements [Section 129(4)].

1.4.1.10. Deviations from Accounting Standards [Section 129 (5)]

If the financial statements of a company do not comply with the accounting standards, the company shall disclose in its financial statements the following namely:

- (a) the deviation from the accounting standards.
- (b) the reasons for such deviation and
- (c) the financial effects, if any, arising out of such deviation.

1.4.1.11. Exemptions [Section 129 (6)]

- (a) The Central Government may, on its own or on an application by a class or classes of companies, by notification, exempt any class or classes of companies from complying with any of the requirements of this Section or the rules made thereunder, if it is considered necessary to grant such exemption in the public interest.
- (b) Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

This notification shall be applicable in respect of financial statement prepared in respect of the financial years ending on or after the 31st March, 2016.

1.4.1.12. Contravention [Section 129 (7)]

If a company contravenes the provisions of this Section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this Section and in the absence of any of the officers mentioned above, all the directors shall be punishable with

- (a) Imprisonment for a term which may extend to 1 year, or
- (b) Fine which shall not be less than ₹ 50,000 but which may extend to ₹5 lakhs, or
- (c) Both with imprisonment and fine.

Section 129A has been inserted by Amendment of 2020. It provides that Central Government may require such class or classes of companies to

- (i) prepare the financial results of the company in such period and form as may be prescribed
- (ii) obtain approval of the Board of Directors, complete audit or limited review of the financial statement and file the same within 30 days of close of the relevant period.

1.4.1.13. Central Government to prescribe Accounting Standards (Section 133)

Section 133 of the Companies Act, 2013 deals with the power of the Central Government to prescribe the accounting standards. Accounting Standards means the standards of accounting or any addendum thereto as recommended by the Institute of Chartered Accountants of India (ICAI) constituted under Section 3 of the Chartered Accountants Act, 1949, as may be prescribed by the Central Government in consultation with and after examination of the recommendations made by the National Financial Reporting Authority constituted under Section 132 of the Companies Act, 2013.

In respect of accounting standards, the role of National Financial Reporting Authority (NFRA) is limited to advise the Central Government on the accounting standards recommended by ICAI for adoption by companies. Alongwith Financial Reporting Authority, the existing Accounting Standards notified under the Companies Act, 1956 shall continue to apply.

1.4.1.14. Financial Statement, Board's report, etc (Section 134)

Section 134 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for financial statement, Board's report, etc. According to this Section:

(A) Authentication of Financial statements [Sections 134 (1), (2) & (7)]

- (1) The financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the following:
 - a) The chairperson of the company where he is authorised by the Board, or
 - b) By two directors out of which one shall be managing director and other the Chief Executive Officer, if he is a director in the company,
 - c) The Chief Financial Officer, wherever he is appointed, and
 - d) The company secretary of the company, wherever he is appointed.
- (2) In the case of a One Person Company, the financial statement shall be signed by only one director, for submission to the auditor for his report thereon.
- (3) The auditors' report shall be attached to every financial statement [Section 134(2)].
- (4) A signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of
 - a) Any notes annexed to or forming part of such financial statement.
 - b) The auditor' report. and
 - c) The Board's report. [Section 134(7)]

(B) Board's report [Sections 134 (3) & (4)]

- (1) According to Companies (Accounts) Rules, 2014, the Board's Report shall be prepared based on the stand alone financial statements of the company, Board report shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report.
- (2) There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which 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;
 - c) Directors' Responsibility Statement;
 - d) Details in respect of frauds reported by auditors under Section 143 (12) other than those which are reportable to the Central Government.
 - e) a statement on declaration given by independent directors under Sub-Section (6) of Section 149.
 - f) in case of a company covered under Sub-Section (1) of Section 178, (Companies where nominatory and Remuneration Committee applies) 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.

However, it is provided vide notification no. G.S.R. 463 (E) dated 5th June, 2015, this clause shall not apply to Government Company.

- g) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made:
 - (i) by the auditor in his report and
 - (ii) by the company secretary in practice in his secretarial audit report.
- h) particulars of loans, guarantees or investments under Section 186.
- i) particulars of contracts or arrangements with related parties referred to in Sub-Section (1) of Section 188 in Form AOC-2.
- j) the state of the company's affairs.
- k) the amounts, if any, which it proposes to carry to any reserves.
- l) the amount, if any, which it recommends should be paid by way of dividend.
- m) 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.
- n) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as prescribed under the Rule 8(3) of the Companies (Accounts) Rules, 2014 which provides for.
- o) 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.

- p) 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.
- q) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year along with the web address where the policy is hosted. Salient features of the policies including on directors appointment & remuneration be mentioned in the Board Report, besides website disclosure.
- r) Every listed company and every other public company having a paid up share capital of ₹25 crore or more calculated at the end of the preceding financial year shall include (as prescribed under the Companies (Accounts) Rules, 2014), in the report by its Board of directors, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.
- s) Such other matters as contain as prescribed under the Companies (Accounts) Rules, 2014. According to which the report of the Board shall also contain:
 - 1) shall be prepared based on the stand alone financial statements of the company ²[and shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report
 - 2) shall contain the particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the Form AOC-2.
 - 3) shall contain the following information and details, namely:-
 - (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 equipments;
 - (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.

¹["Provided that the requirement of furnishing information and details under this sub-rule shall not apply to a government company engaged in producing defence equipment"]

(C) Board's Report in case of OPC [Section 134 (4)]

In case of a One Person Company, the report of the Board of Directors to be attached to the financial statement under this Section shall, mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

(D) Directors' Responsibility Statement [Section 134 (5)]

Board report includes various significant element, one of which is Directors' Responsibility Statement. Directors' Responsibility Statement is a new topic of Corporate Governance.

The Directors' Responsibility Statement referred to in 134 (3) (c) shall state that:

- (a) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures.
- (b) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period.
- (c) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.
- (d) the directors had prepared the annual accounts on a going concern basis, and
- (e) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

Here, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information.

- (f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

(E) Signing of Board's Report [Section 134(6)]

The Board's report and any annexures thereto shall be signed by its chairperson of the company if he is authorised by the Board and where he is not so authorised, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director.

(F) Contravention [Section 134(8)]

If a company contravenes any provisions of this Section, the penalty would be ₹ 3 lakh for the company and ₹ 50,000 for every officer in default.

1.4.1.15. Corporate Social Responsibility (Section 135)

Corporate Social Responsibility (CSR) was introduced in the Companies Act, 2013. It requires that every company having net worth of ₹ 500 crores or more, or turnover of ₹1,000 crores or more or a net profit of ₹5 crores or more during immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. The Board's report shall disclose the composition of the Corporate Social Responsibility Committee where independent director is not required, any two or more directors shall be in committee

The Corporate Social Responsibility Committee shall formulate and recommend to the Board a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII of the Companies Act, 2013, it shall recommend the amount of expenditure to be incurred on the activities referred to above and monitor the Corporate Social Responsibility Policy of the company from time-to-time.

The Board of every company shall after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve of 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 ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

The Board of every company 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 3 years, during such immediately preceding years in pursuance of its Corporate Social Responsibility Policy:

- (a) Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility.
- (b) Provided further that if the company fails to spend such amount, the Board shall, in its report made specify the reasons for not spending the amount and under such unspent amount relates to any ongoing project transfer such amount to a fund specified under Schedule VII within a period of 6 months of expiry of financial year. Any amount remaining unspent relating to any ongoing project shall be transferred by the company within 30 days of the close of financial year to a special account to be used for the purpose of the project during next 3 years, failing which the unspent amount of the end of the 3rd year shall be transferred to fund under Schedule VII.

Average net profit shall be calculated in accordance with the provisions of Section 198 of the Companies Act, 2013.

In this context, the ICAI has issued a guidance note on accounting for expenditure on corporate social responsibility (CSR) activities. It provides guidance on the recognition, measurement, presentation and disclosure of expenditure on activities relating to CSR activities.

1.4.1.16. Right of member to copies of Audited Financial Statement (Section 136)

According to Section 136 of the Companies Act, 2013:

- (a) A copy of the financial statements, which are to be laid before a company in its general meeting, shall be sent to the following:
 - (1) every member of the company,
 - (2) to every trustee for the debenture holder of any debentures issued by the company, and
 - (3) to all persons other than such member or trustee, being the person so entitled.

- (b) Consolidated financial statements, if any, auditors' report and every other document required by law to be annexed or attached to the financial statements shall be annexed with financial statements.
- (c) These financial statements shall be sent in not less than 21 days before the date of the meeting.
If the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members-
 - (a) holding, if the company has a share capital, majority in number entitled to vote and who represent not less than ninety-five per cent. Of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or
 - (b) having, if the company has no share capital, not less than ninety five percent. of the total voting power exercisable at the meeting:

- (d) In the case of a listed company:

- (1) The above provisions 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 21 days before the date of the meeting.
- (2) Along with it a statement containing the salient features of such documents in the Form AOC-3 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.
- (3) The statement is to be sent not less than 21 days before the date of the meeting unless the shareholders ask for full financial statements.

Vide Circular No. 11/2015 dated 21st July, 2015, it is clarified that a company holding a general meeting after giving a shorter notice as provided under Section 101 of the Act may also circulate financial statements (to be laid/considered in the same general meeting) at such shorter notice.

Vide Notification No. G.S.R. 466(E) dated 5th June, 2015, in respect of Section 8 companies, for the word "twenty one days", the words "fourteen days" shall be substituted.

- (e) A company shall also allow every member or trustee of the debenture holder to inspect the audited financial statement at its registered office during business hours.
- (f) In case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent:
 - (1) by electronic mode to such members whose shareholding is in dematerialized format and whose email Ids are registered with Depository for communication purposes.
 - (2) where Shareholding is held otherwise than by dematerialized format, to such members who have positively consented in writing for receiving by electronic mode, and
 - (3) by dispatch of physical copies through any recognised mode of delivery as specified under Section 20 of the Act, in all other cases.
- (g) 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.
- (h) every listed company having a subsidiary or subsidiaries shall place separate audited accounts in respect of each of subsidiary on its website, if any: Provided also that a listed company which has a subsidiary incorporated outside India (herein referred to as "foreign subsidiary")—
 - (a) where such foreign subsidiary is statutorily required to prepare consolidated financial statement under

any law of the country of its incorporation, the requirement of this proviso shall be met if consolidated financial statement of such foreign subsidiary is placed on the website of the listed company;

- (b) where such foreign subsidiary is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the holding Indian listed company may place such unaudited financial statement on its website and where such financial statement is in a language other than English, a translated copy of the financial statement in English shall also be placed on the website.]
- (i) Every company having a subsidiary or subsidiaries shall:
 - (1) place separate audited accounts in respect of each of its subsidiary on its website, if any.
 - (2) provide a copy of separate audited financial statements in respect of each of its subsidiary, to any shareholder of the company who asks for it.
- (j) listed company having subsidiary which is required to be consolidated under the law of the country shall place such account on its website (Indian holding company). Further if such subsidiary is not supposed to get audited, such unaudited accounts shall be placed in website of Indian holding company. If the accounts are prepared in one language, other than English, the English translated version is to be placed in holding company website.

1.4.1.17. Contravention

- (a) If any default is made in complying with the provisions of this Section, the company shall be liable to a penalty of ₹ 25,000.
- (b) Every officer of the company who is in default shall be liable to a penalty of ₹ 5,000.

1.4.1.18. Copy of Financial Statements to be filed with Registrar (Section 137 of the Companies Act, 2013)

Section 137 of the Companies Act, 2013 provides for copy of financial statements to be filed with Registrar. According to this Section:

(a) Filing of Financial Statements when adopted [Section 137 (1)]

A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within 30 days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed within the time specified under Section 403.

(b) If Financial Statements are not adopted [First proviso to Section 137 (1)]

- (i) Where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of annual general meeting.
- (ii) The Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.
- (iii) If the financial statements are adopted in the adjourned annual general meeting, then they shall be filed with the Registrar within 30 days of the date of such adjourned annual general meeting with such fees or such additional fees as may be prescribed within the time specified under Section 403 (i.e. within 270 days from the date by which it should have been filed with additional fees).

(c) Filing by One Person Company [Third proviso to Section 137 (1)]

A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.

(d) Company having subsidiaries outside India [Fourth proviso to Section 137 (1)]

A company shall, along with its financial statements to be filed with the Registrar, attach the accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India.

It has also been clarified vide General Circular No. 11/2015 dated 21st July 2015 that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian may place or file such unaudited accounts to comply with requirements of Section 136 (1) and 137 (1) as applicable. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

(e) Annual General meeting not held [Section 137 (2)]

Where the annual general meeting of a company for any year has not been held, the financial statements along with the documents required to be attached, duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within 30 days of the last date before which the annual general meeting should have been held and in such manner, with such fees or additional fees as may be prescribed within the time specified, under Section 403.

(f) Penalty [Section 137 (3)]

If any of the provisions of this Section are contravened:

- (a) The company shall be punishable with fine of ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees, and
- (b) The managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this Section, and, in the absence of any such director, all the directors of the company, shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of fifty thousand rupees..

1.4.1.19. Internal Audit (Section 138)

Section 138 of the Companies Act, 2013 came into force from 1st April, 2014 which provides first time new provision for internal audit. According to Section 138 of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014:

(a) Companies required to appoint Internal Auditor

- (1) The following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate [As amended vide notification no. G.S.R. 742(E) dated 27th July, 2016], namely:
 - a) every listed company.

- b) every unlisted public company having:
 - i) paid up share capital of ₹50 crores or more during the preceding financial year, or
 - ii) turnover of ₹200 crores or more during the preceding financial year, or
 - iii) outstanding loans or borrowings from banks or public financial institutions exceeding ₹100 crores or more at any point of time during the preceding financial year, or
 - iv) outstanding deposits of ₹25 crores or more at any point of time during the preceding financial year, and
 - c) every private company having:
 - i) turnover of ₹200 crores or more during the preceding financial year, or
 - ii) outstanding loans or borrowings from banks or public financial institutions exceeding ₹100 crores or more at any point of time during the preceding financial year.
- (2) The Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, formulate the scope, functioning, periodicity and methodology for conducting the internal audit.

(b) Transitional period

An existing company covered under any of the above criteria shall comply with the requirements of Section 138 and this rule within 6 months of commencement of such Section.

(c) Who is Internal Auditor

- (a) Internal Auditor shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company. Here, the term “Chartered Accountant” or “Cost Accountant” shall mean a “Chartered Accountant” or a “Cost Accountant”, as the case may be, whether engaged in practice or not.
- (b) The internal auditor may or may not be an employee of the company.

1.4.2. Statutory Auditor, Special Auditor and Cost Auditor - Appointment, Resignation, Removal, Qualification, Disqualification, Rights, Duties and Liabilities

1.4.2.1. Appointment of Auditors [Section 139]

Section 139 of the Companies Act, 2013 provides for appointment of auditors. This provision came into force from 1st April, 2014. This Section provides:

- (a) Every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor of the company.
- (b) The auditor shall hold office from the conclusion of 1st annual general meeting (AGM) till the conclusion of its 6th AGM and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at AGM has been prescribed under the Companies (Audit and Auditors) Rules, 2014. According to the Rules:
- (c) Manner and Procedure of selection and appointment of auditors [Rule 3 of Companies (Audit and Auditors) Rules, 2014]:
 - (1) In case of a company that is required to constitute an Audit Committee under Section 177, the committee and in case where such a committee is not required to be constituted, the Board shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and whether such qualifications and experience are commensurate with the size and requirements of the company.

- (2) Audit Committee or the board, as the case may be, shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India or any competent authority or any Court.
 - (3) It may call for such other information from the proposed auditor as it may deem fit.
 - (4) If the Board agrees with the recommendation of the Audit Committee, it shall further recommend the appointment of an individual or a firm as auditor to the members in the AGM.
 - (5) If the Board disagrees with the recommendation of the Audit Committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.
 - (6) If the Audit Committee, after considering the reasons given by the Board, decides not to reconsider its original recommendation, the Board shall record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the annual general meeting; and if the Board agrees with the recommendations of the Audit Committee, it shall place the matter for consideration by members in the AGM.
- (d) Before the appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor.
- (e) Certificate by Auditor: The Companies (Audit and Auditors) Rules, 2014 provides the content of the Certificate. According to this, the auditor appointed shall submit a certificate that:
- (1) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made there under.
 - (2) the proposed appointment is as per the term provided under the Act.
 - (3) the proposed appointment is within the limits laid down by or under the authority of the Act.
 - (4) the list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.
- (f) The certificate shall also indicate whether the auditor satisfies the criteria provided in Section 141 [Section 141 provides provisions on eligibility, qualification and disqualification of Auditor which will be discussed later].
- (g) Further, the company shall inform the auditor concerned of his or its appointment, and also file a notice (in the Form ADT-1) of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed.

Note: It may kindly be noted that appointment includes reappointment also.

1.4.2.2. Term of Auditor [Section 139 (2)]

- (a) Section 139 (2) provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint:
- (1) an individual as auditor for more than one term of five consecutive years, and
 - (2) an audit firm as auditor for more than two terms of five consecutive years.
- (b) Rule 5 of the Companies (Audit and Auditors) Rules, 2014 has prescribed the following classes of companies for the purposes of Section 139 (2):
- (1) all unlisted public companies having paid up share capital of ₹10 crores or more.
 - (2) all private limited companies having paid up share capital of ₹20 crores or more.

- (3) all companies having paid up share capital of below threshold limit mentioned in (1) and (2) above, but having public borrowings from financial institutions, banks or public deposits of ₹50 crores or more.
- (c) Cooling off Period:
 - (1) An individual auditor who has completed his term (i.e., one term of 5 consecutive years) shall not be eligible for re-appointment as auditor in the same company for 5 years from the completion of his term.
 - (2) An audit firm which has completed its term (i.e., two terms of 5 consecutive years) shall not be eligible for re-appointment as auditor in the same company for 5 years from the completion of such term.
- (d) Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of 5 years.
- (e) Every company, existing on or before the commencement of this Act which is required to comply with provisions of Section 139 (2), shall comply with the requirements of this Sub-Section within a period which shall not be later than the date of the first annual general meeting of the company held, within the period specified under sub-section (1) of Section 96, after three years from the date of commencement of this Act..
- (f) It is also provided that nothing contained in this Sub-Section shall prejudice the right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

1.4.2.3. Rotation of Auditor [Section 139 (3) and (4)]

- (a) Members of a company may resolve to provide that:
 - (1) in the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members, or
 - (2) audit shall be conducted by more than one auditor.
- (b) The Central Government may, by rules, prescribe the manner in which the companies shall rotate their auditors.
- (c) Manner of rotation of auditors by the companies on expiry of their term as provided under Rule 6 the Companies (Audit and Auditors) Rules, 2014:
 - (1) The Audit Committee shall recommend to the Board, the name of an individual auditor or of an audit firm who may replace the incumbent auditor on expiry of the term of such incumbent.
 - (2) Where a company is required to constitute an Audit Committee, the Board shall consider the recommendation of such committee, and in other cases, the Board shall itself consider the matter of rotation of auditors and make its recommendation for appointment of the next auditor by the members in annual general meeting.
 - (3) For the purpose of the rotation of auditors:
 - i) in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of 5 consecutive years or 10 consecutive years, as the case may be.
 - ii) the incoming auditor or audit firm shall not be eligible if such auditor or audit firm is associated with the outgoing auditor or audit firm under the same network of audit firms.
The term “same network” includes the firms operating or functioning, hitherto or in future, under the same brand name, trade name or common control.
 - iii) For the purpose of rotation of auditors:
 - ✦ a break in the term for a continuous period of 5 years shall be considered as fulfilling the requirement of rotation.
 - ✦ if a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of 5 years.

1.4.2.4. First Auditors [Section 139 (6)]

- (a) Notwithstanding anything contained in Sub-Section (1), the first auditor of a company, other than a Government Company, shall be appointed by the Board of directors within 30 days of the date of registration of the company and the auditor so appointed shall hold office until the conclusion of the first annual general meeting.
- (b) If the Board fails to exercise its powers i.e. appointment of first auditor, it shall inform the members of the company and the company in general meeting may appoint the first auditor within 90 days at an extra ordinary general meeting and such auditor shall hold office till the conclusion of the first annual general meeting.

1.4.2.5. Filling up casual vacancy [Section 139 (8)]

- (a) The Board may fill any casual vacancy in the office of an auditor within 30 days but where such vacancy is caused by the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within 3 months of the recommendation of the Board.
- (b) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

1.4.2.6. Appointment of Auditors in case of Government Company or any other company having controlled by State Government or Central Government [Sections 139 (5), 139 (7) and 139 (8)]

- (a) As per Section 139 (5), the Comptroller and Auditor-General of India shall, in respect of a financial year, appoint an auditor duly qualified to be appointed as an auditor of companies under this Act in the case of:
 - (1) a Government company, or
 - (2) any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments.
- (b) The auditor shall be appointed within a period of 180 days from the commencement of the financial year. The auditor appointed shall hold office till the conclusion of the annual general meeting.
 - (1) First auditor [Section 139 (7)]
 - a) In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor General of India within 60 days from the date of registration of the company.
 - b) In case the Comptroller and Auditor General of India does not appoint first auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next 30 days.
 - c) Further, in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.
 - (2) Casual vacancy [Section 139 (8)]
 - a. In the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor General of India, casual vacancy of an auditor be filled by the Comptroller and Auditor General of India within 30 days.
 - b. In case the Comptroller and Auditor-General of India do not fill the vacancy within the said period, the Board of Directors shall fill the vacancy within next 30 days.
- (3) Clarification with regard to applicability of Sections 139 (5) and 139 (7) by MCA
Deemed government Company (as per Section 619B of the Companies Act, 1956):

The following companies shall be deemed to be a Government company, if not less than 51% (impliedly, may be more) of the paid up share capital is held by one or more of the following or any combination thereof:

- i) the Central Government and one or more Government companies.
- ii) any State Government or Governments and one or more Government companies.
- iii) the Central Government, one or more State Governments and one or more Government companies.
- iv) the Central Government and one or more corporations owned or controlled by the Central Government.
- v) the Central Government, one or more State Governments and one or more corporations owned and controlled by the Central Government.
- vi) one or more corporations owned or controlled by the Central Government or the State Government.
- vii) more than one Government company.

1.4.2.7. Re-appointment of retiring auditor [Sections 139 (9), (10) and (11)]

- (a) At any annual general meeting, a retiring auditor may be re-appointed at an AGM, if:
 - (1) he is not disqualified for re-appointment;
 - (2) he has not given the company a notice in writing of his unwillingness to be reappointed, and
 - (3) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.
- (b) Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

1.4.2.8. Audit Committee's recommendation [Section 139 (11)]

Where a company is required to constitute an Audit Committee under Section 177, all appointments, including the filling of a casual vacancy of an auditor under this Section shall be made after taking into account the recommendations of such committee.

1.4.2.9. Removal, resignation of auditor and giving of special notice (Section 140)

Section 140 of the Companies Act, 2013 came into force partially from 1st April, 2014 which provides for removal, resignation of auditor and giving of special notice. According to this Section:

- (a) The auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government by making an application in E-Form ADT-2 and shall be accompanied with the prescribed fees.
- (b) The application shall be made to the Central Government within 30 days of the resolution passed by the Board.
- (c) The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution. [Every special resolution is required to be filed in E-Form MGT-14 as per Section 117(3)(a)].
- (d) Giving opportunity of being heard (Audi Alteram Partem) i.e., before taking any action for removal of auditor before the expiry of his term, the auditor concerned shall be given a reasonable opportunity of being heard.

1.4.2.10. Resignation by Auditor [Sections 140 (2) & (3)]

- (a) If the Auditor has resigned from the company, he shall file within a period of 30 days from the date of resignation, a statement in the form ADT-3 with the company and the Registrar.

- (b) In case of government companies or company controlled by Central Government or State Government, the auditor shall also file such statement with the Comptroller and Auditor General of India also along with company and the Registrar.
- (c) The auditor shall indicate the reasons and other facts as may be relevant with regard to his resignation, in the statement
- (d) If the auditor does not comply with aforesaid provision, he or it shall be liable for a penalty of ₹50,000 or amount equal to the remuneration of auditor, whichever is less, and for further ₹ 500 for every day of containing offence subject to maximum of ₹ 2 lakhs.

1.4.2.11. Special Notice for removing Auditor before the expiry of his term [Section 140 (4)]

- (a) If the retiring auditor has not completed a consecutive tenure of 5 years or, as the case may be, 10 years, as provided under Sub-Section (2) of Section 139, special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.
- (b) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.
- (c) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so:
 - (1) in any notice of the resolution given to members of the company, state the fact of the representation having been made, and
 - (2) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company.
- (d) If a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.
- (e) However, if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar.

1.4.2.12. Eligibility, qualifications and disqualifications of auditors (Section 141)

1.4.2.12.1. Qualifications of an auditor [Section 141 (1) & (2)]

- (a) A person shall be eligible to be appointed as auditor of a company only if he is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949.
- (b) A firm whereof majority of partners practicing in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company.
- (c) Where a firm including a Limited Liability Partnership is appointed as an auditor of a company, only the partners who are chartered accountants shall be authorised to act and sign on behalf of the firm.

1.4.2.12.2. Disqualifications of auditors [Section 141 (3)]

The following persons shall not be qualified for appointment as auditor of a company:

- (a) A body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008.
- (b) an officer or employee of the company.

- (c) a person who is a partner, or who is in the employment, of an officer or employee of the company.
- (d) a person who, or his relative or partner
 - (1) is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company:
 Provided that the relative may hold security or interest in the company of face value not exceeding ₹1 Lakh as prescribed under the Company (Audit and Auditors) Rules, 2014.
 The Company (Audit and Auditors) Rules, 2014 provides that a relative of an auditor may hold securities in the company of face value not exceeding ₹1 Lakh. Further, the above condition shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities. If the relative acquires any security or interest above the prescribed threshold i.e., ₹1 Lakh, the corrective action to maintain the limits as specified above shall be taken by the auditor within 60 days of such acquisition or interest.
 - (2) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ₹5 Lakhs, or
 - (3) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ₹ 1 Lakh.
- (e) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company. According to the Companies (Audit and Auditors) Rules, 2014, the term business relationship shall be construed as any transaction entered into for a commercial purpose, except:
 - (1) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts.
 - (2) commercial transactions which are in the ordinary course of business of the company at arm's length price - like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.
- (f) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel.
- (g) a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies other than one person companies, dormant companies and private companies having paid-up share capital less than one hundred crore rupees. [MCA vide Notification No. 464(E) dated 05/06/2015]. It may be clarified that now the Limit of 20 Companies includes only:
 - ▲ Public Companies and
 - ▲ Private Companies having paid up capital of ₹100 crores or more.
- (h) a person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction.
- (i) a person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company..

1.4.2.13. Vacation of office by an auditor [Section 141 (4)]

If a person appointed as an auditor of a company incurs any of the disqualification specified in Section 141 (3), he shall be deemed to have vacated his office. Such vacation shall be deemed to be a casual vacancy in the office of the auditor.

1.4.2.14. Remuneration of auditors (Section 142)

- (a) The remuneration of the auditors of a company shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.
- (b) In the case of first auditor, remuneration may be fixed by the Board.
- (c) The remuneration mentioned aforesaid shall, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him. But the remuneration does not include any remuneration paid to him for any other service rendered by him at the request of the company.

1.4.2.15. Powers and duties of auditors and auditing standards (Section 143)**1.4.2.15.1. Powers of Auditors [Section 143 (1)]**

- (a) **Access to books of account and vouchers:** Every auditor of a company shall have a right of access at all times to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place.
- (b) **Entitled to have necessary information and explanation:** He shall be entitled to require from the officers of the company such information and explanations as the auditor may consider necessary for the performance of his duties as auditor.
- (c) **Matters of inquiry:** The auditor may also inquire into the following matters, namely:
 - (1) Whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members.
 - (2) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company.
 - (3) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company.
 - (4) Whether loans and advances made by the company have been shown as deposits.
 - (5) Whether personal expenses have been charged to revenue account.
 - (6) Where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.
- (d) **Access to record of all its subsidiaries:** The auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries and associate companies in so far as it relates to the consolidation of its financial statements with that of its subsidiaries and associate companies.

1.4.2.15.2. Duties of auditors [Sections 143 (2), (3) and (4)]

- (a) The auditor shall make a report to the members of the company on the following:
- (1) On the accounts examined by him, and
 - (2) On every financial statements which are required by or under this Act to be laid before the company in general meeting.
- (b) The auditor while making the report shall take into account the provisions of the Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act or any rules made thereunder or under any order made under Section 143 (11).
- (c) The auditor shall express his opinion of the accounts and financial statements examined by him. He shall express the opinion which according to him and to the best of his information and knowledge, the said accounts, financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.
- (d) The auditors' report shall also state:
- (1) whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements.
 - (2) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him.
 - (3) whether the report on the accounts of any branch office of the company audited under Sub- Section (8) by a person other than the company's auditor has been sent to him under the proviso to that Sub-Section and the manner in which he has dealt with it in preparing his report.
 - (4) whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns.
 - (5) whether, in his opinion, the financial statements comply with the accounting standards.
 - (6) the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company.
 - (7) whether any director is disqualified from being appointed as a director under Sub-Section (2) of Section 164.
 - (8) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith.
 - (9) whether the company has adequate internal financial controls with reference to financial statement in place and the operating effectiveness of such controls.
 - (10) Such other matters as prescribed under Rule 11 of the Companies (Audit and Auditors) Rules, 2014 which provides that the auditor's report shall also include their views and comments on the following matters, namely:
 - (i) whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement.
 - (ii) whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts.

- (iii) whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.
- (e) Where any of the matters is answered in the negative or with a qualification, the auditor's report shall state the reason for the answer.
- (f) Compliance with auditing standards:
 - (1) Every auditor shall comply with the auditing standards [Section 143(9)].
 - (2) The Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under Section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.
 - (3) It is further provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.
- (g) Additional matters to be reported in case of specified companies: In respect of such class or description of companies, as may be specified in the general or special order by the Central Government may, in consultation with the National Financial Reporting Authority, the auditor's report shall also include a statement on such matters as may be specified therein.
- (h) Reporting of frauds by auditors [Section 143 (12)]
 - (1) Notwithstanding anything contained in this Section, if an auditor of a company in the course of performance of his duties as auditor, has reason to believe that an offence of fraud involving such amount or amounts as may be prescribed, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government immediately but not later than 60 days of his knowledge and after following the procedure as prescribed in Rule 13 of the Companies (Audit and Auditors) Rules, 2014:
 - i) Auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud, seeking their reply or observations within 45 days;
 - ii) on receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days of receipt of such reply or observations;
 - iii) In case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time.
 - iv) The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same.
 - v) The report shall be on the letter head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number.
 - vi) The report shall be in the form of a statement as specified in Form ADT-4.
 - (2) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred above if it is done in good faith [Section 143(13)].

- (3) The provision of this section shall mutatis mutandis apply to the cost accountant in practice conducting cost audit under section 148 and also to the company secretary in practice conducting secretarial audit under section 204 [Section 143(14)].
- (4) Penalty for non compliance of Section 143 (12): If any auditor, the cost accountant or the company secretary in practice do not comply with the provisions of Section 143 (12) (reporting about the offence to the Central Government), he shall be punishable with fine which shall be ₹ 1 lakh for unlisted company and ₹ 5 lakhs for listed company.

1.4.2.16. Audit of Government Companies [Sections 143 (5), (6) & (7)]

- (a) In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor General of India shall appoint the auditor under Section 139 (5) or 139 (7) and direct such auditor the manner in which the accounts of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor General of India.
- (b) The audit report among other things, include the following:
 - (1) the directions, if any, issued by the Comptroller and Auditor General of India,
 - (2) the action taken thereon and
 - (3) its impact on the accounts and financial statement of the company.
- (c) The Comptroller and Auditor General of India shall within 60 days from the date of receipt of the audit report have a right to:
 - (1) conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorise in this behalf and for the purposes of such audit, require information or additional information to be furnished to any person or persons, so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor General of India may direct, and
 - (2) comment upon or supplement such audit report.
- (d) Any comments given by the Comptroller and Auditor General of India upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under Section 136 (1) and also be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.
- (e) Test Audit: For Government Company or Company controlled by State Government or Central Government, the Comptroller and Auditor General of India may, if he considers necessary, by an order, cause test audit to be conducted of the accounts of such company, without prejudice to the provisions related to Audit and Auditors. The provisions of Section 19A of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971, shall apply to the report of such test audit.

1.4.2.17. Audit of accounts of branch office of company [Section 143(8)]

- (a) Branch office in India:

Where a company has a branch office, the accounts of that office shall be audited either by:

- (1) the company's auditor appointed under Section 139, or
- (2) by any other person qualified for appointment as an auditor of the company under Section 139.

(b) Branch office outside India:

- (1) If the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by:
 - i) the company's auditor, or
 - ii) by an accountant, or
 - iii) by any other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country.
- (c) The duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor, if any, shall be as contained in Sub-Sections (1) to (4) of Section 143.
- (d) The branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.
- (e) The provisions of regarding reporting of fraud by the auditor shall also extend to such branch auditor to the extent it relates to the concerned branch.

1.4.2.18. Auditor not to render certain services (Section 144)

- (a) An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be. But such services shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company), namely:
 - (1) accounting and book keeping services.
 - (2) internal audit.
 - (3) design and implementation of any financial information system.
 - (4) actuarial services.
 - (5) investment advisory services.
 - (6) investment banking services.
 - (7) rendering of outsourced financial services.
 - (8) management services. and
 - (9) any other kind of services as may be prescribed.
- (b) According to the explanation given under Section 144, the term directly or indirectly shall include rendering of services by the auditor:
 - (1) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual.
 - (2) in case of auditor being a firm, either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

1.4.2.19. Auditors to sign audit reports, etc. (Section 145)

- (a) The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company in accordance with the provisions of Sub-Section (2) of Section 141 (i.e. in case of firm including LLP, only Chartered Accountants are authorised to act and sign).
- (b) The qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

1.4.2.20. Auditors to attend general meeting (Section 146)

- (a) All notices of and other communications relating to, any general meeting shall be forwarded to the auditor of the company.
- (b) The auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting.
- (c) The auditor shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

1.4.2.21. Punishment for contravention (Section 147)**(A) Penalty on company [Section 147 (1)]**

If any of the provisions of Sections 139 to 146 (both inclusive) is contravened, the company shall be punishable with fine which shall not be less than ₹25,000 but which may extend to ₹5 lakh.

(B) Penalty on officers [Section 147 (1)]

If any of the provisions of Sections 139 to 146 (both inclusive) is contravened, every officer of the company who is in default shall be punishable:

- (1) With fine which shall not be less than ₹10,000 but which may extend to ₹1 lakh,

(C) Penalty on auditor [Sections 147 (2) & (3)]

- (a) If an auditor of a company contravenes any of the provisions of Section 139, Section 144 or Section 145, the auditor shall be punishable with fine which shall not be less than ₹25,000 but which may extend to ₹5 lacs or four times the remuneration of the auditor, whichever is less
- (b) If an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with:
 - (1) imprisonment for a term which may extend to 1 year and
 - (2) fine which shall not be less than ₹ 50,000 but which may extend to ₹ 25 lakhs or eight times of the remuneration of the auditor which ever is less.
- (c) Further, where an auditor has been convicted as above, he shall be liable to:
 - (1) refund the remuneration received by him to the company, and
 - (2) pay for damages to the company, statutory bodies or authorities or to members or creditors of the company for loss arising out of incorrect or misleading statements of particulars made in his audit report.

(D) Filing of Report with the Central Government [Section 147 (4)]

The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons. Such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification.

(E) Liability of Audit firm [Section 147 (5)]

Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in the Companies Act, 2013, or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally.

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.

1.4.2.22. Cost Audit [Section 148]

According to Section, the Central Government may specify audit of items of cost in respect of certain companies. These provisions are detailed below:

- (a) Notwithstanding anything contained in the provisions related to audit and auditor (Chapter X), the Central Government may, by order, in respect of such class of companies engaged in the production of such goods or providing such services as may be prescribed, direct that particulars relating to the utilisation of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept under Section 128 by that class of companies in Form CRA-1 as per Rule 5(1) of the Companies (Cost Records and Audit) Rules, 2014. This audit is in addition to statutory financial audit under section 143 for Regulated Sections and Non Regulated Section as per Cost Audit Rules.
- (b) The Central Government shall, before issuing such order in respect of any class of companies regulated under a special Act, consult the regulatory body constituted or established under such special Act.
- (c) If the Central Government is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies, which are covered aforesaid and which have a net worth of such amount as may be prescribed or a turnover of such amount as may be prescribed, shall be conducted in the manner specified in the order.
- (d) The cost audit shall be conducted by a Cost Accountant in practice who shall be appointed by the Board on such remuneration as recommended by the Audit Committee and shall be ratified by shareholders.

1.4.3. Company Auditor Report Order (CARO) Rules

MCA has notified now Companies (Auditor's Report) Order, 2020 on 25th February, 2020 which replaced CARO, 2016. It is a new format of reporting of statutory audit having additional reporting requirements decided in consultation with National Financial Reporting Authority (NFRA) CARO, 2020 is applicable for all statutory audits commencing on or after 1.4.2020 corresponding of Financial Year 2019-20. However, by notification, applicability of CARO has been deferred by one year. Now, CARO will be applicable for the accounts of financial year 2020-21. CARO 2020 is applicable to every company including a foreign company as defined in clause (42) of Section 2 of the Companies Act 2013.

1.4.3.1. The following classes of companies are outside the purview of the CARO 2020.

- (a) Banking company as defined under Section 5 (c) of the Banking Regulation Act, 1949.
- (b) Insurance company as defined under the Insurance Act 1938.
- (c) Company licensed to operate under Section 8 of the Companies Act 2013 (companies registered with charitable object).
- (d) A one person company (OPC) as defined under clause (62) of Section 2 of Companies Act 2013 (OPC means a company which has only one person as a member).
- (e) A small company under Section 2 (85) of the Companies Act, 2013.
 - (1) As per sec 2(85) of Companies Act 2013 small company means a company, other than a public company:
 - i) Paid up share capital of which does not exceed ₹ 4 crores or such higher amount as may be prescribed which shall not be more than ₹ 10 crores, and
 - ii) Turnover of which as per its last profit and loss account does not exceed ₹ 40 crores or such higher amount as may be prescribed which shall not be more than ₹ 100 crores.
 - (2) The following company shall not qualify as a small company:
 - i) A holding company or a subsidiary company.
 - ii) A company registered under Section 8 of the Act.
 - iii) A company or body corporate governed by any special act.
- (f) The auditor of following type of Private Companies are not required to comment on the matter prescribed under CARO 2020:
 - (1) A private company which is not holding or subsidiary company of a public company, and
 - (2) A private company having a paid up capital and reserve and surplus not more than ₹1 crore as on the balance sheet date, and
 - (3) A private company which does not have total borrowing exceeding ₹1 crore from any bank and financial institution at any point of time during the financial year, and
 - (4) A private company which does not have total revenue exceeding ₹10 crores during the financial year.

Note: Such revenue means revenue as disclosed in scheduled III to the Companies Act, 2013 and includes revenue from discontinuing operation.

1.4.3.2. Matters included in CARO 2020 are discussed below:**14.3.2.1. Property, Plant & Equipment (PPE) [clause 3 (i)]**

- (a) Whether the company is maintaining proper records showing full particulars including quantitative details and situation of PPE & full particulars of intangible assets.
- (b) Whether these fixed asset have been physically verified by management at reasonable interval, whether any material discrepancies were noticed on such verification and if so, whether the same have been properly dealt with in the books of account,
- (c) Matters relating to title deeds not in the name of the company, revaluation and effects thereof etc.
- (d) Whether the company has revalued its PPE or intangible assets and in this respect any material discrepancies of 10% or more has been observed.
- (e) Whether any proceeding have been initiated or pending against the company for holding any benami property.

1.4.3.2.2. Inventory [Clause 3 (ii)]

- (a) Whether physical verification of inventory has been conducted at reasonable interval by the management, any material discrepancies of 10% or more has been noticed on such verification and if so, whether the same has been properly dealt with in the books of account
- (b) Whether during any point of time, the company has been sanctioned working capital limits in excess of ₹5 crores.

1.4.3.2.3. Investment / providing any guarantee or security or granted loan and advances [Clause 3(iii)]

Whether the company has granted any loans, secured or unsecured to companies, firms, LLP or other parties.

- (a) Whether terms and conditions of the grant of such loan are not prejudicial to the company's interest.
- (b) Whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments and receipts are regular
- (c) If the amount is overdue, state the total amount overdue, state the total amount overdue for more than 90 days and whether reasonable steps have been taken by the company for recovery of principal.

1.4.3.2.4. Compliance with Sec 185 & 186 of the Companies Act: Loan to director and investment by the company [Clause 3 (iv)]**1.4.3.2.5. Acceptance of Deposits [Clause 3 (v)]**

In case, the company has accepted deposits, whether the following has been complied with:

Directives issued by the Reserve Bank of India

- (a) The provision of sec 73 to 76 or any other relevant provision of Companies Act, 2013 and the rules framed there under, and
- (b) Nature of contraventions, due to non compliance

1.4.3.2.6. Maintaining of Cost Records [Clause 3(vi)]

If the companies required to maintain records whether such records have been maintained and non- compliance, if any.

1.4.3.2.7. Depositing Statutory Dues [Clause 3 (vii)]

- (a) Whether the company is regular in depositing statutory dues with the appropriate authorities including GST, Provident fund, Employees State Insurance fund, income tax, sales tax, service tax, duty of custom, duty of excise, value added tax, cess or any other statutory dues. If the company is not regular in depositing such statutory dues, the extent of arrears of outstanding statutory dues as at the last day of the financial year concerned for a period of more than 6 months from the date they become payable, shall be indicated by the auditor.
- (b) In case disputed statutory dues, the amount involved and the forum where dispute is pending.

1.4.3.2.8. Reporting of Transactions not covered in books of Accounts [Clause 3(viii)]

Whether any transactions not recorded in the books of accounts have been surrendered or disclosed as income during the year in the tax assessments under the Income Tax Act, 1961 (43 of 1961) and properly recorded in the books of accounts.

1.4.3.2.9. Repayment of Loan [Clause 3(ix)]

Whether the company has defaulted in repayment of loans and borrowing to a financial institution, banks, government or dues to debenture holders. If yes, the period and the amount of default to be reported.

1.4.3.2.10. Money raised through IPO and further public offer [Clause 3(x)]

Whether money raised by way of initial public offer or further public offer and the term loans were applied for the purpose for which those are raised. If not, the details together with delays and defaults and subsequent rectification, if any, as may be applicable, be reported

1.4.3.2.11. Disclosure regarding Fraud [Clause 3(xi)]

Whether any fraud by the company or any fraud on the company by its officers and employees has been noticed or reported u/s 143(12) during the year: if yes, the nature and the amount involved is to be indicated.

1.4.3.2.12. Nidhi Company [Clause 3(xii)]

Whether the Nidhi company has complied with the net owned funds to deposit in the ratio of 1:20 to meet out the liability and whether the Nidhi company is maintain 10% unencumbered term deposit as specified in the Nidhi rules 2014 to meet out the liability. Details of any default in payment of interest on deposits or repayment.

1.4.3.2.13. Related Party Transaction [Clause 3(xiii)]

Whether the company has complied with section 188 of the Companies Act, 2013 in respect of related party transactions and with appropriate disclosure.

1.4.3.2.14. Internal Audit [Clause 3(xiv)]

- (a) Whether the company has an internal audit system commensurate with the size and nature of its business;
- (b) Whether the report of the Internal Auditors for the period under audit were considered by the statutory auditor.

1.4.3.2.15. Non Cash Transaction [Clause 3(xv)]

Whether the company has entered into any non-cash transactions with directors or persons connected with them and if so, whether provisions of section 192 of The Companies Act, 2013 have been complied with.

1.4.3.2.16. Registration under Section 451A of the RBI Act 1934 [Clause 3(xvi)]

Whether the company is required to be registered under Section 45 IA of Reserve Bank of India Act, 1934 and if so, whether the registration has been obtained.

Other matters to be reported by the Auditor relates to cash losses, resignation of statutory auditors, material uncertainty, transfer of fund under Schedule VII, adverse auditor remark in other company of the group etc.

1.4.3.2.17. Report on cash losses [Clause xvii]: Whether the company has incurred cash losses in the financial year and in the immediately preceding financial, if so, the amount of cash losses to be indicated.

1.4.3.2.18. Reporting on auditor's resignation [Clause xviii]: Whether there has been any resignation by the statutory auditor during the financial year, if so, whether the auditor has taken into consideration the issues, objections or concerns raised by the outgoing auditor.

1.4.3.2.19. Reporting on financial position [Clause xix]: Whether there is, as per auditor's opinion, material uncertainty and the company is capable of meeting its liabilities existing at the date of balance sheet as and when they fall due within a period of one year from the date of balance sheet.

1.4.3.2.20. Reporting on CSR compliance [Clause xx]: (a) Whether unspent CSR amount in respect of other than ongoing projects has been sent to a Fund as specified in Schedule VII to the companies Act; (b) whether unspent CSR amount in respect of ongoing project has been transferred to special designated Bank account.

1.4.3.2.21. Reporting on consolidated financial statement [Clause xxi]: Whether there have been any qualification or adverse remarks by the respective auditors in the CARO reports of the companies included in the consolidated financial statements, if so, details of the companies and the paragraph numbers of the CARO report containing the qualifications or adverse remark to be indicated.

ICAI's Guidance Note on CARO 2020

The ICAI, with a view to provide appropriate guidance to its members, has brought out Guidance Note on the Companies (Auditor's Report) Order, 2020 on 13th June 2020. It is divided into:

- (a) Relevant provision which contains Requirement of all clauses.
- (b) Audit procedures and Reporting which covers Procedure to be adopted by auditor.

This Guidance Note has been written in an easy to understand language and contains detailed guidance on various Clauses of CARO 2020 and the various issues and intricacies involved therein, so that the requirements and expectations of the Order can be fulfilled in letter and spirit by the auditors. It's a comprehensive and self contained reference document for the members. It would suspended the guidance on CARO 2016.

Board of Directors and Key Managerial Personnel

1.5

1.5.1. Directors and Key Managerial Personnel - Appointment, Reappointment, Resignation, Removal

Chapter XI and Chapter XIII of the Companies Act, 2013 contain the provisions as to Board of Directors and Managerial Personnel.

1.5.1.1. Nature of Company Management

Shareholders are the owners of the company. They can anytime decide to run themselves or may like persons to act on their behalf for management of the company and highest level of such inclusion of outside person is director, who will be member of the Board of Directors. The hierarchy of the entities and their status is captured in brief in the table below.

Level/ Entity in Management	Type of Powers	Reference
Shareholders	Powers not given/delegated to the Board of Directors.	Section 180 of the Companies Act, 2013 and Articles of Association of the company.
Board of Directors	All powers of decision making about the company unless reserved for the shareholders.	Section 179 of the Companies Act, 2013.
Chairman	Executive/ Non- Executive functions of the company. Chairing the Company meetings.	Section 104 of the Companies Act, 2013.
Chairman and Managing Director (CMD)	Exercises both Chairman and Managing Director's Power.	
Managing Director	Has substantial powers of the management of the company. Works under the supervision and control of the Board of Directors.	Section 196 of the Companies Act, 2013.
Whole Time Director/ Functional Director	Full time employee of the company. Looks after specified functions of the company.	

1.5.1.2. Concept of Director

When a person chooses to form a company, either he, his relatives or any of the promoters may hold the post of directors. Else the promoters (those controlling the company) may appoint outsiders, who are competent in the area, to become director and manage the company. In former case, we call them owner/promoter director. In later case, we call them professionals.

The Board of directors of a company is a nucleus, selected according to the procedure prescribed in the Act and the Articles of Association. Members of the Board of directors are known as directors, who unless especially

authorized by the Board of directors of the Company, do not possess any individual power of management of the affairs of the company. Acting collectively as a Board of directors, they can exercise all the powers of the company except those, which are prescribed by the Act to be specifically exercised by the company in general meeting.

The directors of a company are its eyes, ears, brain, hands, nerves and other essential limbs, upon whose efficient functioning depends the success of the company. The directors formulate policies and establish organizational set up for implementing those policies and to achieve the objectives as contained in the Memorandum, muster resources for achieving the company objectives and control, guide, direct and manage the affairs of the company.

1.5.1.3. Position of Directors

The position that the directors occupy in a corporate enterprise is not easy to explain. They are professional men hired by the company to direct its affairs. Directors are the ones to make any decisions related to the company. He is the person who has the required knowledge and the intention to run a company. Since an artificial person cannot have all these characteristics, directors are appointed and entrusted with the concerned business. A director is in fact a director or controller of the company's affair'. The team of directors is known as the Board of Directors. A director may, however, work as an employee in a different capacity. He is also a custodian of the assets which are owned by the shareholders and run the company in best interest of the stakeholders.

The senior management positions mainly consist of manager, whole time director or a managing director. These occupy the prominent position in the decision making of the company. Companies shall have a duly constituted Board of Directors.

But, whether a person is to be regarded as a manager, whole time director or as a managing director of the company would depend on the nature and extent of the duties entrusted to him and that the designation under which the appointment is made would not make any difference in this regard. The duties assigned are the main things behind the position. The Companies Act, 2013 has detailed provisions with regard to these key managerial personnel.

1.5.1.4. 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 and shall have:

(a) Minimum number of directors

- (1) in the case of Public company - 3,
- (2) in the case of Private Company - 2, and
- (3) in case of One Person company (OPC) – 1

(b) Maximum number of directors shall be 15

If the company wants to appoint more than 15 directors, it can do so after passing a special resolution. This is not applicable in case of Government and section 8 (non profit) company.

(c) Women director

At least one woman director shall be on the Board of such class or classes of companies as may be prescribed. Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director, under any category of director.

- (1) every listed company.
- (2) every other public company having.
 - a) paid-up share capital of ₹100 crores or more; or

- b) turnover of ₹300 crores or more.

A company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation.

Further, 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 three months from the date of such vacancy whichever is later.

(d) Resident Director

Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the financial year. [Section 149(3)]

Section 149(3) of the Companies Act, 2013 requires every company to have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year. The MCA has relaxed the minimum stay in India for 182 days for the year 2019-20 and 2020-21.

Regarding newly incorporated companies it is clarified that companies incorporated between 1st April, 2014 and 30th September, 2014 should have a resident director either at the incorporation stage itself or within six months of their incorporation.

(e) Independent Director

Every listed public company shall have at least one-third of the total number of directors as independent directors [Section 149(4)]. The Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies. Any fraction contained in such one-third numbers shall be rounded off as one. According to the Rule 4 of the Companies Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors:

- (1) the Public Companies having paid up share capital of ₹10 crores or more, or
- (2) the Public Companies having turnover of ₹100 crores or more, or
- (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding ₹50 crores. (figures as on last day of the audited final statement)

However, in case a company covered under the above rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

Further, 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.

As per Section 149(6) of the Companies Act, 2013, An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,—

- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
- (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;
(ii) who is not related to promoters or Directors in the company, its holding, subsidiary or associate company;

⁵[(c)[who has or had no ¹²[pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. 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 two immediately preceding financial years or during the current financial year;]

¹³[(d) none of whose relatives—

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. 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 may be prescribed during the two 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 during the two 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 two per cent. 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);]

(e) who, neither himself nor any of his relatives—

(i) 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 three financial years immediately preceding the financial year in which he is proposed to be appointed;

Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.

(ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

(iii) holds together with his relatives two per cent. or more of the total voting power of the company; or

(iv) is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, Directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

Independent director shall have get himself registered with ID portal maintained by Indian Institute of Corporate Affairs (IICA). They have to pass an examination conducted by IICA. No examination shall be required for persons:

(i) Experience of 10 years as KMP;

- (ii) 10 years as an advocate, practicing CA/CMA/CS;
- (iii) Working in pay scale of directors, equivalent in CG/SG in matter relating to commerce, corporate, finance, industry etc.,
- (iv) IICA shall send annual report of capacity building of each of the registered director to the company where he is director.

1.5.1.5. Appointment of Directors [Section 152]

- (1) Where no provision is made in the articles of a company for the appointment of the first director, 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, 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)]

- (2) Every director shall be appointed by the company in general meeting, unless any specific method of appointment is provided in the Articles of Association. [Section 152 (2)].
- (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. [Section 152 (3)].
- (4) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) and a declaration that he is not disqualified to become a director under this Act. [Section 152 (4)].
- (5) A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within 30 days of his appointment in Form DIR-12 along with the fee as prescribed [Section 152(5)]

The Ministry of Corporate Affairs has clarified via Notification No. 463(E) and 466(E) dated 5th June, 2015, that section 152 (5) shall not apply:

- a) where appointment of such director is done by the Central Government or State Government, as the case may be.
- b) to a section 8 company.

1.5.1.6. Rotational and non-rotational directors

Out of total number of directors, at least 2/3rd shall be liable to retire by rotation. Articles may provide that more than 2/3rd or all directors shall be rotational directors. Out of such 2/3rd, 1/3rd must retire in every AGM, (Directors appointed by CG, BIFR, FI/Banks shall not be taken in to account for calculating the number of rotational directors) Non rotational directors, shall, unless otherwise expressly provided in this Act, be appointed by the company in general meeting.

- (a) 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.
- (b) The retiring directors shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

- (c) 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. By default, and unless there is proposal to appoint any other person or not to reappoint him, his proposal for reappointment shall be placed in the meeting, unless he suffers from any disqualification.

1.5.1.7. Vacancy in case of retiring director [Section 152(7)]

- (a) 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, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.
- (b) 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, unless:
- (1) 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.
 - (2) 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.
 - (3) he is not qualified or is disqualified for appointment.
 - (4) a resolution, whether special or ordinary, is required for his appointment or re appointment by virtue of any provisions of this Act.
 - (5) Section 162 is applicable to the case.

Non applicability of section 152 (6) and 152 (7)

The provisions relating to retirement, shall not apply to:

- (1) 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;
- (2) 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.

1.5.1.8. Right of persons other than retiring directors to stand for directorship (Section 160)

- (1) A person who is not a retiring director shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the proposal of such member to consider him as a candidate for director.
- (2) Such notice must come along with the deposit of ₹1,00,000 and shall be refunded to such person or, as the case may be, to the member, if the person proposed get selected as a director or gets more than 25% of the total valid votes on such resolution. Requirement of deposit shall not apply if the appointment of director is recommended by Nomination and Remuneration committee/Board.
- (3) Notice of candidature of a person for directorship: Rule 13 of the Companies (Appointment and Qualification of Directors) Rules, 2014 lays down the following points for giving notice of candidature of a person for directorship as under:
 - i) The company shall, at least 7 days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office.

- ii) by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members, and
 - iii) by placing notice of such candidature or intention on the website of the company, if any.
 - iv) However, it shall not be necessary for the company to serve individual notices upon the members as aforesaid, if the company advertises such candidature or intention, not less than 7 days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.
- (4) 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.
 - c) A Private company
 - d) Companies whose articles provide for election of directors by ballot.

1.5.1.9. Appointment of additional director, alternate director and nominee director (Section 161)

(1) Additional Director [Section 161(1)]

Section 161(1) of the Companies Act, 2013 provides for appointment of additional director. According to this section:

- a) 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. Normally, the articles of most of the companies have provisions for additional director. There are some person who is very much needed for the company but they cannot be taken as employee. In order the get the services, guidance and expertise of such persons, Board of directors have been given the power to select a person as director till next AGM.

Example: Mr. Ahuja, CMD of a Govt. of India Steel plant retired on 30.11/21. Next day he was appointed as additional director in large private steel company as additional director (full time) as he was an expert in steel industry. He will continue till next AGM.

- b) A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.
- c) 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.

(2) Alternate Director [Section 161(2)]

Section 161(2) of the Companies Act, 2013 provides for appointment of Alternate director. According to this section:

- a) 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 to act as an alternate director in place of another director (original director) during his absence for a period of not less than 3 months from India.
- b) A person who is holding any alternate directorship for any other director in the company cannot be considered for appointment as above.

- c) 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.
- d) 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.
- e) 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. It may be mentioned that whether an alternate director shall be appointed or not and who shall be appointed is the prerogative of the Board and not the decision of the original director.

(3) Nominee Director [Section 161 (3)]

Section 161(3) of the Companies Act, 2013 provides for appointment of Nominee director. 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. It is worth mentioning here “nomination” do not mean “appointment”. The person appointed shall have to be appointed in the proper manner.

(4) Casual Vacancy [Section 161 (4)]

Section 161 (4) of the Companies Act, 2013 provides for appointment of director in casual vacancy. According to this section:

- a) 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 the members in immediately next GM.
- b) 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.

1.5.1.10. Appointment of Directors elected by Small shareholders (Section 151)

There was persistent demand from the small shareholders to have a director nominated by them to look after the interest of small shareholders. This has been considered in the new Act. According to section 151 of the Companies Act, 2013:

A listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed.

Here, “Small Shareholders” means a shareholder holding shares of nominal value of not more than ₹20,000 or such other sum as may be prescribed.

The Companies (Appointment and Qualification of Directors) Rules, 2014 provides for the procedure for appointment of small shareholders’ director according to which:

- (1) A listed company, may upon notice of not less than
 - a) one thousand small shareholders, or
 - b) one tenth 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 representing small shareholders' suo moto and in such a case the provisions of sub-rule (2), given below, shall not apply for appointment of such director.

- (2) The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signatures 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.
- (3) 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;
 - 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.
- (4) Such director shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.
- (5) 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 three consecutive years; and
 - c) on the expiry of the tenure, such director shall not be eligible for re-appointment.
- (6) 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 of a director.
- (7) 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 sub-section (6) of section 149.
- (8) 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.
- (9) A small shareholders' director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

1.5.1.11. Option to adopt principle of proportional representation for appointment of Directors (Section 163)

As per this Section, Notwithstanding anything contained in this Act,-

- a) The articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation.
- b) Such appointments may be made once in every 3 years whether by the single transferable vote or by a system of cumulative voting or otherwise.

Single transferable vote means, a candidate gets elected if he gets the required number of votes fixed as quota. These systems of voting ensure that the Board will have fair representation of the minority interest.

- c) Casual vacancies of such directors shall be filled in the normal way, as provided in sub-section (4) of section 161.

The above section 163 of the Companies Act, 2013, shall not apply to:

- i) 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;
- ii) 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.

1.5.1.12. Disqualifications for appointment of Director (Section 164)

According to this section:

- (1) A person shall not be eligible for appointment as a director of a company, IF:
- a) he is of unsound mind and stands so declared by a competent court.
 - b) he is an undischarged insolvent.
 - c) he has applied to be adjudicated as an insolvent and his application is pending.
 - d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence.

However, if 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, whether alone or jointly with others, and 6 months have elapsed from the last day fixed for the payment of the call.
 - 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 sub-section (3) of section 152 which requires a director to have a Director Identification Number under section 154.
 - i) he has not complied with the provisions of 165(1) relating to holding of maximum number of directorship.
- (2) No person who is or has been a director of a company which:
- a) has not filed financial statements or annual returns for any continuous period of 3 financial years, or
 - b) has failed to repay the deposits or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared on preference shares and such failure to pay or redeem continues for 1 year or more, however, such director shall not incur the disqualification for a period of 6 months from the date of appointment.

shall be eligible to be re-appointed as a director of that company or appointed in other company for period of 5 years from the date on which the said company fails to do so. [Section 164 (2)]

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment

- (3) Section 164(2) is not applicable to Government Company.
- (4) A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164 as stated above [i.e., point (1) and (2) above].

Provided that the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification

- (5) However, the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) [given in point (1) above] shall not take effect:
- for 30 days from the date of conviction or order of disqualification.
 - where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed off, or
 - where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed off.

1.5.1.13. Resignation of Director (Section 168)

Acceptance of directorship is voluntary and continuation also is voluntary. There cannot any compulsion on continuation of the office. The law provides that:

- a director may resign from his office by giving a notice in writing to the company.
- The Board shall on receipt of such notice take note of the same.
- The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR-12 and post the information on its website, if any.
- The company shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.
- Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in Form DIR- 11.

1.5.1.14. Removal of Directors (Section 169)

It is normal that the appointing authority can only be the removing authority. However, since the appointment has a procedure, the removal also has a procedure. Section 169 of the Companies Act, 2013 provides the provisions for removal of directors.

- A company may, by ordinary resolution, remove a director other than a director appointed by the Tribunal under section 242 of the Act, before the expiry of the period of his office after giving him a reasonable opportunity of being heard. [Section 169(1)]. Independent director appointed for the second term can be removed by the special resolution only.
- the directors appointed on the principle of proportional representation under section 163 cannot be removed by an ordinary resolution as aforesaid.

- (c) A special notice from member(s) shall be required of any resolution, to remove a director under section 169 or to appoint somebody in place of a director so removed, at the meeting at which he is removed. [Section 169 (2)].
- (d) On receipt of the notice, 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. [Section 169(3)].
- (e) The vacancy resulting from the aforesaid removal 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 under section 169(2). [Section 169(5)].
- (f) A director so appointed shall hold office for the remaining tenure of the director who has been removed would have held office if he had not been removed. [Section 169(6)].
- (g) If the vacancy is not filled in the same meeting as above, then it may be filled as a casual vacancy in accordance with the provisions of this Act provided that the director who was so removed from office shall not be reappointed as a director. [Section 169(7)].
- (h) Nothing in this section shall be taken to deprive a person removed under this section 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.

1.5.1.15. Vacation of office of Director (Section 167)

- (a) The office of a director shall become vacant in case [Section 167(1)]:

- (1) he incurs any of the disqualifications specified in section 164.

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

- (2) 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.
- (3) 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.
- (4) 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.
- (5) he becomes disqualified by an order of a court or the Tribunal.
- (6) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months.

Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) 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.]
- (7) he is removed in pursuance of the provisions of this Act.
- (8) 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.
- (b) 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 sub-section (1), he shall be punishable with fine which shall not be less than Rupees 1 lakh but which may extend to Rupees 5 lakhs. [Section 167 (2)].
- (c) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), 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. [Section 167 (3)].
- (d) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1). [Section 167 (4)].

Managing director

Section 2(54) of the Companies Act, 2013 defines a ‘Managing Director’ as a director who is entrusted with substantial powers of management of the affairs of the company by:

- (a) virtue of the articles of a company, or
- (b) an agreement with the company, or
- (c) 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 authorised by the Board, such as

- (a) the power to affix the common seal of the company to any document or
- (b) to draw and endorse any cheque on the account of the company in any bank or
- (c) to draw and endorse any negotiable instrument or
- (d) to sign any certificate of share or
- (e) to direct registration of transfer of any share.

Whole Time Director [Section 2(94)]

Whole-time director’ includes a director in the whole time employment of the company. They are also considered as executive directors as they are executives of the company. There are some companies where a particular function is attached to the director, i.e. Director (Finance), Director (Commercial) etc.

Manager [Section 2(53)]

‘Manager’ means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service

or not. Though, legally, managing director and manager are almost same, we hardly hear know companies with manager instead of managing director. It is gathered that the concept originated from tea gardens where garden manager used to have substantial powers of management.

1.5.1.16. Appointment of Managing Director, Whole Time Director or Manager (Section 196)

Section 196 of the Act contain the provisions for appointment of Managing Director, Whole Time Director or Manager. According to this section:

- (1) No company shall appoint or employ a managing director and a manager at the same time.
- (2) 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, provided that no re-appointment shall be made earlier than one year before the expiry of his term.
- (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. Person who has attained the age of seventy years may be appointed by the passing of a special resolution.
 - (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.
- (4) Schedule V to the Companies Act, 2013, prescribes additional conditions for managing or whole-time director or a manager to be eligible for appointment. The schedule stipulates that :
 - (a) 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 16 Acts as specified under Schedule V.
 - (b) he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:
 - (c) where he is a managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II.
 - (d) he is resident of India.

In this context, 'resident in India' includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India,

- i) for taking up employment in India; or
 - ii) for carrying on a business or vacation in India.
- (e) Where an appointment not approved by AGM, any Act done by him deemed to be invalid.

1.5.1.17. Procedure of Appointment [Section 196 (4)]

- (a) a managing director, whole-time director or manager shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
- (b) The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the

approval of shareholders by a resolution at the next general meeting of the company.

- (c) In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.
- (d) The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
- (e) A return in the prescribed form (Form No. MR-1) along with the prescribed fee shall be filed with the Registrar within 60 days of such appointment.

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 [Section 196 (5)]. It is not applicable for specified Public Company, Govt. Company by notification.

1.5.1.18. Appointment of Key Managerial Personnel (Section 203)

- (a) Every company belonging to such class or classes of companies as maybe prescribed, shall have the following whole time key managerial personnel:**

- (1) Managing Director, or Chief Executive Officer or Manager and in their absence, a whole time Director.
- (2) Company Secretary, and
- (3) Chief Financial Officer.

According to Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 every listed company and every other public company having a paid up share capital of ₹10 crores or more shall have whole-time key managerial personnel.

- (b) 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)].**

After the date of commencement of this Act, 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 of the company at the same time unless:

- (1) the articles of such a company provide otherwise; or
- (2) the company does not carry multiple businesses. [First proviso to section 203(1)].

Provided that the above mentioned prohibition shall not apply to such class of companies 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. [second proviso to section 203(1)].

- (c) Conditions for appointment:**

- (1) Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration. [Section 203 (2)].
- (2) 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)].

Provided that nothing in the above sub section shall disentitle a key managerial personnel from being a director in any company with the permission of the Board.

(e) Managing Director or manager in more than one company [Third proviso to section 203(3)]:

- (1) A company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one of other company, approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting. (unanimous Board resolution)
- (3) Specific notice of such meeting, and of the resolution to be moved thereat has been given to all the directors then in India.

(f) Casual Vacancy [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.

1.5.2. Payment of Remuneration to Directors and Key Managerial Personnel and Disclosure

Section 197 of the Companies Act, 2013 lays down the provisions for overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits. According to this section:

(a) Overall Maximum Managerial Remuneration [Section 197(1)]

- (1) The overall managerial remuneration to the Directors including managing director, whole time director and manager is summarized as under: Where the company has defaulted in the payment to any bank / PFI or Non Convertible Debentures or any secured creditor, prior approval of bank/PFI, shall be obtained before special resolution, If required. Auditor to give a certificate that remuneration paid is within limit as per the provision.

Persons entitled for remuneration	Maximum remuneration in any financial year	If remuneration exceeds maximum remuneration in any financial year as provided under column (b)
(a)	(b)	(c)
Directors including managing director, whole time director and manager of public companies	11% of the net profits of the company for that financial year	Company in general meeting subject to provisions of Schedule V may pay remuneration in excess of 11% of the net profits of the company
One Managing director/ Whole time director/manager	5% of the net profits of the company for that year	With the approval of the company by special resolution in general meeting this limit may be exceeded
More than one Managing director/ Whole time director/ manager	10% of the net profits to all such Directors and manager taken together	With the approval of the company by special resolution in general meeting this limit may be exceeded.
Directors who are neither Managing director nor whole time directors	1% of the net profits of the company if there is a managing director or a whole time director	Approval of the company by special resolution in general meeting is required
Directors who are neither Managing director nor whole time directors	3% of the net profits of the company if there is no managing director or whole time director	Approval of the company by special resolution in general meeting is required

- (2) Section 197(8) further provides that the net profits shall be computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

(b) Remuneration rendered in any other capacity [Section 197(4)]

- (1) 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,
 - a) by the articles of the company, or
 - b) by a resolution or,
 - c) if the articles so require, by a special resolution, passed by the company in general meeting, and
- (2) 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.
- (3) Any remuneration for services rendered by any such director in other capacity shall not be so included if:
 - a) the services rendered are of a professional nature, and
 - b) in the opinion of the Nomination and Remuneration Committee(NRC) if the company is covered under sub-section (1) of section 178, (companies required to have NRC) or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

(c) Sitting Fees to directors [Section 197(5)]

- (1) A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board.
- (2) The sitting fees shall not exceed ₹1 lakh per meeting of the Board or committee thereof. However, for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.
- (3) The percentages under sub-section (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.
- (4) Different fees for different classes of companies and fees in respect to independent directors may be such as may be prescribed.

(d) Mode of remuneration [Section 197(6)]

A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other. Insurance premium paid for fidelity guarantee against misfeasance and misgovernance shall not be treated as remuneration.

(e) No profits or profits are inadequate [Section 197(3) & (11)]

- (1) 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/except in accordance with the provisions of Schedule V.
- (2) If the company is not able to comply with such provisions of Schedule V in the above case, then previous approval of the Central Government shall be taken.
- (3) In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or its Board, shall not

have any effect unless such increase is in accordance with the conditions specified in that Schedule and if such conditions are not being complied, the approval of the Central Government had been obtained.

(f) Refund of excess [Section 197 (9)]

If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company. .

The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless approved by the company by special resolution within two years from the date the sum becomes refundable. [Section 197(10)].

(g) Disclosure by listed company [Section 197(12)]

If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company.

The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless permitted by the Central Government. [Section 197(10)].

(h) Disclosure by listed company [Section 197(12)]

- (1) Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed.
- (2) The Board's report shall include a statement showing the name of top 10 remunerating employees of the company, who:
 - i) If employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than ₹1.25 crores.
 - 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 rupees eight lakh fifty thousand rupees 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 two percent of the equity shares of the company.
- (3) The statement referred to in above para (b) 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 para (b) 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.

(i) Receiving Commission [Section 197 (14)]

Any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report.

(j) Contravention [Section 197 (15)]

If any person contravenes the provisions of this section, he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees

(k) Statement by auditor [Section 197 (16)]

The auditor of the company shall, in his report under section 143, make a statement as to whether the remuneration paid by the company to its Directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed

Calculation of profits (Section 198)

According to this section

Profits for the purpose of manageria remuneration shall be calculated as follows:

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.	Credit shall not be given for those specified in section 198(3) Less: (if credited to the P&L A/c for arriving at Profit before tax - 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 - profits on sales by the company of forfeited shares; - 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; - 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; - 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. - any amount representing unrealised gains, notional gains or revaluation of assets
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Sums specified in 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;
- 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) above;
- o. debts considered bad and written off or adjusted during the year of account.

Sums specified in 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 subsection (4) of Section 198;
- b. any compensation, damages or payments made voluntarily, that is to say, otherwise than in the nature of a liability such as is referred to in clause (m) of sub-section (4) of section 198;
- 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.

1.5.2.1. Central Government or company to fix limit with regard to remuneration (Section 200)

- (a) The Central Government or 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, considering the following.
 - (1) the financial position of the Company
 - (2) the remuneration or commission drawn by the individual concerned in any other capacity.
 - (3) the remuneration or commission drawn by him from any other company.
 - (4) professional qualifications and experience of the individual concerned.
 - (5) any other matters as may be prescribed
- (b) The Central Government or the company shall also have regard to the following matters, namely:
 - (1) the Financial and operating performance of the company during the 3 preceding financial years.
 - (2) the relationship between remuneration and performance.
 - (3) 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.
 - (4) whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.
 - (5) the securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

1.5.3. Power of the Board of Directors and Restrictions on the Powers of Directors

1.5.3.1. Power of the Board of Directors

Section 179 of the Act, provides Powers of Board. According to this section:

- (a) the powers of directors are co existence with the company itself. The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do.
 Powers of the Board may be restricted under articles of association and also in general meeting. Companies Act also provides few powers can only be exercised by the company only.
- (b) Powers of the Board are to be exercised collectively and no individual director, unless specifically authority, shall not have any powers of the Board, However, executive directors, being employees shall have powers as per regulation of the company.
- (c) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made [Section 179 (2)].
- (d) Powers of the Board to be exercised by the Board by means of the resolution passed at a dully convened Board meeting [Section 179 (3)]:
 - (1) to make calls on shareholders in respect of money unpaid on their shares;
 - (2) to authorise buy-back of securities under section 68;

- (3) to issue securities, including debentures, whether in or outside India;
 - (4) to borrow monies;
 - (5) to invest the funds of the company;
 - (6) to grant loans or give guarantee or provide security in respect of loans;
 - (7) to approve financial statement and the Board's report;
 - (8) to diversify the business of the company;
 - (9) to approve amalgamation, merger or reconstruction;
 - (10) to take over a company or acquire a controlling or substantial stake in another company;
 - (11) any other matter which may be prescribed
- (e) Additionally, Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed certain more powers that shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:
- (1) to make political contributions;
 - (2) to appoint or remove KMP
 - (3) to appoint internal auditors and secretarial auditor;
- (f) Power to delegate certain powers of the Board: The Board may, by a resolution passed at a meeting, delegate the powers specified in points (d) to (f) above, on such conditions as it may specify to:
- (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 (in the case of a branch office of the company). Matters referred to in clauses (d), (e), and (f) of sub-section (3) of section 179 may be decided by the board by circulation instead of at a meeting in respect to the companies covered under section 8 of the Companies Act, 2013.
- (g) Nothing in this section shall however be deemed to affect the right of the company in the general meeting, to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section above [Section 179 (4)].

1.5.3.2. Restrictions on Powers of Board (Section 180)

Fact cannot be overlooked that a company is an institution owned and controlled by the shareholders. The inherent, residuary and ultimate powers rest with the shareholders. Section 180 of the Act, provides for restrictions on powers of Board. According to section 180 (1):

The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:

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 u Nothing contained in above point (a) shall affect:

- a) the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith, or

The sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing undertakings.

- (1) 'Undertaking' shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year.
 - (2) The expression 'substantially the whole of the undertaking' in any financial year shall mean 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.
- (b) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation.

This section is not applicable to private company.

- (c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.

Every special resolution shall specify the total amount up to which monies may be borrowed by the Board of Directors [Section 180 (2)].

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 withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

'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;

- (d) To remit, or give time for the repayment of, any debt due from a director.
- (1) Every special resolution passed by the company in general meeting in relation to the exercise of the powers referred to in point (c) above shall specify the total amount up to which monies may be borrowed by the Board of Directors [Section 180 (2)].
 - (2) Nothing contained in above point (a) shall affect:
 - i) the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith, or
 - ii) The sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.
 - (3) Any special resolution passed by the company may be conditional and shall have to be complied with.

1.5.3.3. Shareholders Intervention in Board functions

Shareholders, being the ultimate stakeholders of the company, may intervene in Board functioning and management under exceptional cases. Some of which are discussed below.

- (i) Malafide intention of majority of directors; If the Board itself turn out to be wrong doers.
- (ii) Incompetent Board; For some reason, The Board has become incompetent to act. For example, all Board members have become indirectly interested in a particular resolution or technically there is no Board and immediately Board cannot be constituted.
- (iii) Deadlock situation where majority decision cannot be taken or powers not vested to directors shall remain with the shareholders or a situation where confusion prevails as to powers of the Board.

1.5.4. Obtaining DIN

DIN (Directors Identification Number) is a unique number allotted to a person acting as director and there cannot be two DIN of the same person like Adhar and PAN. 'Director Identification Number' (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. Section 153 to 157 of the Companies Act, 2013 provide for making application to Central Government for allotment of DIN and other matters connected there with.

1.5.4.1. Application for allotment of Director Identification Number (Section 153)

Section 153 of the Act deals with the filing of application to the Central Government for allotment of an application for allotment of DIN to the Central Government in such form and manner and along with such fees as may be prescribed, provided Central Government may prescribe any identification number which may be considered as DIN.

Rule 9 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides a detailed procedure for making application for allotment of DIN. The procedure is detailed below:

- (a) 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 Government for allotment of a Director Identification Number (DIN) along with such fees as provided under the companies (Registration offices and Fees) Rules, 2014. Provided that in case of proposed directors not having approved 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)
- (b) The applicant shall download Form DIR-3 from the portal, fill in the required particulars sought therein, verify and sign the form through digital signature and after attaching copies of the following documents, scan and file the entire set of documents electronically:
 - (1) photograph;
 - (2) proof of identity;
 - (3) proof of residence; and
 - (4) specimen signature duly verified.
- (c) 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:
 - (1) 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
- (d) 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.

1.5.4.2. Allotment of Director Identification Number (Section 154)

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.

Rule 10 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides the procedure for allotment of DIN according to which:

- (a) On the submission of the Form DIR-3 on the portal and payment of the requisite amount of fees through online mode, an application number shall be generated by the system automatically.
- (b) 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.
- (c) 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 defects or incompleteness by resubmitting the application within a period of 15 days of such placing on the website and email.

Provided that the Central Government shall:

- (1) 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.
- (2) treat and label such application as invalid in the electronic record in case the defects are not removed within the given time, and
- (3) inform the applicant either by way of letter by post or electronically or in any other mode.
- (4) 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.
- (5) All DIN 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.
- (6) 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.

1.5.4.3. Prohibition to obtain more than one DIN (Section 155)

According to this section, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another Director Identification Number (DIN).

1.5.4.4. Director to intimate DIN (Section 156)

Section 156 of the Companies Act, 2013, provides for a Director to intimate the DIN allotted to him. According to this section, every existing director shall, within one month of the receipt of DIN from the Central Government, intimate his DIN to the company or all companies wherein he is a director.

1.5.4.5. Company to inform DIN to Registrar (Section 157)

- (a) According to this section:

- (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 as may be prescribed or with such additional fees as may be prescribed within the time specified under section 403.

Every such intimation shall be furnished in such form and manner as may be prescribed. [Section 157(1)].

- (2) If a company fails to furnish the DIN under sub-section (1) above, before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000 and every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000. [Section 157(2)].

- (b) According to Rule 10A of the Companies (Appointment and Qualification of Directors) Amendment Rules, 2014:
- (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 of the Act shall be furnished in Form DIR-3C within 15 days of receipt of intimation under section 156.

1.5.4.6. Obligation to indicate DIN (Section 158)

According to section 158 of the Companies Act, 2013, every person or company, while furnishing any return, information or particulars as are required to be furnished under this Act, 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.

1.5.4.7. Punishment for contravention (Section 159)

Section 159 of the Companies Act, 2013 provides for Punishment for contravention of any of the provisions of section 152, 155 and 156 of the Act.

According to the section, 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 which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues.

1.5.4.8. Cancellation or Surrender or Deactivation of DIN

The Central Government or any officer authorised may, upon being satisfied on verification of particulars or documentary proof attached with the application received cancel or deactivate the DIN in case:

- (a) the DIN is found to be duplicated
- (b) the DIN was obtained in a wrongful manner or by fraudulent means
- (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.

1.5.4.9. Intimation of changes in particulars specified in DIN application

- (a) 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:
 - (1) 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.
 - (2) the form shall be digitally signed by a chartered accountant in practice or a company secretary in practice

or a cost accountant in practice.

- (3) the applicant shall submit the Form DIR-6.
- (b) 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.
- (c) 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.
- (d) 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.

1.5.5. Compensation for Loss of Office

It may be mentioned that loss of office means cessation/end of the job of the director. Section 202 of the Companies Act, 2013 provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:

- (a) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
- (b) No payment of compensation shall be made in the following cases:
 - (1) where the director resigns from his office as a result of the reconstruction/amalgamation of the company, with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate/e amalgamated company.
 - (2) where the director resigns from his office in normal course, otherwise than on the reconstruction of the company or its amalgamation as aforesaid.
 - (3) where the office of the director is vacated under sub-section (1) of section 167.
 - (4) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director.
 - (5) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof, and
 - (6) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.
- (c) The amount of compensation shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or three years, whichever is shorter, 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, during such period .
- (d) No such payment however can be made at all if winding up of the company is commenced whether before or within 12 months after, the date on which he ceased to hold office, if the assets on winding up (after deducting expenses on winding up) are not sufficient to repay the shareholders the capital, including premiums if any, contributed by them.

- (e) Nothing in this section shall be deemed to prohibit the payment to a managing or whole - time director, or manager, of any remuneration for services rendered by him to the company in any other capacity. If the director/manager has rendered services as a professional, that can be paid and shall not be considered as “ compensation.

1.5.6. Waiver of Recovery of Compensation

In case any compensation has been wrongly paid the same can be recovered under this Act. In addition to above, where a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made thereunder, the company shall recovered from any past or present managing director or whole-time director or manager or Chief Executive Officer (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

1.5.7. Making Loans to Directors, Disclosure on Interest of as Director, Holding of Office or Place of Profit by a Director/ Relative

1.5.7.1. Loan to Directors, etc. (Section 185)

Section 185 of the Act provides for Loan to directors, etc. According to this section:

No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by :-

- (a) any director of company, or of a company which is its 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.
- (2) A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that—:
 - (a) a special resolution is passed by the company in general meeting:

Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

- (b) the loans are utilised by the borrowing company for its principal business activities.

Explanation- For the purposes of this sub-section, the expression “any person in whom any of the director of the company is interested” means—:

- (a) any private company of which any such director is a director or member;
- (b) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such Directors, together; or
- (c) any body corporate, the Board of Directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or Directors, of the lending company.

Exceptions: The above restriction does not apply in the following circumstances:

- (a) the giving of any loan to a managing or whole-time director:
 - (1) as a part of the conditions of service extended by the company to all its employees; or

- (2) pursuant to any scheme approved by the members by a special resolution; or
- (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or.
- (c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company, or
- (d) Any guarantee given or security provided by a holding company in respect of any loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses(c) and (d) are utilized by the subsidiary company for its principal business activities.

1.5.7.2. Penalty for Contravention

If any loan is advanced or a guarantee is given or provided in contravention of the provisions of section 185, the following penalties shall be leviable:

- (a) On Company: Minimum- Rupees `5 lakhs and maximum- Rupees `25 lakhs.
- (b) On defaulting director and the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person: Imprisonment- Maximum 6 months, or, Fine- Minimum- Rupees `5 lakhs and maximum- Rupees `25 lakhs, or, with Both .

Thus, penalty is leveiable only on the company or director or person to whom the loan is given or guarantee or security is provided. However, all other persons who are knowingly a party to default has been kept outside the ambit of penalty clause of section 185. The Companies(Meetings of Board and its Powers) Rules, 2014 has exempted the following from the ambit of section 185 provided the loans are to utilize by the subsidiary company for its principal business activities.

- (1) Any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company is exempted from the requirements under this section, and
- (2) Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company is exempted from the requirements under this section.

Vide Notification G.S.R 464(E), dated 5th June 2015, section 185 shall not apply to a private company:

- (a) In whose share capital no other body corporate has invested any money.
- (b) If the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower, and
- (c) Such company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.

1.5.7.3. Disclosure of Interest by Director (Section 184)

It is a basic issue of governance that directors should not have any conflict of interest but in practical situation, there may be some directors who are directly or indirectly interested in some issues or other which also is company's interest and thereby face a situation of conflict of interest. Directors occupy a fiduciary position in relation to the stakeholders and personal relation should not vitiate his duty. Law has made a resolution of this ethical dilemma

of directors. Section 184 is applicable on all directors of the company and all types of Companies.

(a) Every director shall:

- (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 disclosures already made, then at the first Board meeting held after such change.

(b) 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, directorship or in any other capacity. He should ensure that the notice of disclosure is placed in the meeting.

The Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed that the directors shall disclose his concern or interest, by giving a notice in writing.

(c) Circumstances in which disclosure is necessary: Whenever any 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 shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting. Following are the circumstances where disclosure is necessary:

Whenever any director of the 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:

- (1) 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
- (2) with a firm or other entity in which, such director is a partner, owner or member, as the case may be. However, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested.

Consequences of non disclosure:

- (i) Voidable at the option of company: A contract or arrangement entered into by the company without disclosing or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.
- (ii) Penalty: If a director of the company contravenes the provisions of sub-section (1) or subsection (2) of section 184, such director shall be liable to penalty of Rupees 1 lakhs.

(d) 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.

The Act requires the disclosure of interest by a director and prohibits an interested director to participate or vote in respect of that particular transaction at the Board meeting. Further his presence will not be counted for quorum also. But where a whole body of directors is aware of the facts relating to an interest of a director, a formal disclosure is not necessary. [Ramakrishna Rao v Bangalore Race Club; 1970 40 CompCas 1154 Kar.].

(e) Exception: Section 184 shall not apply to any contract or arrangement entered into or to be entered into between 2 companies where any of the directors of the one 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 or the body corporate.

1.5.7.4. Related Party Transactions

Related party transaction is transaction between the director, promoters, KMP, the companies with parties who are related. The related party shall not vote. This, however, will not apply where 90% of the shareholders are promoters, relatives or related parties. The type of transaction is mentioned at para 1.7.6.

Shareholders approval will not be required if -

- (a) transaction is in ordinary course of business other than transaction which are not on answer length basis.
- (b) transaction between a holding company and its wholly owned subsidiary.

Every such, contract shall be disclosed in Board's Report with justification of entering. Such contracts, if not ratified, shall be voidable and parties benefited shall be liable to indemnify the company.

The expression 'office or place of profit' means any office or place:

- (i) 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;
- (ii) 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.

1.5.7.5. Provisions relating the Related Party

Section 188 of the Companies Act, 2013 contemplates the approval required in order to enter into related party transactions. The section provides for the various transactions which cannot be entered into by the company without the consent of the Board of Directors. Meaning thereby unless the Board of Directors have given their consent by way of a resolution at a meeting of the Board, no company shall enter into any contract or arrangement with a related party with respect to—

- (a) sale, purchase or supply of any goods or materials;
- (b) selling or otherwise disposing of, or buying, property of any kind;
- (c) leasing of property of any kind;
- (d) availing or rendering of any services;
- (e) appointment of any agent for purchase or sale of goods, materials, services or property;
- (f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
- (g) underwriting the subscription of any securities or derivatives thereof, of the company:

Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution:

Omnibus approval for related party transactions on annual basis (Rule 8A)

All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions, namely:-

- (1) The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making

the omnibus approval which shall include the following, namely:

- a) maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year.
 - b) the maximum value per transaction which can be allowed.
 - c) extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval.
 - d) review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made.
 - e) transactions which cannot be subject to the omnibus approval by the Audit Committee.
- (2) The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely:
- a) repetitiveness of the transactions (in past or in future).
 - b) justification for the need of omnibus approval.
- (3) The Audit Committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company.
- (4) The omnibus approval shall contain or indicate the following:
- a) name of the related parties.
 - b) nature and duration of the transaction.
 - c) maximum amount of transaction that can be entered into.
 - d) the indicative base price or current contracted price and the formula for variation in the price, if any, and
 - e) any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding ₹1 crore per transaction.

- (5) Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.
- (6) Omnibus approval shall not be made for transactions in respect of selling or disposing of the undertaking of the company.
- (7) Any other conditions as the Audit Committee may deem fit.

1.5.7.6. Contracts or arrangements involving the following [Section 188 (1) (a) to (e)]

- (1) Sale, purchase or supply of any goods or materials, whether directly or through any agent and wherein the amount involved exceeds 10% of the turnover of the company or ₹100 crores, whichever is lower.
- (2) Selling or otherwise disposing of or buying property of any kind, directly or through any agent and where the amount involved exceeds 10% of the net worth of the company or ₹100 crores, whichever is lower.
- (3) Leasing of property of any kind and the amount involved exceeds ten percent of net worth of the company or 10% of turnover of the company or ₹100 crores.

- (4) Availing and rendering of any kind of services, directly or through appointment of agent and which involves amount exceeding 10% of the turnover of the company or ₹50 crores, whichever is lower.

The Notification issued by Ministry provides the explanation that the above mentioned limits that are specified for the transaction(s) shall apply to the transactions to be entered into either individually or taken together with the previous transactions during a financial year.

- a) Appointment of any person in the office or any place of profit in the company, its subsidiary or associate company at a monthly remuneration exceeding Rupees ₹2.5 lakhs.
- b) Remuneration for underwriting of subscription of any securities or derivatives of the Company exceeding one percent of net worth of the company.

According to Section 2 (49) of the Companies Act, 2013 'Interested director' means a director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company.

1.5.7.7. Interested Director

According to Section 2 (49) of the Companies Act, 2013 'Interested director' means a director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company.

Interested Director means any director whose presence cannot count for the purpose of forming a quorum at a meeting of the Board, at the time of the discussion or vote on any matter.

A quorum is the minimum number of qualified persons who must attend in order to transact business at a duly convened Board meeting. A meeting shall not be deemed to have been properly held unless the quorum was present at that meeting. Section 174 of the Companies Act, 2013 provides for Quorum for meetings of Board. According to this section:

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 directors who are present at the meeting and not interested directors and are not be less than 2.

'Interested director' for the purposes of this sub section means a director within the meaning of section 184 (2). Under 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, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting;

Provided, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested [Section 184 (2)].

Further, a contract or arrangement entered into by the company without disclosure under sub-section (2) or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company [Section 184 (3)].

The Act prohibits an interested director from participating in the discussion of or voting on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company in which his presence shall not be counted for the purpose of forming a quorum at the time of any such discussion or vote and if he does vote, his vote shall be void. Interest here means personal interest and not official or any other interest. It may be financial interest and includes interest arising out of fiduciary duties or closeness or relationship such as that of husband and wife, father and son [Firestone Tyre & Rubber Co. v. Synthetics & Chemicals Ltd., (1970) Comp. L.J. 200].

The Act further imposes an obligation on a director to disclose the nature of his concern or interest whether (direct or indirect) if any, at a meeting of the Board of directors. A director is in a fiduciary position. A person in fiduciary position is not permitted to obtain profit from his position except with the consent of his beneficiaries or other persons to whom he owes the duty. Further, an interested director shall not participate or vote in Board's proceedings.

Disclosure of interest has to be made at meeting of the Board of directors. It has to be made formally, even if the interest in question is otherwise known to them. [Guinness PLC v. Saunders (1988) 2 ALL ER 940].

Board Meetings and Procedures

1.6

1.6.1. Board Meetings, Minutes and Registers

Board of directors are responsible for management of the company. Board manages company through meetings where various issues are discussed and decided upon. However, board also decide on the basis of resolution by circulation

Chapter XII of the Companies Act, 2013 (from Section 173 to Section 195) includes the provisions as to conduct of Board Meetings, Constitution of Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee, Powers of the Board, Restrictions on the Powers of the Board, Prohibition regarding Political contributions etc. The procedure aspects of board meeting has to be read with following additional regulations

- i) Listing Obligations and Disclosure Requirement (LODR) of SEBI
- ii) Companies (Meeting of Board and its Powers) Rules, 2014.

1.6.1.1. Frequency of Board Meetings

- (a) Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its Incorporation and thereafter minimum of 4 meetings shall be held every year provided that the gap between two consecutive board meetings shall not be more than 120 days unless exempted by the Central Government . Section 173(1)

Exceptions:

- (a) A one-person company, small company and dormant company shall be deemed to have complied with the provisions of section 173, if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days. This provision will not apply where OPC is having only one director.
- (b) As per Secretarial Standards, 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.
- (c) As per Secretarial Standards, where a company is required to appoint Independent Directors under the Act, such Independent Directors shall meet at least once in a calendar year.

1.6.1.2. Participation in Board Meeting

- (a) Sub section (2) of section 173 allows directors to attend Board meetings:
 - (1) in person, or,
 - (2) through video conferencing, or,
 - (3) other audio visual means.

- (b) Such audio visual means should be 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.
- (c) The Central Government may by restrict matters which shall not be dealt with in a meeting through video conferencing and other audio visual means.
- (d) Key points related to meetings of Board that are held through conferencing or other audio visual means, as provided in Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 are as under:
 - (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:
 - i) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
 - ii) 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;
 - iii) to record proceedings and prepare the minutes of the meeting;
 - iv) 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.
 - v) to ensure that only the concerned director is attending the meeting through video conferencing and
 - vi) 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.

However, the differently disabled persons may make a request to the Board to allow a person to accompany him.

1.6.1.3. Notice of the Meeting

- (a) Section 173(3) provides that, every board meeting shall be called by giving at least 7 days' notice in writing to all the directors at their registered address (whether in India or outside India). The notice may be sent by hand delivery or by post or by electronic means.

Meeting of the Board of Directors may be called on a shorter notice (than 7 days) in order to transact an urgent business, subject to the condition that at least one independent director, if any, shall be present at the meeting. If no independent director is present, then the 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. The fact that meeting is being called at shorter notice, shall be stated in the notice.

- (b) The Companies (Meetings of Board and its Powers) Rules, 2014 further provides that
 - (i) 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.
 - (ii) On receiving such a notice, 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. He shall give prior intimation to that effect sufficiently in advance so that the company is able to make suitable arrangements in this behalf.
 - (iii) If the director does not give any intimation of his intention to participate that he wants to participate

through the electronic mode, it shall be assumed that the director shall attend the meeting in person.

- (iv) The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year. In the absence of any such intimation from the director, it shall be assumed that he will attend the meeting in person.
- (v) Notice of the meeting, wherein the facility of participation through Electronic mode is provided, shall clearly mention a venue to be the venue of the meeting and it shall be the place where all the recordings of the proceedings at the meeting would be made.

Otherwise, it shall be assumed that the director shall attend the meeting in person.

(c) The SS-1 (Secretarial Standards on the Meeting of Board) provides that:

- (i) Where director specifies a particular means of delivery of notice, notice shall be given to him by such means only.
- (ii) Notice shall be issued by the Company Secretary or where there is no Company Secretary, by any director or any other person authorized 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 provide the available option of such facility, information to avail such facility, and contact number or e-mail address of the Chairman or Company Secretary or any other authorized person to whom director shall confirm as to whether they will participate through electronic mode in the meeting.
- (v) The Agenda, setting out the business to be transacted at the meeting, and Notes to agenda shall also be sent to all the directors along with Notice of the Board Meeting.
- (vi) Each meeting and item of the business to be taken up in the meeting shall be serially numbered.
- (vii) Proof of sending notice, agenda and notes on agenda and their delivery shall be maintained by the company.
- (viii) Every Meeting shall have a serial number.
- (ix) A meeting may be convened at any time and place, on any day, excluding a National Holiday.

National Holiday includes Republic Day i.e. 26th January, Independence Day i.e. 15th August, Gandhi Jayanti i.e. 2nd October and such other day as may be declared as National Holiday by the Central Government.

Penalty for failure to give notice [Section 173(4)]: The Act under section 173(4) has prescribed a penalty of ₹ 25,000 on every officer of the Company whose duty is to give notice under this section and who has failed to do so.

1.6.1.4. Quorum for meetings of Board (Section 174)

A quorum is the minimum number of qualified persons who must be present in order to transact business at a duly convened Board meeting. A meeting shall not be deemed to have been properly held unless the quorum was present at that meeting. Presence of requisite Quorum validate decision taken at a meeting.

- (a) The quorum for a Board Meeting shall be one-third of its total strength or two directors, whichever is higher.
- (b) The directors who participate by video conferencing or by other audio visual means shall also be counted for the purpose of quorum.

- (c) The continuing directors may act notwithstanding any vacancy in the Board; but, if the number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing(remaining) directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.
- (d) Where at any time the number of interested directors exceeds or is equal to two third of the total strength of the Board of Directors, the quorum shall be the number of directors who are present at the meeting and not interested directors and are not be less than two.
- (e) Interested director means every director of a company who is in anyway, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement which is placed in agenda of the meeting.

Notes:

- (1) Section 8 Companies under the Act shall constitute quorum for the Board meeting, either eight members or 25% of its total strength whichever is less. Provided that quorum shall not be less than two members. [Vide Notification G.S.R.466(E) dated 5th June 2015]
- (2) The provisions of section 174 are not applicable to one-person company in which there is only one director on its Board of directors.
- (3) For the purpose of calculating quorum, any fraction of a number shall be rounded off as one.
- (4) Total strength shall not include directors whose places are vacant.
- (5) As per the SS-1 (Secretarial Standards on the Meeting of Board):
 - a) Quorum shall be present throughout the meeting.
 - b) In case of committee meetings, the presence of all members of any committee constituted by the Board is necessary to form the quorum for the meetings of such committee unless otherwise stipulated in the Act, or any other law, or the Articles or by the Board.

1.6.1.5. Passing of resolution by circulation (Section 175)

It is always desirable that the business of the Board is discussed and decided in the board meeting only. However, there may be instances where a decision of the Board is to be taken but there no time to call a meeting or immediate meeting is not possible for some reason. Though the Act requires certain business to be approved only at meetings of the Board, the law has provided to deal with such a situation by passing resolution through circulation without holding a meeting.

- (a) The Act allows the Board of directors to pass resolution by circulation also. No resolution shall be deemed to have been duly passed by the Board or by a Committee thereof by circulation unless:
 - (1) The resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the Committee, as the case may be,
 - (2) at their addresses registered with the company
 - (3) by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

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.

- (b) A resolution that has been passed by circulation shall have to be necessarily be noted in the next meeting of board or the committee, as the case may be, and made part of the minutes of such meeting.
- (c) According to Secretarial Standards, not more than 7 days from the date of circulation of draft resolution shall be given to the Directors to respond.

Annexure-A to Secretarial Standards-1 provides illustrative list of items of business which shall not be passed by circulation and shall be placed before the Board at its Meeting, as under:

General Items

1. Noting Minutes of Meetings of Audit Committee and other Committees.
2. Approving financial statements and the Board's Report.
3. Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company.
4. Specifying list of laws applicable specifically to the company.
5. Appointment of Secretarial Auditors and Internal Auditors.

Specific Items

1. Borrowing money otherwise than by issue of debentures.
2. Investing the funds of the company.
3. Granting loans or giving guarantee or providing security in respect of loans.
4. Making political contributions.
5. Making calls on shareholders in respect of money unpaid on their shares.
6. Approving Remuneration of Managing Director, Whole-time Director and Manager .
7. Appointment or Removal of Key Managerial Personnel.
8. Appointment of a person as a Managing Director / Manager in more than one company.
9. Appointment of Director(s) in casual vacancy subject to the provisions in the Articles of the company. To be subsequently approved in the immediate next general meeting.
10. According sanction for related party transactions which are not in the ordinary course of business or which are not on arm's length basis.
11. Sale of Subsidiaries
12. Purchase and Sale of material tangible/intangible assets which are not in the normal course of business.
13. Approve Payment to Director for loss of office.
14. Items arising out of separate meeting of the Independent Directors if so decided by the Independent Directors.

Corporate Actions

1. Authorize Buy Back of securities
2. Issue of securities, including debentures, whether in or outside India.
3. Approving amalgamation, merger or reconstruction.

4. Diversify the business.
5. Takeover another company or acquiring controlling or substantial stake in another company.

Additional list of items in case of listed companies

1. Approving Annual operating plans and budgets.
2. Capital budgets and any updates.
3. Information on remuneration of KMP.
4. Show cause, demand, prosecution notices and penalty notices which are materially important.
5. Fatal or serious accidents, dangerous occurrences, any material effluent or pollution problems.
6. Any material default in financial obligations to and by the company, or substantial non-payment for goods sold by the company.
7. 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.
8. Details of any joint venture or collaboration agreement.
9. Transactions that involve substantial payment towards goodwill, brand equity, or intellectual property.
10. 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.
11. Quarterly details of foreign exchange exposures and the steps taken by management to limit the risks of adverse exchange rate movement, if material.
12. Non-compliance of any regulatory, statutory or listing requirements and shareholder services such as non-payment of dividend, delay in share transfer etc.

1.6.1.6. Minutes of the Meeting of the General Meeting/Board Meeting [Section 118]

The minute in a literal sense means a note to preserve the memory of anything. The minutes of a meeting are a written record of the business transacted; decisions and resolutions arrived at the meeting.

Section 118 of the Companies Act, 2013 imposes a statutory obligation on every company to cause minutes of all proceedings of general meetings, board meetings and other meeting and resolution passed by postal ballot.

Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every Committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within thirty days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered [Section 118(1)]

The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat [Section 118(2)].

All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting [Section 118(3)]. The names of the dissenting directors should be recorded.

The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes [Section 118(6)]. The minutes are to be signed by the chairman of the meeting or the net meeting.

The minutes kept in accordance with the provisions of this Section shall be evidence of the proceedings recorded therein [Section 118(7)] and all recording shall be considered valid and authentic.

No document purporting to be proceeding of a general meeting shall be circulated at the expense of the company.

As per Section 118(10), every company shall observe Secretarial Standards with respect to general and board meetings specified by the Institute of Company Secretaries of India. Accordingly, two Secretarial Standards viz. SS-1: Meetings of the Board of Directors and SS-2: General Meetings have been notified,

1.6.1.7. Inspection of minute books of general meeting [Section 119]

- (a) The books containing the minutes of the proceedings of any general meeting of a company or of a resolution passed by postal ballot, shall:
 - (1) be kept at the registered office of the company in electronic form, and
 - (2) be open, during business hours, to the inspection by any member without charge, subject to such reasonable restrictions as the company may, by its articles or in general meeting, impose, so, however, that not less than two hours in each business day are allowed for inspection. Any member shall be furnished within 7 days of request, with fees, a copy of the minutes of general meeting.
- (b) The other statutory requirements relating to keeping of the minutes of meeting are:
 - (1) The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.
 - (2) All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.
 - (3) In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain:
 - a) the names of the directors present at the meeting, and
 - b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.
 - (4) There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting:
 - (a) is or could reasonably be regarded as defamatory of any person, or
 - (b) is irrelevant or immaterial to the proceedings; or
 - (c) is detrimental to the interests of the company.
 - (5) Therefore, Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in sub-section (5).
 - (6) 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. The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.
 - (7) The recording of the minutes until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.
 - (8) If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of ₹25,000 and every officer of the company who is in default shall be liable to a penalty of ₹5,000.

1.6.1.8. Registers

Any document, register, minutes may be kept in electronic mode and form as may allowed by the Govt. The company has to maintain if its registered office certain registers and records for statutory, statistical, disclosure, information management and MIS purposes. Further, the company is also required to keep these records with in the vicinity of the place prescribed for it by the laws.

Every company incorporated under the Act is required to keep at its registered office, inter alia, the following statutory books and registers:

- (a) Register of investments in securities not held in company's name in Form MBP-3. [Section 187(3)]
- (b) Register of deposits. [Section 73 and Rule 14 of the Companies (Acceptance of Deposits) Rules, 2014]
- (c) Register of securities bought back in Form SH-10. [Section 68(9)]
- (d) Register of charges in Form CHG-7. [Section 85 (1)]
- (e) Register and index of members in Form MGT-1. [Sections 88(1)(a)]
- (f) Register and index of debenture holders in Form MGT-2. [Section 88(1) (b)]
- (g) Register and index of beneficial owners. [Section 88 (1) (3)]
- (h) Foreign register of members and debenture holders and their duplicates in Form MGT-3. [Section 88 (1) (4)]
- (i) Copies of Annual Return [Section 94(1)]
- (j) Books containing minutes of general meeting and of Board and of committees of Directors. [Section 118]
- (k) Register of Postal Ballot [Section 110]
- (l) Books of accounts. [Section 128]
- (m) Cost account records for Companies engaged in industries so specified by Central Government [Section 128]
- (n) Register of contracts with companies/firms in which directors are interested in Form MBP-4. [Section 189 (1)]
- (o) Register of Directors and Key Managerial Personnel. [Section 170 (1)]
- (p) Register of loans or investments made, guarantees given and security provided to other body corporate in Form MBP-2. [Section 186 (9)]
- (q) Register of Renewed and Duplicate Share Certificates in Form SH-2. [Rule 6 of the Companies (Share Capital and Debentures) Rules, 2014]
- (r) Register of sweat equity shares in Form SH-3 [Section 54]
- (s) Place of keeping and Inspection of Registers, returns etc. [Section 94]

Registers and returns are to be kept at registered office. May also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company and the Registrar has been given a copy of the proposed special resolution in advance. [Every Special Resolution is required to be filed in Form No. MGT-14 as per Section 117(3) (a)].

The registers, except when they are closed under the provisions of this Act, and the copies of all the returns shall be open for inspection by any member, debenture holder, other security holder or beneficial owner, during business hours without payment of any fees and by any other person on payment of such fees as may be prescribed. [Section 94(2)]

Any such member, debenture holder, other security holder or beneficial owner or any person may:

- (a) take extract from any register, or index or return without payment of any fee; or
- (b) require a copy of any such register or entries therein or return on payment of such fees as may be prescribed. [Section 94(3)].

The Institute of Company Secretaries of India (ICSI) has issued Secretarial Standard (SS-4) on register and records, which is recommendatory, in nature. It seeks to prescribe a set of principles in relation to various registers and records including the maintenance and inspection thereof. Adherence by the Company to the Secretarial Standard is recommendatory.

1.6.1.9. Powers of the Board (Section 179)

Since Board of Directors are responsible for management of the company, the Act has given adequate general authority to the Board.

- (a) Board of Directors shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. The Board shall be subject to the provisions of this Act, or the Memorandum or Articles, or any Regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.
- (b) The Board shall not exercise any power or do any act or thing to be exercised or done by the company in general meeting. However, no regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.
- (c) No Regulation made by the company in general meeting shall invalidate any prior Act of the Board which would have been valid if that Regulation had not been made.
- (d) Powers of the Board to be exercised by the Board by means of the resolution passed at a duly convened Board meeting [Sub-Section 3] are furnished below:
 - (1) to make calls on shareholders in respect of money unpaid on their shares;
 - (2) to authorise buy-back of securities under section 68;
 - (3) to issue securities, including debentures, whether in or outside India;
 - (4) to borrow monies;
 - (5) to invest the funds of the company;
 - (6) to grant loans or give guarantee or provide security in respect of loans;
 - (7) to approve financial statement and the Board's report;
 - (8) to diversify the business of the company;
 - (9) to approve amalgamation, merger or reconstruction;
 - (10) to take over a company or acquire a controlling or substantial stake in another company;
 - (11) any other matter which may be prescribed
- (e) Further, Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed certain more powers that shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:
 - (1) to make political contributions

- (2) to appoint or remove KMP; and
- (3) to appoint internal auditors and secretarial auditor.
- (f) The Board may, by a resolution passed at a meeting, delegate the powers specified in points (4) to (6) above, on such conditions as it may specify to:
 - (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 (in the case of a branch office of the company).

Note: Matters referred to in clauses (4), (5) and (6) of sub-section (3) of section 179 may be decided by the board by circulation instead of at a meeting in respect to the companies covered under section 8 of the Companies Act, 2013. Vide Notification No. G.S.R.466(E) dated 5th June, 2015.

- (g) Nothing in this section shall however be deemed to affect the right of the company in the general meeting, to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section above.

1.6.1.10. Restrictions on Powers of Board (Section 180)

Section 180 of the Act provides for restrictions on powers of Board. However, this section shall not apply to private companies vide Notification No. G.S.R. 464(E) dated 05th June, 2015.

- (a) The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:
 - (1) 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. (substantially the whole of the undertaking shall mean twenty per cent or more of the value of the undertaking as per balance sheet of the preceding financial year.

Here the 'Undertaking' means an unit of business in which the investment of the company exceeds twenty per cent. of its net worth 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.

- (2) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;
- (3) To borrow money, where the money to be borrowed, together with the money already borrowed will exceed aggregate of its paid-up share capital and free reserves and security premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business;

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 withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

'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;

Note: For above mater, E-Form MGT - 14 is required to be filed under Section 117(3)(e)

- (4) To remit, or give time for the repayment of, any debt due from a director.

Note: Every Special Resolution is required to be filed in Form No. MGT -14 as per Section 117 (3)(a).

- (b) Every special resolution in relation to borrowing shall specify the total amount up to which monies may be borrowed by the Board of Directors.
- (c) No debt incurred by the company in excess of the limit imposed by above point (3) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded

1.6.2. Corporate Governance and Audit Committee

To promote good corporate governance, few provisions have been inserted in the Companies Act, 2013, most for listed companies but some apply to unlisted companies also. For the listed companies, apart from compliance of the Act, LODR has been introduced by SEBI which contains many provisions for better corporate governance. These compliances can be taken as “regulatory corporate governance” and discussed in this chapter.

1.6.2.1. Composition of the Board

As Per Companies Act, 2013

According to Section 149 of the Companies Act, 2013 the board of directors of each company consists only of natural persons or individuals.

The minimum number of directors in a limited liability company is 2, for a public company it is 3 directors and an OPC must have at least 1 director.

However, the maximum number of directors in the company is 15. The company can increase the number of directors above 15 by special resolution of the general meeting.

In a listed company

As per Regulation 17 of Securities and Exchange of India (Listing and Disclosure Obligations) 2015, the composition of the board of directors in a listed company is as follows:

1. The board has a combination of executive and non-executive directors with at least one female director and at least fifty percent of the members of the board consist of non-executive directors.
2. If the chairman of the board of directors is a non-executive director, at least one-third of the board of directors is made up of independent directors, and if the said entity has an executive chairman, then at least half of the board of directors must consist of independent directors.

1.6.2.2. Committees of The Board

It has been felt that all the members of the Board of directors cannot enter into details of every issue relevant to the company. If committees are made on specific issues, it would be possible to go deeper into the affairs. With this in mind, the concept of committee has been introduced in companies. These provisions are now in the Act itself and in LODR. The committees are as follows.

Obligations	Audit committee	NRC committee	Stakeholders relationship committee	Risk management committee
Composition	Minimum 3 directors Majority independent directors	at least 3 directors All shall be non executive director NED Atleast 50 % shall be independent	Board shall decide	Majority from Board
Chairperson	Independent director	Independent director	Non executive director	Member of the Board

CSR committee

Section 135 of the Act provides for the applicability of the CSR provisions on corporates. Sub-section (1) of section lays down that every company having

- net worth of ₹ 500 crores or more; or
- turnover of ₹ 1,000 crores or more;
- net profit of ₹ 5 crores

during immediately preceding financial year shall be required

- to constitute a CSR Committee of the Board consisting
- formulate CSR policy
- spend at least 2% of the average net profit of last three years, during the financial year.

Constitution of CSR Committee

- There will be at least three directors in the committee with at least one independent director;
- Unlisted public company or a private company, falling under the financial threshold but not required to have IDs, shall not have any ID in the committee.
- Private company having 2 directors only shall have 2 directors in the committee
- In case of Foreign company, person who is authorized to receive notice on behalf of the company and any other person nominated by the company.

Every company which ceases to be a company covered under section 135 as per the limits specified thereunder for three consecutive financial years shall not be required to constitute a CSR Committee and comply with the provision of section 135, till such time that it meets the criteria specified.

Functions of CSR Committee

- To institute a transparent monitoring mechanism for implementation of CSR projects;
- To recommend the CSR Policy and modification thereto, if any;
- To recommend projects for approval of Board.

1.6.2.3. Remuneration of Directors

The following disclosures on the remuneration of directors shall be made under section corporate governance in the Annual Report:

- (1) All elements of remuneration package of all the directors i.e. salary, benefits, bonus, stock options, pension etc.
- (2) Details of fixed component and performance linked incentives, along with performance criteria.

1.6.2.4. Board Procedure

- (1) Board meetings shall be held at least, four times a year, with a maximum gap of 120 days between any two meetings.
- (2) A director shall not be a member of more than 10 committees or act as chairman of more than five committees, across all companies, in which he holds directorship.

1.6.2.5. Management

A Management Discussion and Analysis Report should form part of the annual report to the shareholders; containing discussion on the following matters.

- (1) Opportunities and threats.
- (2) Segment-wise or product-wise performance.
- (3) Risks and concerns.
- (4) Discussion on financial performance with respect to operational performance.
- (5) Material development in human resource/industrial relations front.

1.6.2.6. Report on Corporate Governance

There shall be a separate section on corporate governance in the Annual Report of the company, with a detailed report on corporate governance.

1.6.2.7. Compliance

The company shall obtain a certificate from the auditors of the company regarding the compliance of conditions of corporate governance. This certificate shall be annexed with the Directors' Report sent to shareholders and also sent to the stock exchange.

1.6.2.8. Audit Committee (Section 177)

Section 177 of the Act provides for Audit committee. According to this section:

- (a) An audit committee shall be constituted by the Board of directors of:
 - (1) Every listed company, and
 - (2) Such other class or classes of companies as may be prescribed.
- (b) Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014 read along with rule 4 of Companies have prescribed the following classes of companies that shall constitute Audit Committee:
 - (1) all public companies with a paid up capital of ₹10 crores or more.
 - (2) all public companies having turnover of ₹100 crores or more.
 - (3) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding ₹50 crores or more.

Explanation. - The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

- (c) According to sub section 2 of section 177, the Audit Committee shall consist of a minimum of 3 directors with independent directors forming a majority. “With Independent Directors forming a majority” is not required in case of Section 8 Companies. Majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand the financial statement. The composition of the Audit Committee shall be disclosed in the Board’s report.
- (d) Responsibility of Audit Committee: like any other committee, shall be recommendary in nature, but if the Board had not accepted any recommendation, the same shall be disclosed in such report along with reasons thereof. Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, inter alia, include:
- (1) the recommendation for appointment, remuneration and terms of appointment of auditors of the company.
Note: In case of Government companies, in this clause, for the word ‘recommendation for appointment, remuneration and of appointment’ the words ‘recommendation for remuneration’ shall be substituted as in case of Govt. company, appointment is made by CAG.
 - (2) review and monitor the auditor’s independence and performance, and effectiveness of audit process.
 - (3) examination of the financial statement and the auditors’ report thereon.
 - (4) approval or any subsequent modification of transactions of the company with related parties.
The Audit Committee may make omnibus approval for related party transactions proposed to be entered by the company subject to such conditions as may be prescribed.
 - (5) scrutiny of inter-corporate loans and investments.
 - (6) valuation of undertakings or assets of the company, wherever it is necessary.
 - (7) evaluation of internal financial controls and risk management systems.
 - (8) monitoring the end use of funds raised through public offers and related matters.
- (e) The Audit Committee shall have authority to investigate into any matter in relation to the items specified above for this purpose may obtain professional advice from external sources and have full access to information contained in the records of the company.
- (f) Role of auditor in Audit Committee:
According to section 177 (5), the Audit Committee is empowered to:
- a) call for the comments of the auditors about:
 - 1) internal control systems,
 - 2) the scope of audit, including the observations of the auditors,
 - 3) review of financial statement before their submission to the Board,
 - b) discuss any related issues with the internal and statutory auditors and the management of the company.
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.
- (g) Board Report shall disclose the constitution of Audit Committee and where Board has not accepted any recommendation of the Audit Committee, the same shall be disclosed.
- (h) Vigil mechanism: According to section 177 (9), a Vigil mechanism shall be formed in:

- 1) Every listed company, and
 - 2) Such other prescribed classed of companies.
- (a) Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following classes of companies that shall constitute Vigil mechanism:
- 1) the Companies which accept deposits from the public;
 - 2) the Companies which have borrowed money from banks and public financial institutions in excess of 50 crore rupees.
- (b) Objective of formation of vigil mechanism:
- 1) A vigil mechanism shall be formed for directors and employees to report genuine concerns in such manner as may be prescribed.
 - 2) The vigil mechanism shall provide for adequate safeguards against victimization of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. It is imperative for the company to disclose the details of the establishment of vigil mechanism on the website of the company and in Board 's report.
 - 3) According to the Companies (Meetings of Board and its Powers) Rules, 2014:
 - i. Persons who use such mechanism means employees and directors who avail the vigil mechanism.
 - ii. The audit committee shall oversee the vigil mechanism 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.
 - iii. In case of other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.
 - iv. The employees and directors who avail of vigil mechanism may have direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee, as the case may be, in exceptional cases.
 - v. 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.

1.6.3. Duties and Liabilities of Directors

Board of Directors, collectively, are authorized to do what the company is authorized to do unless barred by restrictions on their powers by the provisions of the Companies Act, 2013, the Memorandum or Articles of the company. Therefore, there are various kinds of functions to be exercised by the Board.

The Act specifies certain powers to be exercised only at Board Meeting (Section 179) and, certain powers only with the consent of shareholders in general meeting (Section 180). The Act also casts certain duties upon the directors such as duty to disclose the interest in contracts, duty to attend Board meetings etc.

They are authorized to do what the company is authorized to do, unless barred by restrictions on their powers by the provisions of the Companies Act, 2013, the memorandum or articles of the company (Section 179).

The directors shall exercise their powers bonafide and in interest of the company. The directors while exercising their powers do not act as agents of the shareholders. He serves an individual manager to use his knowledge,

skills, attributes. Even the shareholders group which has nominated the director cannot instruct him how he shall exercise their powers.

In [Milan Sen v. Guardian Plastic Ltd. (1998) 2 Comp L J 320], the directors passed a resolution for rights issue which was questioned by certain shareholders. The Calcutta High Court held that the question whether the company needed additional capital was a question which should primarily be decided by the directors of the company and if they were of the view that further capital in the form of rights issue was required, the Court would not be allowed to disturb the same unless there were extreme circumstances of malafides or breach of trust.

The powers of directors are co-extensive with those of the company itself. The relationship of the Board of directors with the shareholders is more of federation than one of subordinates and superior. Some powers are specially reserved for the Board. On the other hand, some powers are exclusively reserved for the members in general meeting. However, since directors are appointed by shareholders, who are the owners of the trust/company; supremacy of the shareholders shall prevail.

1.6.3.1. Duties of Directors

Duties of directors has been defined in the company Law for the first time under section 166 of the Companies Act, 2013. The following duties have been prescribed for a director under the said section:

- (a) He shall act in accordance with the articles of the company, subject to the provisions of this Act.
- (b) He shall act in good faith in order to promote the objects of the company and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- (c) He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- (d) He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or, with the interest of the company.
- (e) He shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates.
- (f) He shall not assign his office.

The duties of directors are also mentioned in other provisions of the Act rules. The code of conduct which is now introduced also specifies few duties.

1.6.3.2. Liabilities of Directors

The liabilities of the directors may be grouped under certain heads for convenience of consideration and discussion. They are:

1.6.3.2.1. Liability to outsiders

Directors of a company may personally become liable to outside parties in the following cases:

- (a) When they enter into contracts on behalf of the company:
 - (1) if the contracts are ultra vires the company;
 - (2) if they act outside the scope of their own authority;
 - (3) if they act in their own name and not for and on behalf of the company;
- (b) When they issue a prospectus; in violation of the provisions of the Companies Act, 2013 and the SEBI (ICDR) Regulations which contains mis-statements(s).

- (c) When they are found guilty of fraud.
- (d) When they allot shares in an irregular manner.
- (e) When the Court orders that the directors are personally liable for all or any of the debts or liabilities of the company for fraudulent trading on the part of the company.

1.6.3.2.2. Liability to the Company

The directors are liable to the company in the following cases:

- (a) When they are negligent in the performance of their duty as directors and the company suffers loss, etc.
- (b) When they commit an act which is ultra vires their powers or ultra vires the company.
- (c) When any illegal act or breach of trust is committed by them.

1.6.3.2.3. Liability to the shareholders

The position of the directors in respect of the company's properties and the rights conferred upon them to be exercised as directors is that of a trustee. If they commit any breach of trust or indulge in wrongful uses of their rights and the company suffers loss, they have to make good the loss. Similarly, if shareholders suffer loss due to the negligence of the directors they are personally liable for the loss.

1.6.3.2.4. Liability for statutory defaults and violations.

Under the Companies Act, 2013 the directors are required to ensure compliance with the several provisions of the Act and penalties have been prescribed for defaults and/or non-compliance. The directors are liable for consequences.

1.6.4. Powers Related to Political Contributions

Section 182 of the Act provides for prohibitions and restrictions regarding political contributions. According to this section:

- (a) A company may contribute any amount directly or indirectly to any political party. Here, political party means a political party registered under section 29A of the Representation of the People Act, 1951.
- (b) The following companies are not allowed to contribute to any political party:
 - (1) a Government company; and
 - (2) a company which has been in existence for less than three financial years.
- (c) There is no limit on the amount of contribution.
- (d) such contribution shall be made through a resolution passed at a meeting of the Board of Directors.

Political contribution would amount to:

- (a) such donation or subscription or payment was given or made which can reasonably be regarded as likely to affect public support for a political party.
- (b) the amount of expenditure incurred, directly or indirectly, for publication in politically connected publication for political benefit.
- (c) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year to which that account relates.

Inspection, Inquiry and Investigation

1.7

Before going into the topic, let us understand the meaning of the terms ‘Inspection’, ‘Inquiry’ and ‘Investigation’. According to Cambridge English Dictionary:

(a) Inspection

‘Inspection’ means the act of looking at something carefully, or an official visit to a building or organization to check that everything is correct and legal. Inspection, by itself, is routine and is not negative unless there is such report on inspection.

Purpose

The purpose of an inspection is to confirm that the company, organization or individual is obeying the law, regulations and guidelines.

(b) Inquiry

‘Inquiry’ is an official process or a judicial inquiry to discover the facts about something bad that has happened:

Purpose

An inquiry is any process that has the aim of augmenting knowledge, resolving doubt, or solving a problem. Inquiry denotes a negative action unless clean report is made.

(c) Investigation

‘Investigation’ means the act or process of examining a crime, problem, statement, etc. carefully, especially to discover the truth.

Purpose

The purpose of an investigation is to gather information and evidence to support the prosecution of a suspected violation. If the enforcement officer reasonably believes that there has been a violation of the law, then they have the authority to conduct an investigation. Inspection is not negative and a routine procedure but inquiry and investigation is always negative. Sometimes, inspection leads to investigation. For inquiry and investigation, there has to be some reason, like information, complaint etc.

Chapter XIV of the Companies Act, 2013 provides for Inspection, Inquiry and Investigation.

1.7.1. Power to call for information, Inspect Books and Conduct Inquiries [Section 206(1) & (2)]

- 1) According to section 206(1) of the Companies Act, 2013, where on a 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.
- (2) On the receipt of a notice under sub-section (1), it shall be the duty of the company and of 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.

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.

1.7.2. 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:

- (1) If no information or explanation is furnished to the Registrar within the time specified under Section 206 (1), or
- (2) If the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate, or
- (3) 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, the Registrar shall record his reasons in writing for issuing such notice.

1.7.3. Inquiry by the Registrar [Section 206 (4)]

- (1) The Registrar may call on the company to furnish in writing any information or explanation on matters specified in the order and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard, if the Registrar is satisfied, on the basis of information available with or furnished to him, or on a representation made to him by any person that
 - (a) 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
 - (b) the grievances of investors are not being addressed.
- (2) Before calling the company to furnish in writing any information or explanations and carrying out inquiry, the Registrar has to inform the company of the allegations made against it by a written order.
- (3) 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.
- (4) It is further provided that where 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.

1.7.4. Inspection by Central Government [Section 206 (5)]

The Central Government also, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an Inspector or by any statutory authority. Failure to furnish information would make the officers of the company liable for penalty.

1.7.5. Conducting Inspection and Inquiry

- (a) Duty of director, officer or employee [Section 207 (1)]

It shall be the duty of every director, officer or other employee of the company:

- (1) to produce all such documents to the Registrar or Inspector, and
- (2) to furnish him with such statements, information or explanations in such form as the Registrar or Inspector may require, and
- (3) to render all assistance to the Registrar or Inspector in connection with such inspection.

1.7.5.1. Powers of the Registrar or Inspector [Section 207 (2) & (3)]

- (1) 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:
 - a) make or cause to be made copies of books of account and other books and papers, or
 - b) place or cause to be placed any marks of identification in such books in token of the inspection having been made.
- (2) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, 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:—
 - (a) 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;
 - (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.

1.7.5.2. Penalty for Contravention [Section 207 (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 one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one 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.

1.7.6. Search and Seizure

Search means, an examination of public records to determine and confirm a property's legal ownership, and find out what claims are on the property.

Seizure is the forcible taking of property by a government law enforcement official from a person who is suspected of violating, or is known to have violated, the law.

Search and seizure is a procedure used in many civil law and common law legal systems by which police or other authorities and their agents, who suspect that a crime has been committed, do a search of a person's property and confiscate any relevant evidence to the crime.

Section 209 of the Act provides for Search and seizure. According to this section:

1.7.6.1. Circumstances or Seizure [Section 209 (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 company, or relating to:

- (1) The key managerial personnel or any director or auditor or company secretary in practice or company secretary of the company, 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:
 - a) enter, and Search ; and
 - b) seize such books and papers as he considers necessary.
- (2) The Registrar or inspector shall return the books and papers seized under subsection (1), as soon as may be, and in any case not later than one hundred and eightieth day after such seizure, to the company from whose custody or power such books or papers were seized:
 Provided that the books and papers may be called for by the Registrar or inspector for a further period of one hundred and eighty days by an order in writing if they are needed again:
- (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.

1.7.7. Report on Inspection

Section 208 of the Act provides that person making the inspection shall submit a report to the Central Government along with such documents, if any and such report may, if necessary, include a recommendation for further investigation.

1.7.8. Investigation into affairs of the company

Sections 210 to 229 of the Companies Act, 2013 contain provisions relating to investigation of the affairs of company. Investigation within the meaning of the relevant provisions of the Act is a form of a deeper probe; into the affairs of a company. It is a fact finding exercise. The main object of investigation is to collect evidence and to see if any illegal acts or offences are disclosed and then decide the action to be taken. Section 210 of the Act provides:

Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company:

- (1) on the receipt of a report of the Registrar or Inspector under section 208.
- (2) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated, or
- (3) in public interest, it may order an investigation into the affairs of the company.

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.

1.7.9. Investigation by Serious Fraud Investigation Office

The Central Government have established an office called the Serious Fraud Investigation Office (SFIO) to investigate frauds relating to a company.

Section 212 of the Act provides for Investigation into affairs of Company by the Serious Fraud Investigation Office (SFIO). According to this section:

- (a) where the Central Government :
 - (1) on receipt of a report of the Registrar or Inspector under section 208;
 - (2) on intimation of a special resolution passed by a company that its affairs are required to be investigated.
 - (3) in the public interest, or
 - (4) 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 Serious Fraud Investigation Office (SFIO),

the Central Government may, by order, assign the investigation into the affairs of the said company to the SFIO.

- (b) 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, the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to facilitate SFIO to investigate.
- (c) The Director, Serious Fraud Investigation Office 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.
- (d) 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)]
- (e) The SFIO shall submit an interim report and on completion , final report to the Central Government, if the Central Government.
- (f) Any person concerned by making an application in this regard to the court may get a copy of the report.
- (g) The Central Government may, after examination of the report, 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)].

1.7.10. Investigation into company's affairs in other cases. . (Section 213)

The National Company Law Tribunal may register applications under following situations:

- (a) on an application made by:
 - (1) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital, or
 - (2) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence
- (b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that:
 - (1) 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.
 - (2) 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
 - (3) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, the Tribunal may order, that the affairs of the company ought to be investigated by the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company provided that if after investigation the allegations are proved, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447, which deals with punishment for fraud.

1.7.11. Investigation of ownership of Company

- (1) As per Section 216 (1), 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 have been significant beneficial owner of the company.

Section 217 of the Act provides for procedure, powers, etc., of Inspectors as under:

- (a) 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 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:
 - (1) 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
 - (2) to give to the Inspector all assistance in connection with the investigation.
- (b) The Inspector shall not keep in his custody, any books and papers produced 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.

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.

- (c) The Inspector, being an officer of the Central Government making an investigation, shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908, namely:
 - (1) the discovery and production of books of account and other documents, at such place and time as may be specified by such person.
 - (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.
- (d) 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.
- (e) 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.

1.7.12. Protection of Employees During Investigation (Section 218)

- (a) Notwithstanding anything contained in any other law for the time being in force, if:
 - (1) during the course of any investigation of the affairs 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 and
 - (2) during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of such company, other body corporate or person proposes:
 - a) to discharge or suspend any employee; or
 - b) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or
 - c) 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 and

- (b) If the company does not receive permission within thirty days of making of application the company, other body corporate or person concerned may proceed to take against the employee, the action proposed. The decision of the Tribunal is appealable.

1.7.13. Powers of the Inspector

If the company does not receive permission within thirty days of making of application the company, other body corporate or person concerned may proceed to take against the employee, the action proposed. 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.

Power of the Inspector

Section 219 of the Act provides for power of Inspector to conduct investigation into affairs of related companies, etc. as under:

- (a) 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:
 - (1) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company.
 - (2) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company.
 - (3) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors, or
 - (4) any person who is or has at any relevant time been the company's managing director or manager or employee.
- (b) 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.

1.7.14. Seizure of documents by Inspector

Section 220 of the Act provides for seizure of documents by Inspector as under:

- (a) Where in the course of an investigation 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:
- (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.
- (c) 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

1.7.15. Imposition of 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 3 years as may be specified in the order. The Tribunal may freeze assets of the company and impose restriction upon securities during the pander of the investigation; Non-compliance shall attract major penalty.

1.7.16. Actions to be Taken in Pursuance of Inspector's Report.

Section 224 of the Act provides the following provisions in respect of the actions to be taken in pursuance of Inspector's report:

- (a) 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.
- (b) 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 anybody corporate whose affairs have been investigated under this Chapter:
 - (1) 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
 - (2) 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.
- (c) 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)].

1.7.17. Expenses of Investigation.

Section 225 of the Act lays down the following provisions in respect of expenses of investigation:

- (a) the 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:
 - (1) any person who is convicted on a prosecution instituted, or who is ordered to pay damages or restore any property in proceedings brought, under section 224, 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.
 - (2) any company or body corporate in whose name proceedings are brought as aforesaid, to the extent of the amount or value of any sums or property recovered by it as a result of such proceedings.
 - (3) unless, as a result of the investigation, a prosecution is instituted under section 224:
 - a) any company, body corporate, managing director or manager dealt with by the report of the Inspector, and
 - b) the applicants for the investigation, where the Inspector was appointed under section 213, to such extent as the Central Government may direct.
- (b) As per sub-section (2), any amount for which a company or body corporate is liable under clause (2) above shall be a first charge on the sums or property mentioned in that clause.

Compromises, Arrangements and Amalgamations

1.8

Chapter XV of the Companies Act, 2013 (Section 230 to Section 240) provides for Compromises, Arrangements and Amalgamations. Rule referred in this chapter denotes Companies (Compromise, Arrangement and Amalgamation) Rules, 2014 and amendments thereto.

1.8.1. Introduction

We are in the era of business alliances and joint ventures, companies are finding ways to regroup business verticals by separating companies, merging companies and selling and purchasing controlling stake in companies. Though there are basic business strategic issues, they have to be done within boundary of law.

Compromise

‘Compromise’ is a term which implies the existence of a dispute such as relating to rights. It means settlement or adjustment of claims in dispute by mutual concessions. If the members have to give up their rights entirely, it will not be compromise. There can be no ‘compromise’ unless there is a dispute. Compromise is a logical sequence to settle dispute without any third party intervention.

Arrangement

The term ‘arrangement’ is of very wide import. It includes a reorganization of the share capital of a company by the consolidation of shares of different classes, or by the division of share into shares of different classes or by both these methods. All modes of reorganising the share capital, including interference with preferential and other special rights attached to shares, can properly form part of an arrangement with members [Investment Corp. of India Ltd., Re (1987) 61 Comp. Cas.92 (Bom)]. Arrangement can be between various class of shareholders or between creditors and shareholders.

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 and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company. The shareholders of each amalgamating company become the shareholders in the amalgamated company.

Note: The word Amalgamation is not defined anywhere in Companies Act 2013.

1.8.2. Compromise or arrangement under Companies Act, 2013,

Compromise or arrangement under Companies Act, 2013, is possible:

- (1) between a company and its creditors or any class of them, or
- (2) between a company and its members or any class of them. The following entities may apply to NCLT.
 - a) company or

- b) of any creditor or
 - c) member of the company, or
 - d) the liquidator,
- (b) NCLT may 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. The application to the Tribunal can be made jointly also.
- (1) Application shall have 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.
 - (2) reduction of share capital of the company, if any, included in the compromise or arrangement.
 - (3) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including:
 - a) a creditor's responsibility statement in the prescribed form;
 - b) safeguards for the protection of other secured and unsecured creditors;
 - c) 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;
 - d) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
 - e) 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.
- (c) Notice of the meeting called in pursuant to the order of the Tribunal 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, which shall be accompanied by:
- (1) a statement disclosing the details of the compromise or arrangement,
 - (2) a copy of the valuation report, if any, and
 - (3) explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture holders, and
 - (4) the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
 - (5) such other matters as may be prescribed:

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 .

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.

1.8.3. Procedural aspects relating to notice

Notice of the meeting pursuant to the order of the Tribunal to be given in Form No. 15.3, and shall be sent individually specifying therein,

- (1) disclosure of nature and extent of interest and effect of compromise or arrangement on such interest of key managerial personnel, directors, promoters, non-promoter members, depositors, creditors, debenture holders, deposit and debenture trustee, and key managerial personnel of holding company, subsidiary and associate companies, employees of the company.
- (2) where there is no interest or there is no effect on such interest of any promoter, director or key managerial personnel, a statement to the effect that there is no interest or there is no effect of the scheme of compromise or arrangement on such interests of such persons.
- (3) investigation proceedings, if any, pending against the company or against any promoter, director or key managerial personnel of such company.
- (4) details of shareholding of directors, key managerial personnel and promoters of the company as on the date of making this statement and change in their shareholding in the last six months.
- (5) details of any No-objection(s), approvals or sanctions, if already received from the concerned authorities for the compromise or arrangement.
- (6) details of the availability of the following documents for obtaining extract from or for making copies of or for inspection by the members and creditors, namely:
 - a) latest audited financial statements of the company including consolidated financial statements.
 - b) copy of the order of Tribunal in pursuance of which the meeting is to be convened.
 - c) copy of scheme of compromise or arrangement.
 - d) contracts or agreements material to the compromise or arrangement, and
 - e) such other information/documents as the Board/ Management believes necessary and relevant for making decision for / against the scheme.
- (7) declaration to the effect that the scheme is in the best interests of the employees, creditors, debenture holders, members particularly non-promoter members and minority shareholders of the company, as detailed in the scheme.
- (8) Status of approval(s) of regulatory or any other authority(ies), required, if any in connection with compromise or arrangement.
- (9) Any objection to the compromise or arrangement can 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.
- (10) Notice to be sent to the regulators seeking their representations under section 230(5). It states that a notice under Sub-Section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement who represent by them shall be made within a period of 30 days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.
- (11) Approval and sanction of the scheme

At a meeting if, 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 and the contributories of the company.

(12) Order of the Tribunal sanctioning the scheme to provide for the Certain matters

An order made by the Tribunal shall provide for all or any of the following matters, namely:

- (i) In case of convertible preference 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.
- (ii) the protection of any class of creditors.
- (iii) 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.
- (iv) 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:

(13) Compromise or arrangement is to be in conformity with the accounting standards to be confirmed by company's auditor.

(14) Order of Tribunal to be filed with the Registrar under section 230 (8)

within a period of thirty days of the receipt of the order. Further, a statement of compliance needs to be filed with ROC within 210 days.

(15) The Tribunal may dispense with calling of a meeting of creditor 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.

(16) Compromise includes takeover

Section 230 (11) states that any compromise or arrangement may include takeover offer made in such manner as may be prescribed. A member of a company along with other member holding not less than 3/4th shares of the company and such application is filed to acquire remaining share (Notification dated 2/2/20). In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

1.8.4. Power of Tribunal to Enforce Compromise or Arrangement. [Section 231]

As per Section 231(1) when the Tribunal makes an order under Section 230 sanctioning a compromise or an arrangement, it:

- (a) shall have power to supervise the implementation of the compromise or arrangement; and
- (b) may, give such directions in regard to any matter or make such modifications in the scheme of compromise or arrangement as it may consider necessary for the proper implementation.

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.

- (c) Tribunal may require the liquidator or the company to report on the working of the scheme.

1.8.5. Merger and Amalgamation of Companies [Section 232]

- (a) U/s 232(1), 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:
- (1) 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
 - (2) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company is required to be transferred to another 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 Section 230 shall apply mutatis mutandis.
- (b) Such order shall also require to circulate the following for the meeting so ordered by the Tribunal, namely:
- (1) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company.
 - (2) confirmation that a copy of the draft scheme has been filed with the Registrar;
 - (3) 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 specifying out in particular the share exchange ratio, specifying any special valuation difficulties.
 - (4) the report of the expert with regard to valuation, if any.
 - (5) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than 6 months before the first meeting of the company summoned for the purposes of approving the scheme.

The Tribunal, after satisfying itself that the procedure of holding meeting has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:

- (1) 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.
- (2) 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:
- (3) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer.
- (4) dissolution, without winding-up, of any transferor company.
- (5) 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.
- (6) 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;

- (7) the transfer of the employees of the transferor company to the transferee company.
- (8) when the transferor company is a listed company and the transferee company is an unlisted company:
 - a) the transferee company shall remain an unlisted company until it becomes a listed company.
 - b) 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:
- (9) 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
- (10) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:
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.
- (11) Any property or liabilities, 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.
- (12) Certified copy of the order to be filed with the registrar Section 232(5) within thirty days of the receipt of certified copy of the order.
- (13) 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.
- (14) Annual statement certified by CA/CS/CMA to be filed with Registrar every year until the completion of the scheme.

Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

1.8.6. Merger and Amalgamation of certain Companies [Section 233]

It prescribes simplified procedure for Merger or amalgamation of

- (a) two or more small companies or
- (b) between a holding company and its wholly-owned subsidiary company or
- (c) such other class or classes of companies as may be prescribed. On 1/2/21, Central Govt. has prescribed holding company, two or more start-up companies, one or more start-up company with one or more small company.

As per Section 2 (46) 'holding company', in relation to one or more other companies, means a company of which such companies are subsidiary companies. Small company –defined :As per Section 2 (85) "small company" means a company, other than a public company:

- (a) paid-up share capital of which does not exceed ₹ 4 crores or such higher amount as may be prescribed which shall not be more than ₹ 10 crores, or
- (b) turnover of which as per its last profit and loss account does not exceed ₹ 40 crores or such higher amount as may be prescribed which shall not be more than ₹ 100 crores.

Start-up company defined-amendment in Rule-start-up company means a private company, recognised under notification of Department of Promotion of Industry and International Trade.

Provided that nothing in this clause shall apply to: (1) a holding company or a subsidiary company. (2) a company registered under Section 8. or (3) a company or body corporate governed by any special Act.

1.8.7. Merger of small Companies/holding and subsidiary Companies

Accordingly, Sub-Section (1) of Section 233 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;
- (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, with the Registrar of the place where the registered office of the company is situated; and
- (d) the scheme is approved by majority representing 9/10th 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 21 days along with the scheme to its creditors for the purpose or otherwise approved in writing.
- (e) the notice of the meeting to the members and creditors shall be accompanied by:
 - (1) a statement, as far as applicable, referred to in Sub-Section (3) of Section 230.
 - (2) the declaration of solvency made in pursuance of clause (c) of Sub-Section (1) of Section 233.
 - (3) a copy of the scheme.

1.8.8. 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.

1.8.9. Miscellaneous provisions

- (i) Central Government to issue confirmation order, where there are no objections or suggestions from Registrar or official liquidator

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. If there are any objections or suggestions, he may communicate the same in writing to the Central Government within a period of 30 days, failing which, it shall be presumed that he has no objection to the scheme.

(ii) Application by Central Government to the Tribunal

If the Central Government forms 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 stating its objections and requesting that the Tribunal may consider the scheme under Section 232.

(iii) Tribunal's Action to Central Government's application

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.

(iv) Registrar having jurisdiction over transferee company has to be communicated

A copy of the order confirming the scheme shall be communicated to the Registrar 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.

1.8.10. Effect of Registration of the Scheme

the registration of the scheme as above shall be deemed to have the effect of dissolution of the transferor company without process of winding up.

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.
- (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.
- (e) The 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.

1.8.11. Merger or Amalgamation of the Company with Foreign Company

Section 234 (2) Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the 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, 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. A foreign company may merge with an Indian company and vice versa after obtaining permission from RBI (Rule 25A).

Section 235 of the Companies Act 2013 prescribes the manner of acquisition of shares of shareholders dissenting from the scheme or contract approved by the majority shareholders holding not less than nine tenth in value of the shares, whose transfer is involved. It includes notice to dissenting shareholders, application to dissenting shareholders to tribunal, deposit of consideration received by the transferor company in a separate bank account etc.,

1.8.12. purchase of minority shareholding

Section 230 (7) (e) provides that the order made by the National Company Law Tribunal may provide for 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 27 of the relevant Rules provides for methodology of valuation by registered valuer for fixation of price of the shares of minority. Company shall within two weeks from the receipt of the amount of the share consideration, verify the details of minority shareholders. Cut-off date for, any corporate action (benefits to transferee) to be announced in advance.

1.8.13. Amalgamation by Central Govt. on public interest

Section 237 (1) states that when 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.

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.

As per Section 237 (4) 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.

1.8.14. Registration of offers and scheme

Section 238 (1) states that 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 such manner as may be prescribed.
- (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 only be circulated after registration.

Registrar may refuse registration which may be appealed to the NCCT.

Prevention of Oppression and Mismanagement

1.9

1.9.1. Majority Rule but Minority Protection

The concept of shareholders' democracy in the present day corporate world denotes the shareholders' supremacy in the governance of the business and affairs of corporate sector either directly or through their elected representatives. Democracy means the rule of people, by people and for people. In that context the shareholders democracy means the rule of shareholders, by the shareholders, and for the shareholders in the corporate enterprise, to which the shareholders belong. Precisely it is a right to speak with co-shareholders and to learn about what is going on in the company.

Under the Companies Act, the powers have been divided between two segments: one is the Board of Directors and the other is of shareholders. The directors exercise their powers through meetings of Board of directors and shareholders exercise their powers through General Meetings. Although constitutionally all the acts relating to the company can be performed in General Meetings but most of the powers in regard thereto are delegated to the Board of directors by virtue of the constitutional documents of the company viz. the Memorandum of Association and Articles of Association. Companies Act also recognizes the power of the Board in decision making.

The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. However, in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting. Further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

It is quite obvious that the group of shareholders having majority shall control the management and decision making process. This process is universal in any body Corporate, association or company.

Certain decisions need to be taken regarding the management of the company and these decisions are generally taken by the majority members. There may arise certain occasions wherein the interests of the majority shareholders may come in conflict with that of the minority shareholders. In such a case, if the decisions taken, are not in the larger interest of the company as a whole, but only caters to the interest of one particular group, the minority group whose interest may have been violated, can raise its voice against such an action.

The protection of minority shareholders within the domain of corporate activity constitutes one of the most difficult problems facing modern company law. The aim must be to strike a balance between the effective control of the company and the interest of the small individual shareholders.

It is only right to expect that in matters of a company, any decisions that are taken are done so in keeping with principles of natural justice and fair play. In case of failure to do so, it is important that the interest of minority shareholders be protected.

1.9.1.1. Power of Majority

Member's right to vote is recognised as right of property and the shareholder may exercise it as he thinks fit according to his choice and interest. However, this rule is modified by the Act in certain cases. A special resolution, for instance, requires a majority of 3/4th of those voting at the meeting and therefore, where the Act or the Articles require a special resolution for any purpose, a three fourth majority is necessary and a simple majority is not enough [Edwards v. Halliwell, (1950) 2 All. E.R.1064]. The resolution of a majority of shareholders, passed at a duly convened and held general meeting, upon any question with which the company is legally competent to deal, is binding upon the minority and consequently upon the company [North-West Transportation Co. v. Beatty (1887) L.R. 12 A.C. 589].

Thus, the majority of the members enjoy the supreme authority to exercise the powers of the company and generally to control its affairs. subject to the provisions of the Company's memorandum and articles of association and the provisions of the Act or any other statute, or constitute a fraud on minority depriving it of its legitimate rights.

The Principle of Non-interference

The general principle of company law is that every member holds equal rights with other members of the company in the same class. In case of difference(s) amongst the members the issue is decided by a vote of the majority. 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.

The justification for the rule laid down in Foss v. Harbottle is that the will of the majority prevails. 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 and 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].

Exceptions to the Rule in Foss v. Harbottle - Protection of Minority Rights and shareholders remedies

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.
- (b) the provisions of the Companies Act, 2013.

1.9.1.2. Action may be taken by Shareholders in Common Law

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 majority rule will not apply in the following cases.

(a) Ultra Vires Acts

Where the directors representing the majority of shareholders perform an illegal or ultra vires act for the company,

an individual shareholder has right to bring an action. In such case a shareholder has the right to restrain the company by an order or injunction of the court from carrying out an ultra vires act.

(b) Fraud on Minority

Where an act done by the majority amounts to a fraud on the minority, an action can be brought by an individual shareholder.

(c) Wrongdoers in management control

If the wrongdoers are in control of the company, the minority shareholders' representative action for fraud on the minority will be entertained by the court [Cf. *Birch v. Sullivan*, (1957) 1 W.L.R. 1274]. The reason for it is that if the minority shareholders are denied the right of action, their grievances in such case would never reach the court, for the wrongdoers themselves, being in control, will never allow the company to sue [Par *Jenkins L.J.* in *Edwards v. Halliwell*, (1950) 2 All E.R. 1064, 1067].

(d) Resolution requiring Special Majority but is passed by a simple majority

A shareholder can sue if an act requires a special majority but is passed by a simple majority..An individual shareholder has the right of action to restrain the company from acting on a special resolution to which the insufficient notice is served [*Baillie v. Oriental Telephone and Electric Co. Ltd.*, (1915) 1 Ch. 503 (C.A.) and *Nagappa Chettiar v. Madras Race Club*, 1 M.L.J. 662].

(e) Personal actions by shareholders

Individual member is entitled to all the rights and privileges according to his status as a member. He can insist on the strict compliance with the legal rules, statutory provisions. Provisions in the memorandum and the articles are mandatory in nature and cannot be waived by a bare majority of shareholders [*Salmon v. Quin and Axtens*, (1909) A.C. 442]. In *Nagappa Chettiar v. Madras Race Club*, (1949) 1 M.L.J. 662 at 667, it was observed by the Court that 'An individual shareholder is entitled to enforce his individual rights against the company, such as, his right to vote, the right to have his vote recorded, or his right to stand as a director of a company at an election'.

(f) Breach of Duty

The minority shareholder may bring an action against the company, where although there is no fraud, there is a breach of duty by directors and majority shareholders to the detriment of the company.

In *Daniels v. Daniels*, (1978) 2 W.L.R. 73, the plaintiff, who were minority shareholders of a company, brought an action against the two directors of the company and the company itself. In their statement of the claim they alleged that the company, on the instruction of the two directors who were majority shareholders, sold the company's land to one of the directors (who was the wife of the other) for £4,250 and the directors knew or ought to have known that the sale was at an under value. Four years after the sale, she sold the same land for £1,20,000. The directors applied for the statement of claim to be disclosed on reasonable cause of action or otherwise as an abuse of the process of the Court.

1.9.2. Prevention of Oppression and Mismanagement

1.9.2.1. Meaning of oppression

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. Law provides for the grounds on which case of oppression can be made.

The meaning of the term 'oppression' as explained by Lord Cooper in the Scottish case of *Elder v. Elder & Watson Ltd.* [(1952) Scottish Cases 49], which has been cited with approval by Wanchoo. J (afterwards C.J.) of the Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.* [(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 shareholders who entrusts his money to the company is entitled to rely.’

The complaining shareholder must be under a burden which is unjust or harsh or tyrannical. [Lord Simonds in *Scottish Co-operative Wholesale Society v. Meyer* (1959) AC 324 at p. 342]

1.9.2.2. Right to apply to Tribunal (Section 244)

- a) The following members of a company shall have the right to apply under Section 241, namely:
- (1) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or 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;
 - (2) in the case of a company not having a share capital, not less than one-fifth of the total number of its members: (Tribunal may, waive all or any of the requirements)
- Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.
- (b) 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.

1.9.2.3. Application by CG to Tribunal for relief in cases of oppression, etc. (Section 241).

The Central Government may also file application to the Tribunal, if it is satisfied that the affairs of the company are being conducted in a manner prejudicial to the public interest. According to this Section:

- (a) Any member of a company who complains that:
- (1) 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
 - (2) 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, 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, may apply to the Tribunal, provided such member has a right to apply under Section 244.
- (b) 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 under this Chapter and all applications shall be made before the Principal Bench of the Tribunal.

1.9.2.4. Central Govt.'s power to refer

Companies Amendment Act, 2019 have inserted sub-section 3 to section 241, enabling Central Govt. to make a case of oppression and mismanagement, under following situations.

- a) Any person management guilty of fraud, misfeasance, persistent negligence or breach of duty and trust,
- b) Business not conducted with sound business principles or prudent commercial practices,

- c) Management conducted in many injuries to interest of the trade, industry or business to which the company pertains
- d) Business carried out with an intention to defraud its creditors, members or in fraudulent or unlawful purpose or in a manner prejudicial to public interest,

1.9.2.5. Powers of Tribunal (Section 242)

The Tribunal may appoint such number of persons as directors, who may be required to report to the Tribunal on such matters as the Tribunal may direct.

- (a) The Tribunal is of the opinion:
 - (1) 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
 - (2) 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.
- (b) Without prejudice to the generality of the powers under sub-section (1), an order under that Sub- Section may provide for:
 - (1) the regulation of conduct of affairs of the company in future.
 - (2) the purchase of shares or interests of any members of the company by other members thereof or by the company.
 - (3) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital.
 - (4) restrictions on the transfer or allotment of the shares of the company.
 - (5) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager or any other person , upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case.
 - (6) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (5):
 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.
 - (7) 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.
 - (8) removal of the managing director, manager or any of the directors of the company.
 - (9) recovery of undue gains made by managerial persons
 - (10) 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 (8);
 - (11) 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.

- (12) imposition of costs as may be deemed fit by the Tribunal.
- (13) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.
- (c) A certified copy of the order of the Tribunal shall be filed by the company with the Registrar within thirty days of the order of the Tribunal. [Sub-Section 3]
- (d) The Tribunal may, make any interim order also
- (e) Where an order of the Tribunal makes any alteration in the memorandum or articles of a company, the company shall not have power, to make any alteration inconsistent with the order, either in the memorandum or in the articles.

1.9.2.6. Consequences of Termination or Modification of Certain Agreements.(Section 243)

This Section deals with the situations arising out of termination/modification of certain agreements. According to this Section:

- (a) Where an order made under Section 242 terminates, sets aside or modifies an agreement such as is referred to in Sub-Section (2) of that Section:
 - (1) 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;
 - (2) 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:

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.

Person considered unfit by Tribunal under section 242(4A) shall not hold any office of director or connected with management of a company for 5 years, unless approved by the Central Government and the Tribunal. Such person shall not be entitled to any compensation for loss of office regardless of such provision in any document.

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

- (b) Any person who knowingly acts as a managing director or other director or manager of agreements a company in contravention of clause (b) of Sub-Section (1), and every other director of the company who is knowingly a party to such contravention, shall be punishable with fine which may extend to Rupees ₹5 Lakhs

1.9.2.7. Class Action (Section 245)

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.

- (a) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in Sub-Section (2) may, 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, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:

- (1) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company or
 - (2) breach of any provision of the same
 - (3) 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.
 - (4) to restrain the company and its directors from acting on such resolution.
 - (5) 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.
 - (6) to restrain the company from taking action contrary to any resolution passed by the members.
 - (7) to claim damages or compensation or demand any other suitable action from or against:
 - a) 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.
 - b) 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
 - c) 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 conduct or any likely act or conduct on his part.
 - (8) to seek any other remedy as the Tribunal may deem fit.
- (b) The requisite number of members provided in Sub-Section (1) shall be as under:
- (1) in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or 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.
 - (2) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.
 - (3) The requisite number of depositors provided in Sub-Section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever less or any depositor is or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.
- (c) If an application filed under Sub-Section (1) is admitted, then the Tribunal shall have regard to the following, namely:
- (1) 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.
 - (2) 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.
 - (3) two class action applications for the same cause of action shall not be allowed.
 - (4) 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.

- (d) Any order of 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.
- (e) 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 Rupees ₹5 lakhs but which may extend to Rupees ₹25 lakhs and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 years and with fine which shall not be less than Rupees ₹25,000 but which may extend to Rupees ₹1 lakh.
- (f) Nothing contained in this Section shall apply to a banking company.
- (g) 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.

1.9.2.8. Application of certain provisions to proceedings under Section 241 or Section 245 (Section 246).

In terms of the Section 246, the provisions of Sections 337 to 341 (both inclusive) relating to fraud and damages shall apply 'mutatis mutandis', in relation to an application made to the Tribunal under Section 241 or Section 245.

EXERCISE

Multiple Choice Questions (MCQs)

1. How many minimum members are required to form a public limited company?
 - a) 3
 - b) 4
 - c) 6
 - d) 7
2. In order to be a Govt. Company, 51% shares shall be held by: -
 - a) Central Govt.
 - b) State Govt.
 - c) Both Central and State Govt. jointly
 - d) Any or all of the above
3. In case of “limited” companies, what is limited?
 - a) Shares
 - b) Liability of members
 - c) Capital of the company
 - d) Powers of the shareholders
4. Restriction in transfer of shares can be there in ____
 - a) Private Ltd. company
 - b) Public Ltd. Company
 - c) Govt. company
 - d) Unlimited company
5. Foreign company is a company, registered out of India and ____
 - a) Having a place of business in India
 - b) Conducts any business in India
 - c) Need not have any business in India
 - d) Either (a) or (b)
6. Company which do not have any significant accounting transaction is called:
 - a) Asocial Company
 - b) Non-functional company
 - c) Dormant company
 - d) Sleeping company

7. Life Insurance Corporation is: -
 - a) A statutory corp. but not PFI
 - b) A statutory corp. and PFI
 - c) Govt. Company
 - d) None of the above
8. Persons who sign the MOA are called:
 - a) Promoters
 - b) Shareholders
 - c) Subscribers to MOA
 - d) Members
9. Certificate of incorporation is issued by: -
 - a) Regional director
 - b) Registrar of companies
 - c) Central Govt.
 - d) None of the above
10. Declaration by professional at the time of incorporation of a company means declaration by:
 - a) Practicing CS
 - b) Practicing CA
 - c) Practicing CMA
 - d) Any of the above.
11. Change of registered office within a city, town or village requires:
 - a) Special Resolution
 - b) Board Resolution
 - c) Approval of CG
 - d) None of the above
12. Section 8 companies cannot:
 - a) Generate surplus
 - b) Make profit
 - c) Distribute dividend
 - d) Profit is to given to Govt.

13. ABC Ltd. is registered in India with 100% shares being held by KYZ Ltd., a company registered in UK having no business in India. ABC Ltd. is a:
- a) An Indian Company
 - b) Foreign company
 - c) Wholly owned subsidiary of a foreign company but Indian Company
 - d) Does not come under definition of foreign company
14. ABC Ltd. has 35% shares in XYZ Ltd. The majority of directors of XYZ Ltd. are appointed and removed by ABC Ltd. XYZ Ltd. is:
- a) Subsidiary of ABC Ltd.
 - b) Not a subsidiary of ABC Ltd.
 - c) Depends on Board of ABC Ltd.
 - d) Depends on Board of XYZ Ltd.
15. A guarantee company is similar to:
- a) Unlimited company
 - b) LLP
 - c) Partnership
 - d) Sole proprietorship
16. Once a company is converted into LLP, intimation to ROC has to be made within:
- a) 10 days
 - b) 15days.
 - c) 20 days.
 - d) 30 days
17. Which chapter of the Companies Act, 2013, deals with foreign companies?
- a) XX
 - b) XXI
 - c) XXII
 - d) XXIII
18. In case of secured debentures of public issue, the security is created in favour of:
- a) Public
 - b) SEBI
 - c) Merchant banker
 - d) Debenture trustee

19. Fully convertible debenture is a:
- a) debt instrument
 - b) equity instrument
 - c) hybrid instrument
 - d) None of the above
20. Register of deposit:
- a) is voluntary
 - b) is mandatory but particulars may vary
 - c) is mandatory with particulars as per Rules
 - d) Not to be maintained at all
21. A debenture trustee can be:
- a) Any bank
 - b) Any NBFC
 - c) any merchant banker
 - d) Any entity registered with SEBI as such
22. “loan” in parlance to Companies Act, means:
- a) short term loan for revenue purpose
 - b) long term loans
 - c) cash credit
 - d) working capital
23. In case of deposits by the company,
- a) no brokerage can be given
 - b) any amount of brokerage can be given
 - c) rate of brokerage shall be as per RBI Regulations
 - d) rate of brokerage shall be as per SEB Regulations
24. Once declared in AGM, dividend-
- a) May be revoked
 - b) Cannot be revoked
 - c) May be reduced
 - d) Payment can be delayed
25. IEPF stands for-
- a) Investor Employment and Protection Fund
 - b) Investor Education and Publicity Fund
 - c) Investor Entrepreneurship and Protection
 - d) Investor Education and Protection Fund

26. Once declared, the amount of dividend shall be transferred to special dividend A/c within-
- a) 3 days
 - b) 5 days
 - c) 10 days
 - d) 15 days
27. A practicing Chartered Accountant may be appointed as Auditor for term of:
- a) 3 years
 - b) 5 years
 - c) 8 years
 - d) 10 years
28. Directors Responsibility Statement is a part of: -
- a) Annual Accounts
 - b) Auditors' Report
 - c) Board Report
 - d) None of the above
29. NFRA stands for:
- a) National Financial Reporting Authority
 - b) National Fiscal Reporting Authority
 - c) Non-Financial Reporting Authority
 - d) National Financial Reforms Authority
30. A statutory Auditor shall be-
- a) ACS
 - b) CMA
 - c) Practicing CA
 - d) Any of the above
31. In normal course, the Board's Report is signed by –
- a) Chairman without Authority of Board
 - b) Chairman with Authority of Board
 - c) MD
 - d) Any director
32. CAG stands for:
- a) Controller of Audit of Govt.
 - b) Comptroller of Auditor General
 - c) Company Auditor General
 - d) None of the above

33. The Financial statements are to be filed with the Registrar within-
- a) 15 days of AGM
 - b) 31st October of any year
 - c) 30 days of AGM
 - d) 60 days of AGM
34. In case of private company, internal auditor has to be appointed if the turnover is:
- a) ₹ 100 Crores or more
 - b) ₹ 150 Crores or more
 - c) ₹ 200 Crores or more
 - d) ₹ 300 Crores or more
35. Auditors Report is addressed to:
- a) Board of directors
 - b) Central Govt.
 - c) Audit Committee
 - d) Shareholders
36. CARO,2020 is effective from: -
- a) 1.4.2019
 - b) 1.4.2020
 - c) 1.4.2021
 - d) 1.4.2022
37. First Auditor is appointed by-
- a) CG
 - b) CAG
 - c) Board of Directors
 - d) Shareholders
38. Auditor can render the following additional service to the company where he is auditor:
- a) Internal Audit
 - b) Accounting and book keeping
 - c) Investment Advisory services
 - d) None of the above

39. Additional director's tenure is up to ____
- a) Next Board meeting
 - b) Next AGM
 - c) 5 years from the date of appointment
 - d) Date of superannuation
40. Alternate director may be appointed when the additional is out of India for at least _____
- a) 1 month
 - b) 2 months
 - c) 3 months
 - d) 4 months
41. A women director has to be there is the company is:
- a) A listed company
 - b) With turnover of ₹300 crore or more
 - c) Either of the above
 - d) None of the above
42. Section 184 of the Companies Act provides for:
- a) Ordinary
 - b) Board
 - c) Special
 - d) None
43. A whole time director is appointed for a term of:
- a) 2 years.
 - b) 3 years.
 - c) years.
 - d) years.
44. If a person other than retiring director is proposed, a cheque of _____ is to be deposited with the proposal.
- a) ₹ 50,000
 - b) ₹ 75,000
 - c) ₹ 1 lakh
 - d) ₹ 2 lakhs

45. A director may be appointed by small shareholder. Small shareholder means, shareholders who hold shares worth of face value of maximum, _____
- a) ₹ 5,000
 - b) ₹ 10,000
 - c) ₹ 15,000
 - d) ₹ 20,000
46. A company may remove a director with –
- a) Board Resolution
 - b) Ordinary resolution of shareholders
 - c) Special Resolution of shareholders
 - d) Approval of ROC
47. Managing Director's appointment is ratified in AGM through-
- a) Ordinary
 - b) Special
 - c) No AGM resolution is required
 - d) None of the above
48. Section 203 provides for appointment of
- a) KMP
 - b) CS
 - c) MD
 - d) WTD
49. The eligibility and conditions of appointment of MD is mentioned in Schedule
- a) I
 - b) II
 - c) IV
 - d) V
50. Maximum remuneration to all managerial personnel is-
- a) 5%
 - b) 8%
 - c) 11%
 - d) 15%

51. Independent directors are not entitled to get-
- a) Sitting fee
 - b) Reimbursement of expenses
 - c) Stock option
 - d) Commission on profit
52. Board's Report is addressed to-
- a) Central Govt.
 - b) Stock exchange
 - c) Members
 - d) ROC
53. Power of Board of directors may be restricted subject to:
- a) Companies Act
 - b) Articles of Association
 - c) Resolution of general meeting
 - d) Any or all of the above
54. Related party transaction is provided under Schedule:
- a) 188
 - b) 189
 - c) 190
 - d) 191
55. Majority of audit committee members shall be:
- a) Executive director
 - b) Non-executive
 - c) Independent
 - d) None of the above
56. Independent directors, separately, shall meet _____ in a calendar year.
- a) Once
 - b) Twice
 - c) Thrice
 - d) Not meet

57. For Board meeting, quorum as per the Act is:
- a) One third of the total no. of directors
 - b) Two third of the total no. of directors
 - c) One third of the total no. of director or two, whichever is higher
 - d) Half of the total no. of directors
58. If _____ of the directors require that a resolution under circulation be placed in the Board meeting for decision, it has to be complied with.
- a) All director
 - b) Two-third
 - c) One-third
 - d) Three-fourth
59. Minutes of the Board meeting are to be signed by-
- a) Chairman of the company
 - b) Chairman of the present meeting or next meeting
 - c) Chairman of the company, whether he was present in the meeting or not
 - d) None of the above
60. Minutes of Board meeting are to be preserved for-
- a) 5 years
 - b) 8 years
 - c) 10 years
 - d) Permanently
61. Minutes are supposed to be kept at:
- a) Registered office
 - b) Head office
 - c) Any office
 - d) Any of the above
62. SFIO stands for:
- a) Serious Fraud Institution Office
 - b) Serious Fraud Investigating Organization
 - c) Serious Fraud Investigating Office
 - d) None of the above

63. The decision to authorize buy back by Board can be made by-
- a) Resolution by circulation
 - b) Only in board meeting
 - c) Any of the above
 - d) None of the above
64. In case chairman is executive, at least _____ of the Board members shall be independent director.
- a) 1/3rd
 - b) 2/3rd
 - c) 1/2
 - d) Majority
65. Majority of members of the audit committee shall be-
- a) Executive directors
 - b) Non-executive director
 - c) Nominated director
 - d) Independent directors
66. Board of directors are supposed to address their report to –
- a) Central Govt.
 - b) NCLT
 - c) SEBI
 - d) None of the above
67. The provisions relating to investigation are provided in which chapter of the Act?
- a) XIIB
 - b) XIII
 - c) XIV
 - d) XV
68. If a company wants to punish an employee or officer of a company, it has to take permission of:
- a) ROC
 - b) CG
 - c) NCLT
 - d) High Court
69. The investigating officer has the power of inspection, taking evidence etc. as per-
- a) Civil Procedure Code
 - b) Criminal Procedure Code
 - c) Companies Act
 - d) None of the above

70. In case of merger, the transferor company is:
- a) Continues to exist
 - b) Dissolved
 - c) Shall have to go through liquidation process
 - d) Goes under the tribunal control
71. The Auditors has to confirm in the scheme that
- a) It is in conformity with the Accounting Standard
 - b) It is in compliance with the Companies Act
 - c) Both (a) and (b)
 - d) None of the above
72. On amalgamation, the following are transferred to the transferee company:
- a) Rights
 - b) Liabilities
 - c) Both above
 - d) None of the above
73. When a transferor company is a listed company and transferee company is any unlisted company, the transferee company_____.
- a) Becomes a listed company
 - b) Continues to an unlisted company and can never be a listed company
 - c) Continues to be an unlisted company unless it is listed by complying with listing requirement
 - d) Any of the above
74. Powers of the majority is subject
- a) Companies Act,
 - b) Common law
 - c) Memorandum of association
 - d) All of the above
75. Any Act done by directors beyond authority, is considered as;
- a) unauthorized
 - b) illegal
 - c) ultra vires
 - d) None of the above

76. A case of oppression, application may be made on:
- a) fraud on minority
 - b) ultra vires act
 - c) breach of duty
 - d) Any or all of the above
77. Application has to be made for relief of oppression to:
- a) Central Govt.
 - b) NCLT
 - c) ROC
 - d) None of the above
78. Powers of the tribunal is listed in section:
- a) 240
 - b) 241
 - c) 242
 - d) 243
79. Statutory auditor can also function as:
- a) Internal Auditor
 - b) Financial Adviser
 - c) Accounting Solutions Advisor
 - d) Tax Auditor
80. A CFO of a company has to be a:
- a) Chartered accountant
 - b) Cost accountant
 - c) MBA
 - d) None of the above.
81. Sitting fee of Board meetings and Board Committee meetings:
- a) shall have to be same
 - b) may not be same
 - c) shall have to be different
 - d) None of the above

82. Disclosure of interest by director is:
- a) one time feature at the time of appointment
 - b) annual feature
 - c) event based, being interested due to some event
 - d) all or any of the above
83. Quorum of aboard meeting is.....total strength of the Board:
- a) 1/4th
 - b) 1/3rd
 - c) half
 - d) 1/3rd or two whichever is higher
84. In case of merger of A ltd with B Ltd., A ITd is:
- a) liquidated
 - b) dissolved
 - c) sold
 - d) closed down
85. Dividend Distribution Policy of a company is decided by:
- a) Board of directors
 - b) shareholders in general meeting
 - c) Stock exchange
 - d) SEBI
86. Rate of interest in deposit is guided by :
- a) SEBI
 - b) RBI
 - c) MCA
 - d) MOF
87. No eligible company shall accept or renew deposit from its members up to:
- a) 5 %
 - b) 10%
 - c) 15%
 - d) 20%

88. Interim dividend is decided by:
- a) Board of Directors
 - b) AGM
 - c) CMD
 - d) Audit Committee
89. Books of accounts can be inspected by:
- a) MD only
 - b) any director
 - c) any shareholder
 - d) any public on payment of fees
90. Accounting Standards are prescribed by:
- a) Central Govt.
 - b) SEBI
 - c) Institute of Chartered Accountants of India
 - d) None of the above
91. The Board Report is signed by:
- a) MD
 - b) any director
 - c) CS
 - d) None of the above
92. Zenith Ltd. Is a company registered in USA and doing business in USA. As per Indian law, this is a:
- a) foreign company
 - b) not a foreign company
 - c) It will be a foreign company once it starts business in India
 - d) both (b) and (c) is correct.
93. A sectorial company is supposed to comply with:
- a) Companies act only
 - b) Sectorial laws only
 - c) Both Companies Act and sector laws
 - d) All statements are correct
94. Articles of association can be altered by:
- a) Ordinary resolution
 - b) Special resolution
 - c) Resolution requiring special notice
 - d) None of the above

95. Shifting of register office from one state to another, would require:
- special resolution only
 - special resolution and Central Govt.(CG) approval
 - only CG approval
 - only Board approval
96. The following members of a company shall have the right to apply under Section 241, for oppression namely:
- in the case of a company having a share capital, not less than one hundred members of the company;
 - or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company;
 - in the case of a company not having a share capital, not less than one-fifth of the total number of its members.
 - Any of the above.
97. SFIO stands for:
- Serious Fraud Investigation office
 - Serious Fault Investigation office
 - Serious Fund Inquiry office
 - None of the above.

State True or False

- Private companies can invite finance from public.
- A public company shall have minimum 5 directors.
- A subsidiary of Govt. Company is also a Govt. company.
- A foreign companies are free from any kind of compliances
- Pre incorporation contracts can be ratified by the company after incorporation
- CSR is mandatory for companies having net profit of Rs. 5 crore and above during the previous Financial Year.
- Unlisted companies need not have independent directors.
- ABC Ltd. holds 30% shares of BCD Ltd. but ABC Ltd. has the right to appoint and remove majority of Board of Directors of BCD Ltd. BCD Ltd. shall be considered subsidiary of ABC Ltd.
- Maximum tenure of preference shares for non infrastructure companies can be 20 years.
- Non Profit companies cannot generate surplus.

12. Appointment of auditors can be made for five years at a time but shall be ratified in each AGM.
13. Only listed companies are supposed to have women director.
14. The CMD of the company cannot be chairman of audit committee.
15. The CMD of the company cannot be chairman of CSR committee.
16. Maximum period of redemption of debenture is 20 years.
17. Board has unlimited powers to take loan on behalf of the company.
18. CFO is not a KMP.
19. CS has to sign the annual financial statement
20. The financial year of a company under Companies act and income Tax act is same, unless special approval is taken.

Fill in the blanks

1. An OPC may have maximum ____ directors.
2. A partnership of more than ____ partners, need to be registered as a company
3. A company shall have to intimate the registered office on or after ____ day of incorporation
4. A public company with a net worth of ₹.....crores can accept public deposit
5. A company may invest through not more than layers of investment.
6. Maximum investment with Board approval is.....of the paid up capital, free reserves and share premium account
7. For inter corporate investment resolution of the Board is required.
8. Dividend is payable within ____ days of declaration
9. Dividend is transferred to IEPF after ____ years
10. Books and accounts are to be retained for at least _____ years
11. Companies are supposed to maintain accounts on _____
12. The maximum sitting fee for attending Board meeting is _____ per meeting
13. Company Secretary is compulsorily to be appointed as one of the KMPs if the paid up capital is min. ____.
14. A minimum ____ days' notice is to be given for Board meeting.
15. Audit committee shall have min. of _____ directors
16. The first meeting of the Board of Director shall be held within _____ days of incorporation of the company
17. The Inspecting authority can cease documents and keep it for max. _____ days.

18. The provision relating to merger of small/holding and subsidiary company, if mentioned under section _____.
19. Any person aggrieved by the assessment of compensation, in case of merger may appeal to NCCT within _____ days.
20. One Board meeting is supposed to held in each.....
21. Compromise happens between the stakeholders, in case
22. Auditors Report is addressed to.....
23. Any qualification in the audit report is to be replied by.....
24. Auditor appointed in casual vacancy shall continue up to.....
25. For removal of Auditors, ...notice has to be given by shareholders.
26. In case of Govt. Company, Auditor is appointed by
27. Auditors' report shall be as per.....
28. Overall managerial remuneration is% of the net profit of the company during the financial year.
29. In normal course, books of accounts are to be kept at.....office of the company.
30. Directors' Responsibility Statement is all about.....
31. Preference shares issued by infrastructure companies are to be redeemed within years of issue
32. When debentures do not have any interest payable, it is called.....coupon rate debentures.
33. A shareholder, who has not claimed his dividend for more than 7, years, shall claim from
34. In case of public issue of debentures, debenture are secured by mortgaging assets to
35. Partnership with more than partners shall have to be registered as company.
36. For certificate of commencement of business, form is to be filed.
37. In case of compromise, the statement of compliance, after the order has been passed, is to be filed within days .
38. For merger of a foreign company with Indian company, prior approval of also will be required.
39. The will of the majority shall prevail was settled in famous case of.....
40. The threshold limit of combined assets of individual domestic companies combination is.....
41. One of the objects of the Competition Act is to competition

Short Essay Type Questions

1. Discuss the law relating to inter-corporate loans and investments.

2. Which companies are exempt from the provisions with regard to inter-company investments/loans?
3. What particulars are required to be entered in the Register of Loans and Investments?
4. Explain the provisions has to prohibition on Acceptance of Deposits from the Public Under Section 73 of the Companies Act, 2013
5. Explain the provisions in respect of Acceptance of Deposits by the Companies under Chapter V of the Companies Act, 2013.
6. Dividend must be paid only out of profits. Explain.
7. Explain the law relating to treatment of unpaid dividend.
8. Who are KMPs and which categories of companies are supposed to have KMPs?
9. Differentiate between:
 - a) interim and final dividend
 - b) Internal Audit and Statutory Audit
 - c) Audit of Public limited non Govt. Company and Govt. Company
 - d) executive and non-executive director
 - e) rotational and non-rotational Director
 - f) CMD and MD
 - g) non-executive director and Independent director
10. Write short notes on-
 - a) Memorandum of Association
 - b) Doctrine of ultra vires
 - c) Perpetual succession
 - d) Unlimited liability
 - e) Corporate body
 - f) Authorised capital
 - g) Certificate of incorporation
 - h) Deposit Repayment Reserve Account
 - i) Return of deposits.
 - j) Registrar of Deposits
 - k) Deposit Insurance

- l) IEPF
- m) Financial Statement
- n) Accounting Standard
- o) Internal Audit
- p) Cost Audit
- q) additional director
- r) alternate director
- s) women director
- t) nominee director
- u) SFIO
- v) Powers of inspectors for investigation under Companies Act
- w) Related body corporate

Essay Type Question

1. Explain the doctrine of indoor management. How it is opposite to doctrine of constructive notice?
2. Differentiate between a private company and a public limited company. What steps the private company need to take if it wants to be converted into a public limited company?
3. What are the services which an auditor is not supposed to take up ?
4. Discuss the provisions relating to placing of accounts in AGM and filing with the Registrar.
5. Discuss the disqualifications of an Auditor.
6. Write a detailed note on independence of Auditor
7. Discuss the appointing authority and tenure of additional director and normal director.
8. Discuss various provisions relating to nomination of director.
9. Discuss situations when the office of director shall become vacant.
10. Discuss the role of Central Govt. in investigation into affairs of any company, under the Act.
11. What are the various types of inquiries and investigation under the Companies Act,2013?
12. Discuss the role of Central Govt. in investigation into affairs of the Act.
13. What are the various types of inquiries and investigation under the CA,2013
14. Define the term 'Compromise'. How is it different from arrangement?

15. Explain the stepwise procedure for merger and amalgamation under the Companies Act, 2013.
16. What options are given to the minority shareholders?
17. Discuss the powers of Central Government to provide for amalgamation in the public interest
18. Discuss the concept of majority rule.
19. What are the remedies available to minority shareholders.
20. What are the powers of Central Government to prevent Oppression and Mismanagement?

Case Study (Solved)

1. ABC limited is a company with paid up capital of ₹ 50 cr. and turnover of ₹ 310 cr. Mr. Rajesh Kumar, who is promoter and MD of the company wants to run the company complying with all laws and regulations. The chairman is non executive and is an eminent academician. There are two more directors, one is Director (Finance), Mr Joshi and Director (commercial) Mr. Nirmal Kumar, who is related to the promoter. Company is in the process of taking substantial loan for capital investment from SBI, where SBI will nominate a director in the Board.

The MD wants to clarify the following issues from you. Pl clarify with references, if any.

- (i) Is the present Board properly constituted? If not, what is the non compliance.
- (ii) Can Mr. Nirmal Kumar be considered as independent director?
- (iii) Is there any need of women director?
- (iv) What will be the status of the director nominated by SBI? If she is a women, would satisfy the requirement of women director.

Solution:

- (i) Company is an unlisted company with four directors which is properly constituted. However, since the turnover is more than ₹300 cr., a women director is required.
 - (ii) No, since he is related to the promoter.
 - (iii) Yes. Answered in (i) above.
 - (iv) He or she will be classified as nominee director. Yes, if she will be considered to fulfil the requirement. Rule 3 of companies (appointment and qualification of directors) Rule 2014 refers.
2. Kapoor and Sons Ltd is a listed company with Mr. S K Kapoor as CMD and main stakeholder. Board comprises of the following.
 - (a) Mr. S K Kapoor, as CMD
 - (b) Mr. K Murli, Director (Finance)
 - (c) Mr. B B Singh, Director (Commercial)
 - (d) Mr K Shekhar, ind. Dir. Appointed in AGM in Sept, 2020
 - (e) Mr.B. Ramesh, Ind. Dir., appointed in AGM is August, 2019

- (f) Mr. Mahesh Singh, nominee of IDBI
- (g) Smt. Rekha Singh, ind. Director, appointed in AGM in Sept 2019
- (h) Ms. Rukmini Mathur, non executive, non independent, appointed as additional director in March 22.

With the above directors, please suggest constitution of CSR committee, Audit Committee and Nomination and Remuneration committee as per the Act and Rules.

Solution:

I have to suggest constitution of various committees with the existing Board members. I suggest the following.
CSR committee:

In case of CSR committee, there will be at least three directors in the committee with at least one independent director. CSR committee shall be as follows.

- (i) Mr. B Ramesh, as chairman
- (ii) Ms. Rekha Singh, ind. Director, member
- (iii) Mr. K Murli, Director (Finance), member

Since the company has adequate number of independent directors, we can have two instead of one. Since financial issues are involved, D(F) is made member.

Audit committee

- (i) Mr K Shekhar, ind. Dir. as chairperson
- (ii) Mr. Mahesh Singh, nominee of IDBI
- (iii) Ms. Rekha Singh, ind. Director,

As per rule, there has to be three directors, all non executive, the chairman to be independent and majority shall be independent. This has been complied here.

Nomination and Remuneration committee

- (i) Ms. Rekha Singh, ind. Director, chairperson
- (ii) Mr. B Ramesh, member
- (iii) Ms. Rukmini Mathur ,member

All members need to be non executive and /or independent.

3. The last Board meeting of ABC Structurals Ltd., a public limited company was held on 25th January, 2022. The MD wants that in the next Board meeting the annual financial statements to be placed and approved. The Accounts manager feels that the financial statements shall be ready latest by 15h June only. Mr Ahuja is the chairman of audit committee, who will not be in India during the whole of June. MD feels that we get the financial statements approved through video board meeting. Presently, there is no chairman in the company/ MD chairs the Board meetings.

Solution:

MD of the company need to know and understand and comply with the following.

- (i) As per section 173(1) Next board meeting shall have to be held within 120 days of the previous meeting. Therefore next Board cannot be held in June. There shall be another meeting to be held when financial statements are ready.
 - (ii) Rule 4 of Companies (meeting of Board and its powers) Rules prohibits approval of annual financial statements through video meetings.
4. Western India Industries is a public limited company making micro chips. During 2010 to 2015, company made huge profits and declared substantial dividend ranging from 500% to 2000%. In 2016, it made public issue of equity. The share capital was increased to 15 crores from 5 crores. The company drastically reduced the rate of dividend and paid 20 % to 50% during 2016 to 2021.

Few shareholders raided the issue in last 3 annual general meetings but could get support of other shareholders. The chairman clarified that they want invest in new projects which, of course are justified by the annual reports of the Directors.

Your advice is required for following issue.

- (i) Can minority shareholders object to lower dividend?
- (ii) Does it amount to oppression on minority?
- (iii) Shareholders totaling to 75 want to file petition? Is it ok? Where they will file ?
- (iv) Do minorities have any forum of grievances?

Solution:

- (i) The dividend is declared in AGM every year based on the recommendation of Board of Directors. Shareholders cannot pressurize Board to recommend higher dividend but they can declare lower rate of dividend than recommended by Board.
 - (ii) In normal course, it may not oppression on minority. However, if it can be proved that minorities are being deprived of genuine benefits, petition can be file , which will be subject ti judicial review.
 - (iii) Petition has to be filed by at least 100 members or shareholders holding 1/10th of the total number of share-holders, whichever is less or any shareholder not less than one tenth of the issued share capital of the company.
 - (iv) Minorities of listed companies may vent their grievances in Investor Relations committee of the Board or else file petition in NCLT.
5. Jyoti industries is a public limited company. Due to some IR Problem the factory and office was closed. Two accounts officers dealing with finalization of accounts left the company in quick succession and accounts could not be prepared. It is likely that the financial statements will not be placed within the last date if AGM, i.e. 30th September .MD wants to know the consequences in following situations.
- (i) Accounts is not ready and cannot be placed in AGM.
 - (ii) AGM to be deferred after 30th September
 - (iii) Accounts are ready but AGM could not be held

- (iv) AGM held, accounts placed but not approved

Solution

- (i) Company has to adjourn the meeting to a date where the accounts shall be ready but such meeting also shall be within 30th September.
 - (ii) AGM cannot be deferred by the Company. Approval of extension is given by Registrar of Companies. However, the approval for extension shall have to be taken within 30th September.
 - (iii) If AGM s could not be held, it would amount to violation of law and extension to be sought.
 - (iv) If the AGM is held but the accounts are not adopted, the unadopted accounts shall be filed with the Registrar. Where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such un adopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of annual general meeting.
6. Shri R K Chauhan is MD of Dowell Co. Ltd. The audit is going on and there are many issues which the auditor is pointed out which are being clarified but Auditor is not satisfied with the answer. MD wants to know how the auditor can be removed. Auditor also is not comfortable and have threatened to resign. In such situation, MD wants clarification on legal provisions of various situations.
- (i) Can the Auditor be removed? What is the procedure?
 - (ii) What happens if the auditor resigns?
 - (iii) What happens if the auditor gives a qualified report?

Solution

The auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government by making an application in E-Form ADT-2 and shall be accompanied with the prescribed fees. The application shall be made to the Central Government within 30 days of the resolution passed by the Board. The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution. The auditor concerned shall be given a reasonable opportunity of being heard.

- (i) If an auditor is removed, anew auditor has to be appointed by The Board In casual vacancy, thereafter in the next general meeting.
 - (ii) If the Auditor has resigned from the company, he shall file within a period of 30 days from the date of resignation, a statement in the form ADT-3 with the company and the Registrar. The auditor shall indicate the reasons and other facts as may be relevant with regard to his resignation, in the statement.
 - (iii) If the auditor gives a qualified report, the same has to be replied by the Directors as annexure to Board Report and shall be circulated/ placed in AGM.
7. Ramesh, Rohit and Madan, all graduate in pharmacy, decide to form a start-up business of manufacturing rare medicine for cancer. Rohit plans big and wants to go to public for finance in course of time. Madan has requested his uncle, an NRI based at USA to invest in the company which he has agreed. Ramesh feels that they should go for section 8 company as the target is not to make money. Madan's uncle wants to know the advantages and disadvantages of public and private company in India.

You are advised to clarify the following issues.

- (i) In order to fulfil Rohit's plan, what kind of entity should be preferred and why?

- (ii) Can Madan's uncle invest in the company as an NRI?
- (iii) Ramesh's idea of section 8 company is ok?
- (iv) Prepare small note for Madan's uncle.

Solution

- (i) Private company cannot call for finance from the public. However, a private company can be converted into public company. It is preferred that a public limited company be incorporated so that finance can be taken from the market.
- (ii) Yes, Madan's uncle can invest in the company, subject to FDI restrictions.
- (iii) Ramesh's idea of section 8 company is not ok as this is a business, where they are investing as entrepreneur and it is not a NGO or social enterprise.
- (iv) Note for Madan's uncle.

Advantages of private company

- (a) Many provisions of the companies Act do not apply
- (b) Shareholders are limited and are normally known.

Disadvantages of private company

- (a) Cannot invite fund from public
- (b) Cannot increase number of shareholders over 200

8. ABC Ltd. is a public limited unlisted company with ₹50 crore equity capital of ₹10 each. It has taken over 70% equity of a company called BCG Ltd which is a listed company with equity capital of ₹20 crores divided into shares of ₹10 each. ABC Ltd. and BCG Ltd. have decided to merge.

The CEO of BCG Ltd. has following queries which you have to answer.

- (i) Is the decision to merge in order?
- (ii) Is a scheme necessary for merger?
- (iii) Is the merger to be approved by shareholders of each of the companies?
- (iv) What happens if few shareholders do not consent?
- (v) Does require order of NCLT?

Solution

- (i) Yes. The decision to merge is in order. Companies are free to merge with consent of shareholders and by

following the procedures prescribed under law. However, it will not fall under special category mergers under section 233 of the Act.

- (ii) Yes, a scheme is necessary.
- (iii) Yes, the scheme has to be approved by 3/4th majority of shareholders in value.
- (iv) The dissenting shareholders have to accept the decision of the majority.
- (v) Yes. It requires approval of NCLT. Since the transferee company is listed, SEBI regulations have to be complied with, wherever applicable

Answer:

Multiple Choice Questions (MCQ)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
d	d	b	a	d	d	b	c	b	d	b	c	a	a	b	b	c	d	a	c
21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40
d	c	c	b	d	b	b	d	a	c	b	b	c	c	d	c	c	d	b	c
41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60
c	d	c	c	d	b	a	a	d	c	c	c	d	d	c	a	c	c	b	d
61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80
a	c	b	c	d	c	c	c	a	b	a	c	c	d	c	d	c	c	d	d
81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97			
b	d	d	b	a	b	b	a	b	a	d	d	c	b	b	d	a			

State True or False

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
F	F	T	F	F	F	T	F	T	T	F	F	F	T	F	F	F	F	T	T

Fill in the blanks

1	Fifteen	2	50
3	30	4	100
5	2	6	60
7	unanimous	8	30
9	7	10	8
11	Accrual basis	12	1 Lakh
13	5 Crores	14	7

15	3	16	30
17	180	18	234
19	30 days	20	quarter
21	dispute	22	shareholders
23	Board of Directors	24	conclusion of the ensuing AGM
25	special	26	CAG
27	CARO	28	11%
29	registered	30	accounting standards
31	30	32	zero
33	IEPF	34	debenture trustees
35	50	36	INC-20A
37	210	38	RBI
39	Foss vs. Harbottle	40	₹ 2,000 crore
41	encourage		