

PAPER – 4 : CORPORATE LAWS AND SECRETARIAL PRACTICE

QUESTIONS

THE COMPANIES ACT, 1956

Meetings of Board and Proceeding

1. The Board Meeting of ABC Ltd. was scheduled on a Sunday. State with reference to the provisions of the Companies Act, 1956, whether meetings of the Board can be held on such a day. What would be your answer, if the said Board meeting is an adjourned meeting?
2. The Board of Directors of M/s Infotech Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2009. They seek, your advice in respect of the following matters:
 - (i) Can the board meeting be held in Chennai, when all the directors of the company reside at Kolkata.
 - (ii) Whether the board meeting can be called on a public holiday and that too after business hours as the majority of the directors of the company have gone to Chennai on vacation.
 - (iii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

Advise with reference to the relevant provisions of the Companies Act, 1956.

3. In course of administration of the affairs of a limited company, Chairman of its Board of Directors came across a matter, which required the approval by say of a board resolution. In the prevailing circumstances, it is not possible to convene and hold a Board Meeting. The Chairman approaches you to advise him of the way and the relevant procedure to obtain such approval without holding the Board Meeting. You are required to advise him on the matter as per the provisions of the Companies Act, 1956.

Directors

4. A company has 11 directors on the Board consisting of the following:
 - (a) Mr. Active, Mr. Archive as nominees from two Public Financial Institutions.
 - (b) Mr. First, Mr. Second, Mr. Third appointed at the 2nd AGM.
 - (c) Mr. Fourth, Mr. Fifth appointed at the 3rd AGM.
 - (d) Mr. Addition was appointed as additional director subsequent to 3rd AGM.
 - (e) Mr. Casual was appointed as director in place of Mr. Soul who died and was earlier appointed during the 3rd AGM.
 - (f) Mr. Excellent was appointed as Managing Director for 5 years w.e.f. 2nd AGM.
 - (g) Mr. One more was appointed as additional Director soon after Mr. Addition was appointed as Additional Director.

List out in order, who shall be vacating the office at the 4th AGM of the company.

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5. Whether the following persons can be appointed as a Director of a Public company:
- (i) Mr. John, who has huge personal liabilities far in excess of his Assets and Properties, has applied to the court for adjudicating him as an insolvent and such application is pending.
 - (ii) Mr. Smith, who was caught red-handed in a shop lifting case two years ago, was convicted by a court and sentenced to imprisonment for a period of eight weeks.
 - (iii) Mr. Tom, a Former Bank Executive, was convicted by a court eight years ago for embezzlement of funds and sentenced to imprisonment for a period of one year.
 - (iv) Mr. Samuel is a Director of PQR Limited, which has not filed its Annual Returns pertaining to the Annual General Meetings held in the calendar years 2006, 2007 and 2008. Advice.
6. XYZ Ltd. is a foreign collaborator in ABC Ltd incorporated in India under the Companies Act, 1956. The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC Ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations notices of the meetings of the Board can be sent by e-mail. State in this connection whether such a provision in the Articles of Association of a foreign collaborated company is valid within the purview of the provisions of the Companies Act, 1956.
7. A company is offering one of its flats on sale to one of its Directors on the condition that 50% of the price to be paid in cash and the rest in equated instalments. Comment on the situation, whether this could be treated as a loan under Section 295 of the Companies Act, 1956.

Inter Corporate Loans and Investments

8. From the following information extracted from the Balance Sheet of VCD Ltd. as at 31st March, 2009, Board of Directors of the Company decide to grant a loan of Rs. 80 crores to another company JN Ltd.

	Rs. (in crores)
Paid-up Share Capital:	
Equity Share Capital	50
Preference Share Capital	10
General Reserves	100
Debentures	5
Debenture Redemption Reserve	5

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The company has already given loans to the following companies:

- (i) Peters Ltd. Rs. 5 crores
- (ii) Steel India Ltd. Rs. 10 crores

The Company has also given a corporate guarantee of Rs. 10 crores to NR & Co. Ltd.

Advise whether the Board can go ahead with the above proposal.

9. Alpha Ltd. and Beta Ltd. entered into a scheme of amalgamation by which Alpha Ltd. would transfer its entire undertaking to Beta Ltd. However, the Central Government raised an objection that unless the objects clause of the companies are similar, and memorandum empowers to do so, the scheme of amalgamation cannot be permitted. Is the contention of the Central Government correct?
10. A group of shareholders filed petition praying for relief against mis-management of the affairs of the company. However during the course of proceedings at the Company Law Board, it was understood that there were no longer any wrong doings by the Board in the conduct of the affairs of the company and hence it was pleaded that the complaint should be set aside. Advise with reference to the provisions of section 397 of the Companies Act, 1956.

Winding-up of Companies

11. Write short notes on:
 - (i) Disclaimer of onerous property
 - (ii) Misfeasance

Some Relevant Miscellaneous Provisions of the Companies Act, 1956

12. In case, a foreign company does not deliver its documents to the Registrar of Companies as required under Section 597 of the Companies Act, 1956, state the penalty prescribed under the said Act, which can be levied.
13. Ram and Co. Ltd. having paid up share capital of Rs. 40 lakhs appointed on 1st January, 2005 Lakshman and Co. Pvt. Ltd. as sole selling agent for a period of 5 years with effect from 1st January, 2005 with the approval of the company in general meeting. The directors of Lakshman and Co. Pvt. Ltd. were holding 40,000 equity shares of Rs. 10 each fully paid-up in Ram and Co. Ltd. since 1st December, 2004.

State with reasons whether the appointment is valid. Will your answer be different, if Lakshman and Co. Pvt. Ltd. had acquired the aforesaid shares only on 1st December, 1995?
14. What extra requirements must be fulfilled in the prospectus issued by a foreign company?
15. Write a short note on “Annual Report on Government Companies”?

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Law relating to Producer Companies

16. A Producer Company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 1956 in this regard.
17. Explain the circumstances in which the registration of a Producer Company may be cancelled by the registrar?

Foreign Exchange Management Act, 1999

18. State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999?
 - (i) X, a Film Star, wants to perform alongwith associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.
 - (ii) F International Ltd. has purchased the trade mark from a Foreign Company to establish retail business chain in India as a joint venture at a consolidated price of US dollars 500,000 which is to be paid in Foreign currency of that country.
 - (iii) R wants to get his heart surgery done at UK. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?
 - (iv) L wants to pursue a course in Fashion design in Paris. The Foreign Exchange drawal is US dollars 20,000 towards tuition fees and US dollars 30,000 for incidental and stay expenses for studying abroad.
19. Toy is a Japanese company having several business units all over the world. It has a robotic unit with its head quarter in Mumbai and has a branch in Singapore. Headquarter at Mumbai controls the branch of robotic unit. What would be the residential status of robotic unit in Mumbai and that of the Singapore branch?

The Securities and Exchange Board of India (SEBI) Act, 1992

20. Explain briefly the powers of SEBI under Securities and Exchange Board of India Act, 1992 to seize the records of a Stock broker or other Intermediaries associated with Securities Market.
21. M/s Earth Chemicals and Engineering Ltd. is a closely held unlisted company with a paid up share capital of Rs. 3.00 crores, since 1st April, 2001 and its net worth as on 31st March, 2007 was Rs. 5.00 crores. The net tangible assets of the company as per last three audited balance sheets as at 31st March, 2005, 2006 and 2007 were Rs. 4.00 crores, 4.50 crores and 5.00 crores respectively out of which monetary assets were less than Rs. 50 lakhs in each of the three years. The company was incorporated in 1998 and commenced its business on 1st April, 1998 and since then it was earned good profits and it has not incurred any loss in any year in the past. The company has not declared any dividend so far. But according to the profits earned so far, the management could have declared dividends in each of the last five years. The name of the company was changed from Earth Engineering Ltd. to its present name effective from 1st October, 2006. The company wants to make a public issue of shares to raise Rs. 20.00 crores by issuing

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equity shares at premium. For the purpose of including the information in the prospectus. The company has prepared its accounts for 12 months ended 30th September, 2007 showing segment wise revenue, which reveals that revenue from chemical segment was more than the revenue from engineering segment. Keeping the relevant guidelines issued by SEBI into account, examine whether the company can make the desired issue of equity shares based on the facts stated above.

The Competition Act, 2002

22. The Association of Truck Operators of India by agreement insisted that members of the association shall not deal with the non-members in transportation of goods. The Association claims that this agreement is entered for the welfare of trade and not for any other purpose. In your opinion whether the agreement would be under the purview of the Competition Act, 2002. Whether your answer would be different if the association attempts to control the provisioning of services rendered by its members.
23. The Central Government has formed an opinion that Mr. CBM (a member of the Competition Commission of India) has acquired such financial interest that it may affect prejudicially his functions as a member of the Competition Commission and it wants to remove him from his office. You are required to state with reference to the provisions of the Competition Act, 2002, whether the Central Government can do so and if yes, how?

Securities Contracts (Regulation) Act, 1956

24. The application filed by M/s XYZ Ltd. for the listing of its securities has been rejected by the Mumbai Stock Exchange. Advise the company regarding the steps it can take against the rejection.

Interpretation of Statutes and Corporate Secretarial Practice

25. Many a time a proviso is added to a Section of the enactment. Explain the function of such a proviso while carrying out the interpretation?

SUGGESTED ANSWERS/HINTS

1. The term “public holiday” in this context should be understood. According to the proviso to Section 2 (38) of the Companies Act, 1956 no day declared by the Central Government to be a public holiday shall be deemed to be a public holiday unless the declaration was notified before the issue of the notice of the meeting. Suppose, the notice of a meeting was issued on April 1st where by it was to be held on May 3. If on April 2, the Central Government declares the 3rd day of May as a public holiday, there is no bar to the holding of the meeting on May 3 in spite of its being declared as a public holiday. If, however, the declaration is notified before the issue of the notice convening the meeting, say on 31st March, the meeting cannot be held on May 3.

Whether or not the Board meeting can be held on a public holiday and out of business hours is a question open to conflict. As already state earlier, under Section 288, the adjourned Board meeting is to be held on a day which is not a holiday but no such

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restriction has been levied on the matter of holding the original Board meeting. On the basis of the provision of Section 288, one set of arguments may be that like the adjourned meeting, the holding of the original Board meeting is equally a normal and usual work of a company and that is why it should be held during usual business hours and on a day, which is not a public holiday. On this analogy, a similar inference may be drawn from the provision of Section 166(2) as well, because it prescribes only for each annual general meeting that it held on a day which is not a public holiday and during the business hours and also because annual general meeting is normal work of the company. Another set of arguments is that a meeting of the board can take place even on a public holiday and out of business hours because there is not such restriction as contemplated either by Section 166(2) or by Section 288. We are rather inclined to subscribe to latter set of arguments. This is because if the Legislature could think of imposing similar restrictions twice-once at the time of drafting Section 166(2) in respect of only annual general meeting and the other at the time of drafting Section 288 in respect of adjourned Board meetings-it could rationally think of similar restrictions for the third time in respect of original Board meetings. If the human element of forgetfulness on the part of the draftsmen is to be given any consideration, even then it can be upheld on the first occasion when Section 166(2) was drafted. But definitely such forgetfulness is not tenable on second occasion when Section 288 was enacted especially in respect of adjourned Board meeting. Had it been the intention of the legislature, it could easily enact a provision and add it as a sub-section to Section 288. It, therefore, seems that the legislature did not deliberately think it necessary to provide for original board meeting to be held on a day other than a public holiday and during usual business hours. The law will take its course, however the course may sound irrational. **Therefore, in the absence of any specific provisions in Act it seems that the original Board meeting can be held even on a holiday and out of the business hours, where however an adjourned meeting of the Board be held on a day which is not a public holiday.**

2. (i) There is no difficulty at all in holding the board meeting at Chennai even if all the directors of the company reside at Kolkata and the registered office is situated at Kolkata provided requirements regarding signing of register of contracts, etc. are complied with.
- (ii) Under provisions of Section 166 of the Companies Act, 1956, the annual general meeting shall be held during business hours and on a day that is not a public holiday. There is no similar provisions in the Act with regard to board meetings. Therefore, in the absence of any specific restrictive provision, the board meeting can be held even on a public holiday and out of the business hours.
- (iii) If the articles of association of the company are silent, the notice of board meeting is not required to specify the nature of business to be transacted thereat [*Companies de Mayville v. Whitley* (1896) 1 Ch. 788 (CA)]. If, however, the articles provide otherwise, then the notice must specify the nature of business to be transacted. All said and done, a better course seems to be that the notice should specify the purpose of the meeting, if it is an extra-ordinary or special meeting.

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3. As per the provisions of the Companies Act, 1956, several Board Resolutions are required in course of carrying on the affairs of a limited company. But it may sometimes so happen that a Board Meeting can not be held. To meet such eventualities, the Companies Act, 1956 contains the solution in section 289. According to this section, the board resolution can be passed by way of circulation. It may however be noted that the matter listed in the provisions of section 292 and other sections requiring passing of resolution at the board meetings only can not be passed by way of circulation and can be passed only at the Board Meeting. The Chairman of the company is advised that the approval in the form of a Board Resolution may be obtained by way of passing the relevant resolution by circulation if the matter is not covered by the barring sections of the said Act.

The procedure to be adopted for the purpose shall be as follows::

- (i) Send the draft of the resolution in duplicate together with the necessary papers, if any, to all the directors then in India. It is to be ensured that the number of such directors is not less than the directors required to form the quorum for a Board meeting.
- (ii) Send the draft of the resolution in duplicate together with the necessary papers, if any, to all other directors at their usual address in India.
- (iii) Obtain one copy of the draft resolution duly signed by the directors, whether approving the resolution or disapproving the same. It may be noted that the resolution shall be deemed to be passed by the Board if all the directors then in India or majority of all directors as are entitled to vote on the matter approve the resolution by signing one copy and returning the same to the company.
- (iv) The resolution passed by circulation shall be placed before the next Board Meeting for confirmation.

The resolution shall be recorded in the minutes of the next Board Meeting.

4. Section 255 of the Companies Act, 1956, provides that unless the Articles provide for retirement of all the directors at every general meeting, not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall retire by rotation. In terms of section 256 of the Act, one-third of the directors liable to retire by rotation shall retire at the Annual General Meeting of the Company. If the number of directors liable to retire by rotation is not three or a multiple of three, then the number of nearest to one-third shall retire from the office of director.

In order to determine the directors who shall retire by rotation at every general meeting, it is provided that the persons who have been longest in office since their last appointment shall be liable to retire. As between the persons who became directors on the same day, the directors who shall retire may be determined by agreement among themselves. In the absence of any such agreement the persons liable to retire shall be chosen by lot of the 11 directors mentioned in the question, Mr. Active and Mr. Archive, who are nominees of Public Financial Institutions respectively, are non-rotational directors and are not liable to

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retire. Mr. Excellent being the Managing Director, is also not liable to retire. The position in regard to the remaining 8 directors is as under:

- (i) Mr. Addition & Mr. One More who were appointed as Additional Directors in subsequent to 3rd Annual General Meeting respectively, shall vacate office on the date of 4th Annual General Meeting.
 - (ii) Mr. Casual was appointed in place of Mr. Soul who died and will, therefore, hold office till the date. Soul would have held office.
 - (iii) Of the 6 rotational directors, [viz., Mr. First, Mr. Second, Mr. Third, Mr. Fourth, Mr. Fifth and Mr. Casual, 2 directors who constitute one-third, and who have been longest in office are liable to vacate office. Accordingly, two amongst Mr. First, second and third who were appointed in 1st AGM and have been longest in office, shall vacate office. Amongst themselves, either they can decide by mutual consent or by draw of lots.
5. All the cases stated above are based on the provisions of Section 274(1) of the Companies Act, 1956 dealing with disqualifications of directors. Based on the provisions of the said section, each case can be discussed as follows:
- (a) Section 274(1)(c) of the Companies Act, 1956 states that a person shall not be capable of being appointed as a director of a company if he has applied to be adjudicated as an insolvent and his application is pending in the present case, Mr. John has applied to be adjudicated as an insolvent and his application is pending with the Court. Hence, he cannot be appointed as a Director of a Company – whether public or private.
 - (b) Section 274(1)(c) states that a person shall not be capable of being appointed as a director of a company if he has been convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months, and a period of five years has not elapsed from the date of expiry of the sentence. In the present case, although the sentence was only two years ago, but the period of sentence was only eight weeks, i.e., less than six months. Hence, Mr. Smith does not come under the prescribed disqualification and can be appointed as a director of a company.
 - (c) This case also falls within the provisions of section 274(1)(c). In this case the imprisonment was for a period of one year, i.e., for more than six months, but since more than five years have elapsed from the expiry of the sentence, Mr. Tom has come out of the prescribed disqualification and can be appointed as a director of a company.
 - (d) Section 274(1)(g) states that a person who is already a director of a public company which has not filed the annual accounts and annual returns for any continuous three years, then such a person shall not be eligible to be appointed as a director of another public company. In the present case, PQR Limited has failed to file only annual returns and not annual accounts. Hence, the disqualification for Mr. Samuel is not attracted and he can be appointed as a director.

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6. In the post-Independence period, there is an upsurge of foreign consortia. Articles of foreign collaborations frequently provide that notice of Board meetings should be sent by Air Mail to foreign directors so that they may be able to attend the statutorily prescribed minimum number of meetings (i.e. 3 consecutive meeting without obtaining the leave of absence from the Board) so as to prevent the vacation of their office due to continuous non-attendance under Section 283(1) (g) of the Act. *Now a vital question crops up as to whether such a provision in the articles of foreign collaborations is valid*, because of the provisions of Section 286(1) which, as we have already stated earlier, requires the service of the said notice on a director out of India at his usual address in India. Such a question is not free from doubt. In England, such a notice is required to be given to a director abroad, only when he is within easy reach, else not. But a moot point arises whether a foreign director falls within the purview of the expression “a director other than a director for the time being in India.” On a scrutiny of the act we find that whereas Section 53 provides for service of documents like notices, etc. on members by a company there is no such or similar Section providing for services of notice on directors.
7. (i) This transaction does not per se amount to a loan so as to violate Section 295 of the Companies Act, 1956. The burden of proving otherwise lies with the prosecution. (*M.G. Electronics Components Ltd v. Asst. Registrar of Companies*).
- (ii) The deposit of the cost of purchase of property cannot be regarded as a loan or advance to the M.D. or book debt attracting the provisions of section 295 or section 296 of the Companies Act. It is no concern of the M.D. on what terms the company secures premises for residential accommodation for him.
- (iii) In a petition in *Dr. Freddie Ardeshir Mehta v. Union of India* seeking quashing of a prosecution launched under Section 295, the Bombay High Court came to the conclusion that a company selling one of its flat to one of its Directors on receiving half price in cash and agreeing to accept the balance in instalments does not give a loan to the Director. It is a credit sale. It cannot continued be described even as an indirect loan. In view of this decision, the transaction in question does not amount to a loan to a Director requiring approval of the Central Government.
8. In accordance with the provisions of Section 372A of the Companies Act, 1956, a company cannot grant any loans or inter corporate investment exceeding 60% of its paid up capital and free reserves or 100% of its free reserves, whichever is more.

In case of VCD Ltd. the position as at 31st March, 2009 is as under:

Paid-up share Capital:	Equity Share Capital:	Rs. 50 crores
	Preference Share Capital:	Rs. 10 crores
General Reserves		Rs. 100 crores
Total Rs. 160 crores. (60% of Rs. 160 crores = Rs. 96 crores)		
100% of Reserves & Surplus (i.e. General Reserve) Rs. 100 crores.		

As 100% of free reserves, i.e. Rs. 100 crores is more than 60% of paid up share capital (both Equity and Preference share Capital) and free reserves, i.e. Rs. 96 crores,

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therefore, the overall limit for release of loan is Rs. 100 crores.

The company has already granted loan / given guarantee as under:

(i)	Peters Ltd.	Rs. 5 crores
(ii)	Steel India Ltd.	Rs. 10 crores
(iii)	Corporate Guarantee	Rs. 10 crores
	Total	Rs. 25 crores

Balance of limit upto which further loans/guarantee can be given = Rs. 100 crores – 25 crores = Rs. 75 crores

Therefore, the company can grant loan upto Rs. 75 crores to JN Ltd. Loan upto Rs. 80 crores as proposed can be given provided a special resolution in company's general meeting has been passed as required under Section 372A of the Companies Act, 1956. It may however, be noted that the special resolution as required must be passed through postal ballot in accordance with the rule 4 of the Companies (Passing of the Resolution by Postal Ballot) Rules, 2001.

9. The power to amalgamate may flow from the memorandum or it may be acquired by resorting to the statute. Section 17 of the Companies Act, 1956 indicates that a company which desires to amalgamate with another company will take necessary steps to come before a court for alteration of its memorandum in aid of such amalgamation. The statute confers a right on a company to alter its memorandum in aid of amalgamation with another company. The provisions contained in sections 391 to 396 and 494, illustrate instances of statutory power of amalgamating a company with another company without any specific power in the memorandum. [*Hari Krishna Lokia (v) Hoolungooree Tea Co. Ltd*, 1996].

Section 391 is not only a complete code, but it is in the nature of a single window clearance system to ensure that parties are not put to avoidable, unnecessary and cumbersome procedure for making repeated applications to court for various alterations and changes. What is to be seen is the overall fairness and feasibility of scheme of amalgamation and there need not be any 'unison of objects of both transferor and the transferee company. [*R Morarjee Gokuldas & Wrg. Co.*, 1995]. To amalgamate with another company is the power of the company and not an object of the company. [*Re. Hari Krishna Lohia*, 1996]. Irrespective of the objects clause, the court is empowered to sanction scheme of amalgamation provided it does not prejudice the interest of the public. Therefore, based on the above judicial rulings, the contention of the central government is not correct. [*Golkunda Engg. Enterprises Ltd (v) the G. V. Ltd*, 1997].

10. The remedy available under Section 397 of the Companies Act, 1956, can be invoked only when the affairs of the company are being conducted in a manner oppressive to a shareholder or shareholders. Likewise, the remedy available under Section 398 can be invoked only when the affairs of the company are being conducted in a manner prejudicial to the interest of the company. These two Sections clearly postulate that at the time application is made, there must be a continuing course or conduct of the affairs

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the company, which is oppressive to any shareholder or shareholders or prejudicial to the interest of the company. It is this course of oppressive or prejudicial conduct, which can be made the subject matter of a complaint in the application. The forgoing provisions of law do not confer any power on the Company Law Board to set aside or interfere with past and concluded transactions between the company and the shareholders or third parties which are no longer continuing wrongs or to award a compensation to the company for the aggrieved shareholders in respect of such transactions [*Seth Mohanlal Ganpatram vs. Shri Satyaji Jubilee Cotton and Jute Mills Co. Ltd.* (1964) 34 Comp. Cas 777].

11. (i) **Disclaimer of onerous property:** The liquidator may, with the leave of the Tribunal, disclaim any onerous property within twelve months of the commencement of the winding-up. If the existence of any disclaimable property does not come to the knowledge of the liquidator within one month after the commencement of the winding-up, he can disclaim at any time within 12 months after he has become aware of it. The Tribunal may, however, extend the time.

An onerous property may consist of: (a) land of any tenure, burdened with onerous covenants (b) shares or stocks in companies; (c) any other property which is unsaleable or is not readily saleable, being onerous, binding the possessor thereof either to perform any onerous act or to pay any sum of money; or (d) unprofitable contracts.

His right to disclaim is lost if, within twenty eight days or such extended period as may be, allowed by the Tribunal of receiving a demand from any interested person to make his decision, (he does not give notice that he intends to apply for leave to disclaim).

Any person injured by disclaimer is treated as a creditor of the company to the amount of compensation or damages payable in respect of the injury, and may prove in the winding-up to the extent of the injury (Section 535).

- (ii) **Misfeasance:** If, in the course of winding-up of a company, it appears that any person who had taken part in the formation or promotion of the company, or any past or present director, manager, liquidator or other officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company, the Tribunal may, on the application of the Official Liquidator, or any creditor or contributory, examine into the conduct of such person, and compel him to repay or restore the money or property or make compensation to the company for misfeasance or breach of trust/misapplication etc. (Section 543).
12. Section 598 of the Companies Act, 1956 prescribes the penalty for non-compliance of the provisions of section 597 of the said Act. According to the provisions of the said section 598, the foreign company and its every officer or agent, who is in default, shall be punishable with a fine upto Rs.10,000/- and in case of continuing offence, additional fine upto Rs.1,000/- per day for the period during which the default continues.

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13. Under section 294AA. no company can except with the prior approval of the Central Government, appoint any individual, firm or body corporate, who or which has a substantial interest in the company as sole selling agent of that company. A person holding paid-up capital exceeding Rs.5 lakhs or 5% of the paid-up capital of the company whichever is less is deemed to have substantial interest in that body corporate [Explanation to Section 294AA].

Thus Ram & Co. should have obtained prior approval of the Central Government for appointing Lakshman & Co. Pvt Ltd as sole selling agents as the latter holds 10% of the paid-up capital of the former company. The appointment is accordingly not valid.

The situation shall be different if shares were acquired by Lakshman & Co. on 1st December 2005. According to a clarification issued by the Department of Corporate Affairs, if the provisions of Section 294AA(2) are not attracted to the appointment of sole selling agents at the time of entering into the agreement with them, it will not be obligatory on the company to comply with the said provision for continuance of said appointment for the remaining duration of the current tenure, even if the provisions of section 294AA(2), became applicable after the appointment due to sole selling agents acquiring substantial interest.

However Lakshman & Co. Ltd can continue as sole selling agents for period of 5 years i.e. upto 31st December, 2009, if it acquired the shares only on 1st December 2005 i.e after its appointment on 1st January 2005.

14. In so far as foreign companies are concerned the provisions as regards prospectus requirements have been brought almost in line with the provisions applicable to companies incorporated in India, subject to minor modifications.

Under Section 603 of the Companies Act, 1956, the prospectus to be issued by an existing or intended foreign company in India must be dated and contain the following particulars: (a) the instrument constituting or defining the constitution of the company; (b) the enactments or provisions under which the company was incorporated; (c) the address of the place in India where the said instruments, enactments etc., translation thereof in English, if they are in some other foreign language, can be inspected; (d) the date on which and the country in which the company was incorporated; and (e) whether there is a place of business in India, and if so, the address of its principal office. The provisions contained in (a), (b) and (c) above, shall not be applicable, if the prospectus is issued more than 2 years after the company had become entitled to commence business. As in the case of the prospectus of a company incorporated in India, the prospectus of a foreign company too, must contain the matters laid down in Part I of Schedule II and set out the report specified in Part II of the Schedule subject always to the provisions of Part III of the Schedule.

Furthermore, the penalty prescribed for contravention of any of the provisions contained in Sections 603, 604 and 605 is imprisonment for a term extending up to 6 months, or fine up to Rs. 5,000 or both (Section 606). Section 62 relating to civil liability for mis-statement in a prospectus is applicable also to a prospectus issued, circulated or distributed in India by a foreign company, with the substitution for references in Sections 62 to Section 60 of this Act, of reference to Section 604 thereof (Section 607).

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- 15. Annual Report on Government Companies (Section 619A):** The Central Government, where it is a member of a Government company, shall cause an annual report on the working and affairs of that company to be prepared within 3 months of its annual general meeting whereas, the audit report is placed under Section 619(5). As soon as this annual report is prepared the Central Government shall also cause to be laid before both Houses of Parliament together with the copy of the audit report and comments on, or supplement to the audit report made by the Comptroller and Auditor General.

Where, in addition to the Central Government, any State Government is also member of the Government company, that State Government shall cause a copy of the annual report (prepared as aforementioned) to be placed before the House or both Houses of the State Legislature, together with a copy of the audit report and the comments thereon or supplement thereto.

Where the Central Government is not a member of a Government company, every State Government which is a member of that company, or where only one State Government is a member of the company that State Government shall cause an annual report on the working and affairs of the company to be prepared within the time mentioned above. As soon as the annual report is prepared, the State Government concerned must cause it to be laid before the House or both Houses of the State Legislature with a copy of the audit report and comments or supplement referred to above.

The provisions of this section shall so far as may be apply to a Government company in liquidation as they apply to any other Government [Section 619A(4) as added by the Companies (Amendment) Act, 1988].

- 16.** As per provisions of section 581ZJ of the Companies act 1956, any Producer Company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalisation of amounts from general reserves referred to in section 581ZI in proportion to the shares held by the Members on the date of the issue of such shares.
- 17.** Section 581 ZP of the Companies Act, 1956, deals with cancellation of registration of a Producer Company. The provisions of section 581 ZP are explained as follows:

If a Producer Company fails to commence business within one year of its registration or ceases to transact business with the member or if the Registrar is satisfied, after making such inquiry as he thinks fit, that the Producer Company is not carrying any of its objects specified in Section 581B, he shall make an order striking off the name of the producer company, which shall thereupon cease to exist forthwith.

No such order cancelling the registration as aforesaid shall be passed until a notice to show cause has been given by the Registrar to the Producer Company with a copy to all its Directors on the proposed action and reasonable opportunity to represent its case has been given.

Where the Registrar has reasonable cause to believe that a Producer Company is not maintaining any of the mutual assistance principles specified, he shall strike its name off the register in accordance with the provisions contained in Section 560 of this Act.

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Any member of a producer company, who is aggrieved by an order made under this Section, may appeal to the Company Law Board (Tribunal) within sixty days of the order. After disposing the appeal, if any, the order to striking off the name shall take effect.

18. Approval to the following transactions under FEMA, 1999:

- (i) Foreign Exchange drawals for cultural tours require prior permission/approval of the Government of India irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the Government of India.
- (ii) In this case prior permission/approval of RBI is required for purchasing trade mark from a foreign company where purchase consideration is to be paid in foreign currency. Therefore, F International Ltd. needs prior permission of RBI.
- (iii) Remittance in foreign exchange for medical treatment abroad requires prior permission/approval of RBI when the expenditure in foreign currency exceeds the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment. Therefore, R can draw foreign exchange up to the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment and prior permission/approval of RBI is required.
- (iv) Release of foreign exchange for education abroad is permitted up to US\$ 1,00,000 on self declaration basis. Therefore, L can draw foreign exchange on self declaration basis for pursuing a course in fashion design in Paris.

19. Toy being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly robotic unit in Mumbai, being a branch of a company, would be a 'person'.

Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

However, robotic unit in Mumbai, though not 'owned' controls Singapore branch, which is a person resident in India. Hence *prima facie*, it may be possible to hold a view that the Singapore branch is 'person resident in India'.

20. Section 11C was inserted by SEBI (Amendment) Act, 2002. Where SEBI has reasonable grounds to believe that (a) transactions in securities are being dealt with in a manner detrimental to the investors or securities market or (b) any intermediary or any person associated with securities has violated provisions of SEBI Act, Rules, Regulations or Directions issued by SEBI, it can appoint an Investigating Authority to investigate the affairs of such intermediary/person and report matter thereon to the Board [Section 11C (1)].

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If Investigating Authority is of the opinion that the records are likely to be destroyed or mutilated or secreted or altered, he can make application to Judicial Magistrate of First Class for an order of seizure of such books, registers, other documents and record [Section 11C(8)]. The Magistrate can authorize Investigating Authority to enter premises search and seize records. But Magistrate will authorize seizure of records of a listed company or company intending to be listed only if it is indulging in insider trading or market manipulation [11C (9)]. The seized records will be kept by Investigating Authority till conclusion of investigation and then return it to person concerned after placing identification marks on them [11C(10)].

21. Regulation 26 of the SEBI (ICDR) Regulations, 2009 prescribes the conditions to be fulfilled for issue of shares. As per the said Regulation, an issuer may make an initial public offer, if:
- (a) it has net tangible assets of at least three crore rupees in each of the preceding three full years (of twelve months each), of which not more than fifty per cent. are held in monetary assets. Further that if more than fifty per cent of the net tangible assets are held in monetary assets, the issuer has made firm commitments to utilise such excess monetary assets in its business or project.
 - (b) it has a track record of distributable profits in terms of section 205 of the Companies Act, 1956, for at least three out of the immediately preceding five years. The extraordinary items shall not be considered for calculating distributable profits.
 - (c) it has a net worth of at least one crore rupees in each of the preceding three full years (of twelve months each).
 - (d) the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year.
 - (e) if it has changed its name within the last one year, at least fifty per cent. of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

In the given case,

- (a) The net tangible assets of the company as per the last three audited balance sheets as on 31st March, 2005, 2006 and 2007 were Rs. 4.00 crores, Rs. 4.50 crores, and Rs. 5.00 crores respectively. It satisfies the requirements of clause (a) as above as during each of the preceding three full years, it has net tangible assets, more than Rs.3 crores and out of which the monetary assets are not more than 50 % of the net tangible assets. (In this case it has monetary assets less than Rs 50 lacs).
- (b) The company has good track record of distributable profits in terms of section 205 of the Companies Act, 1956. In other words, it has not incurred any loss in any year in the past.

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- (c) The net worth of the company during the three preceding years was at least Rs. 1 crore in the preceding three full years. (paid-up capital since 1st April, 2001 is Rs 3 crores and net worth as at 31st March, 2007 was Rs. 5.00 crores.
- (d) The aggregate of the proposed issue and all previous issues made in the same financial years does not exceed 5 times its pre-issue net worth. (Rs. 20 crores is the proposed issue and pre-issue net worth is Rs. 5 crores as on 31st March, 2007.
- (e) It is stated in the problem that the revenue earned by the company under its activity (chemical) the new name is more than from the old activity (engineering, it satisfied the condition (e) as stated above.

Hence Earth Chemicals & Engineering Ltd can proceed to make a public issue of shares to raise Rs. 20.00 crores by issuing equity shares at premium.

- 22. Cartel [Section 2(c) of Competition Act, 2002]:**"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services; The term cartel like agreement has been given an inclusive meaning. Thus an association for the welfare of the trade or formed for any other purpose not mentioned in the aforesaid definition will not be a cartel. It is only when an association, by agreement amongst themselves, limits control or attempts to control the production, distribution, sale or price of, or, trade in goods or provision of services, that it will be a cartel.
- 23.** Section 11(2) of the Competition Act, 2002 empower the Central Government to remove, by an order, a member of the Competition Commission of India from his office if such member has acquired such financial interest as is likely to affect prejudicially his functions as a Member of the Competition Commission. However, provisions of Section 11(3) of the said Act puts some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, the Central Government wants to remove a member of the Competition Commission from his office on the above ground it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office on such ground.
- Thus, the Central Government can remove a member of Competition from his office by following the above procedure.
- 24.** Yes XYZ Ltd. can appeal against refusal of stock exchange to list the securities. Section 22 of Securities Contracts (Regulation) Act 1956 deals with this. According to section where a recognized stock exchange refuses listing to a company, it has to furnish reasons for refusal to the company. Section 73(1) of the Companies Act, 1956 specifies the time period within which stock exchange has to grant listing permission. If exchange fails to do so within the time limit or refuses to list, the company may within 15 days make an appeal to the Central Government. The Central Government may after hearing the Stock Exchange vary or set aside the decision of the Stock Exchange, or grant permission for listing.

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However, no appeal under this section shall be allowed after the commencement of Securities Laws (Second Amendment) Act 1999 since appeal before Securities Appellate Tribunal is permitted under Section 22A. Where a Stock Exchange refuses listing or is unable to grant listing within time frame prescribed, company is entitled to appeal to Securities Appellate Tribunal (SAT). SAT may, after hearing the exchange vary or set aside exchange's order or grant or refuse. (Section 22A).

25. The normal function of a proviso is to except something out of the enactment or to qualify something stated in the enactment which would be within its purview if the proviso were not there. The effect of the proviso is to qualify the preceding enactment which is expressed in terms which are too general. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment. Ordinarily a proviso is not interpreted as it stating a general rule.

It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the provision to which it has been enacted as a proviso and not to the other. (*Ram Narain Sons Ltd. Vs. Assistant Commissioner of Sales Tax., A.I.R., 1995 Sc 765*)

An explanation is at times appended to a Section to explain the meaning of the text of the section. An explanation may be added to include something within the Section or to exclude something from it. An explanation should normally be so read as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.

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Applicability of relevant Amendments/Circulars/Notifications/Regulations etc. relating to Corporate Laws for November 2010, Examination:

S. No.	Subject Matter	Applicability	Website for reference
	Companies Act, 1956		
1.	Companies Bill, 2009	Not applicable	www.mca.gov.in
2.	Company Law Settlement Scheme, 2010	Not Applicable	www.mca.gov.in
3.	Easy Exit Scheme, 2010	Not Applicable	www.mca.gov.in
4.	Companies (Second Amendment) Act, 2002 [relating to Winding Up]	Not applicable [Only the general provisions of winding up as covered under Paragraph 4.0 of chapter 4 of the study material are applicable]	
	Section B: Allied Laws		
5.	SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 <i>For highlights on ICDR vis – a vis SEBI (DIP) Guidelines 2000 (now rescinded. See ANNEXURE-I)</i> <i>For Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2010 see ANNEXURE-II</i>	Amendments upto April 2010 are Applicable	www.sebi.gov.in
6.	SEBI (Disclosure and Investor Protection) Guidelines, 2000 (now rescinded)	Not applicable from May 2010 examination	www.sebi.gov.in
7.	FEMA, 1999 (Circular No. 50 of A.P. (DIR Series)/Circular No. 7 of A.P. (FL Series) relating to release of Foreign Exchange for Visits Abroad as covered under FEMA	Not applicable	www.rbi.org.in

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	1999- Currency Component (Increased to \$3000 from \$2000)		
8.	Competition (Amendment) Act, 2009 <i>For detail see ANNEXURE-III</i>	Applicable (Since from May 2010 examination)	www.mca.gov.in

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 w.e.f. August 26, 2009.

SEBI has been empowered in terms of section 11A(1)(a) of the Securities and Exchange Board of India Act, 1992 to specify by regulations, for the protection of investors, the matters relating to issue of capital, the manner in which such matters shall be disclosed and other matters incidental thereto. Accordingly, in exercise of powers conferred by section 30 of the Act, the Board has framed the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as "the ICDR Regulations"), which have been notified on August 26, 2009. The ICDR Regulations have been made primarily by conversion of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 (since rescinded) (hereinafter referred to as "the rescinded Guidelines"). While incorporating the provisions of the rescinded Guidelines into the ICDR Regulations, certain changes have been made by removing the redundant provisions, modifying certain provisions on account of changes necessitated due to market design and bringing more clarity to the provisions of the rescinded Guidelines.

**SIGNIFICANT CHANGES IN SEBI ICDR, REGULATION, 2009 VIS-À-VIS
SEBI (DIP) GUIDELINES, 2000.**

Sr. No.	Subject Matter	Provision under the rescinded Guidelines	Provision under the ICDR Regulations
1.	Exemption from eligibility norms formaking an IPO	Exemption available to banking company, corresponding new bank and infrastructure company.	Exemption removed. Eligibility norms made applicable uniformly to all types of issuers.
2.	Debarment	Company prohibited from making an issue of securities if it had been prohibited from accessing the capital market under any order or direction passed by the Board.	Issuer not to make public issue or rights issue of specified securities if: (a) the issuer, any of its promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by the Board; (b) if any of the promoters, directors or persons in control of the issuer was or also is a promoter, director or person in control of any other company which is debarred from accessing the capital

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			market under any order or directions made by the Board.
3.	Offer for sale by listed companies	No provision.	Provided for.
4.	OTCEI Issues and E-IPO	Contained in Chapter XIV and Chapter XI A.	Omitted.
5.	Firm allotment in public issues	Permitted.	Omitted.
6.	Reservation on competitive basis in public issues	(a) For Indian and multilateral development financial institutions, Indian mutual funds, foreign institutional investors and scheduled banks. (b) For shareholders of the promoting companies in the case of a new company and shareholders of group companies in the case of an existing company.	(a) Omitted. (b) For shareholders (other than promoters) in respect of listed promoting companies, in case of a new issuer and listed group companies, in case of an existing issuer.
7.	Book building process	Book building process through 75% or 100% of issue size.	75% book building route omitted.
8.	Allotment/ refund period in public issues	30 days for fixed price issues and 15 days for book built issues.	15 days for both fixed price and book built issues.
9.	Disclosure of price or price band	Required in draft prospectus in case of fixed price public issues.	Not required to be disclosed in draft prospectus.
10.	Transfer of surplus money in Green Shoe Option (GSO) Bank Account	Surplus money to be transferred to Investor Protection Fund of Stock Exchanges.	Surplus money to be transferred to Investor Protection and Education Fund (IPEF) established by the Board.

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11.	Issue period for Infrastructure companies in public issues	21 days, as against 10 days for other issues.	Uniform period of 10 days for all types of issuers.
12.	Currency of financial statements disclosed in the offer document	Particulars as per audited financial statements not to be more than 6 months old from the issue opening date for all issuers, except Government companies.	Government and non-government issuers treated at par.
13.	Definition of "Key Management Personnel"	Not defined.	Defined.
14.	Disclosure on pledge of shares by promoters	Not provided.	Provided for.
15.	Extent of underwriting obligation	Not explicit.	Where 100% of the offer through offer document is underwritten, underwriting obligations shall be for the entire amount underwritten.
16.	Financial institution as a monitoring agency	The term "Financial Institution" open to interpretation.	The term "financial Institution" replaced by "public financial institution or a scheduled commercial bank".
17.	Definition of "employee"	Includes permanent employee/director of subsidiary or holding company of the issuer.	Excludes permanent employee/ director of subsidiary or holding company of the issuer and promoters and immediate relatives of promoters.
18.	Restrictions on advertisements	If issue opening and closing advertisement contained highlights, then the advertisement required to contain risk factors.	If advertisement contains information other than the details specified in the format for issue advertisement, the advertisement shall contain risk factors.
19.	Forfeiture of money on un-exercised warrants in preferential issues	Open to interpretation.	Where the warrant holder exercises his option to convert only some of the warrants held by him, upfront payment made against only such

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			warrants can be adjusted. The balance upfront payment made against the remaining unexercised warrants shall be forfeited.
20.	Outstanding convertible instruments in case of initial public offer (IPO)	Compulsory conversion of outstanding convertible instruments and other rights held by promoters or share-holders.	Compulsory conversion of all outstanding convertible instruments held by any person.
21.	Minimum promoters' contribution	Could be brought in by promoters/ persons belonging to promoter group/friends, relatives and associates of promoters.	Shall be brought in only by promoters whose identity, photograph, etc are disclosed in the offer document.
22.	Issue period in case of public issues	Issue period not clear in case of revision in price band in book built public issues.	Total issue period not to exceed 10 days, including any revision in price band.
23.	Timing of pre-issue advertisement for public issues	Pre-issue advertisement to be made immediately after receipt of observations from the Board.	Pre-issue advertisement to be made after registering of prospectus/ red herring prospectus with Registrar of Companies before opening of the issue.
24.	Documents to be attached with due diligence certificate	Documents such as memorandum of association and articles of association of the company, audited balance sheet, checklist for compliance with the rescinded Guidelines etc.	Only checklist to be attached.
25.	Group companies	The term "group companies" not explained.	The term "group companies" explained.

Highlights

1. Definition of employee (Regulation 2(m))

“(m) “employee” means a permanent and full-time employee, working in India or abroad, of the issuer or of the holding company or subsidiary company or of that material associate(s) of the issuer whose financial statements are consolidated with the issuer’s financial statements as per Accounting Standard 21, or a director of the issuer, whether whole time or part time and does not include promoters and an immediate relative of the promoter (i.e., any spouse of that person, or any parent, brother, sister or child of that person or of the spouse);”

2. New Chapter

“CHAPTER XA

ISSUE OF SPECIFIED SECURITIES BY SMALL AND MEDIUM ENTERPRISES

Applicability.

- 106A.** (1) An issuer whose post-issue face value capital does not exceed ten crore rupees shall issue its specified securities in accordance with provisions of this Chapter.
- (2) An issuer, whose post issue face value capital is more than ten crore rupees and upto twenty five crore rupees, may also issue specified securities in accordance with provisions of this Chapter.
- (3) The provisions of these regulations, in respect of the matters not specifically dealt or excluded under this Chapter, shall *mutatis mutandis* apply to any issue of specified securities under this Chapter:

Provided that provisions of sub-regulations (1), (2) and (3) of regulation 6, regulation 7, regulation 8, regulation 9, regulation 10, regulation 25, regulation 26, regulation 27 and sub-regulation (1) of regulation 49 of these regulations shall not apply to an issue of specified securities made under this Chapter.

Definitions.

- 106B.** (1) In this Chapter, unless the context otherwise requires, -

- (a) “Main Board” means a recognized stock exchange having nationwide trading terminals, other than SME exchange;
- (b) “nominated investor” means a qualified institutional buyer or private equity fund, who enters into an agreement with the merchant banker to subscribe to the issue in case of under-subscription or to receive or deliver the specified securities in the market-making process;

Explanation: “private equity fund” means a fund registered with any regulatory authority or a fund established by any person registered with any regulatory authority;

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- (c) “SME exchange” means a trading platform of a recognised stock exchange having nationwide trading terminals permitted by the Board to list the specified securities issued in accordance with this Chapter and includes a stock exchange granted recognition for this purpose but does not include the Main Board;
- (2) All other words and expression used in this Chapter but not defined under sub-regulation (1) shall derive their meaning from regulation 2 of these regulations.

Filing of offer document and due diligence certificate.

106C. (1) The issuer making a public issue or rights issue of specified securities under this Chapter shall not file the draft offer document with the Board:

Provided that the issuer shall file a copy of the offer document with the Board through a merchant banker, simultaneously with the filing of the prospectus with the SME exchange and the Registrar of Companies or letter of offer with the SME Exchange:

Provided further that the Board shall not issue any observation on the offer document.

- (2) The merchant banker shall submit a due-diligence certificate as per Form A of Schedule VI including additional confirmations as provided in Form H of Schedule VI alongwith the offer document to the Board.
- (3) The offer document shall be displayed from the date of filing in terms of sub-regulation (1) on the websites of the Board, the issuer, the merchant banker and the SME exchange where the specified securities offered through the offer document are proposed to be listed.

Underwriting by merchant bankers and underwriters.

106D. (1) The issue made under this Chapter shall be hundred per cent. underwritten.

Explanation: The underwriting under this regulation shall be for the entire hundred percent of the offer through offer document and shall not be restricted upto the minimum subscription level.

- (2) The merchant banker/s shall underwrite at least fifteen per cent of the issue size on his/ their own account/s.
- (3) The issuer in consultation with merchant banker may appoint underwriters in accordance with Securities and Exchange Board of India (Underwriters) Regulations, 1993 and the merchant banker may enter into an agreement with nominated investor indicating therein the number of specified securities which they agree to subscribe at issue price in case of under-subscription.
- (4) If other underwriters fail to fulfill their underwriting obligations or other nominated investors fail to subscribe to unsubscribed portion, the merchant banker shall fulfill the underwriting obligations.

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- (5) The underwriters other than the merchant banker and the nominated investors, who have entered into an agreement for subscribing to the issue in case of under-subscription, shall not subscribe to the issue made under this Chapter in any manner except for fulfilling their obligations under their respective agreements with the merchant banker in this regard.
- (6) All the underwriting and subscription arrangements made by the merchant banker shall be disclosed in the offer document.
- (7) The merchant banker shall file an undertaking to the Board that the issue has been hundred per cent. underwritten along with the list of underwriters and nominated investors indicating the extent of underwriting or subscription commitment made by them, one day before the opening of issue.

Minimum Application Value.

- 106E.** The issuer shall stipulate in the offer document, the minimum application size in terms of number of specified securities which shall not be less than one lakh rupees per application.

Minimum Number of Allottees.

- 106F.** No allotment shall be made pursuant to any initial public offer made under this Chapter, if the number of prospective allottees is less than fifty.

Listing of specified securities.

- 106G.** (1) Specified securities issued in accordance with this Chapter shall be listed on SME exchange.
- (2) Where any listed issuer issues specified securities in accordance with provisions of this Chapter it shall migrate the specified securities already listed on any recognized stock exchange/s to the SME exchange.

Migration to SME exchange.

- 106H.** A listed issuer whose post-issue face value capital is less than twenty five crore rupees may migrate its specified securities to SME exchange if its shareholders approve such migration by passing a special resolution through postal ballot to this effect and if such issuer fulfils the eligibility criteria for listing laid down by the SME exchange:

Provided that the special resolution shall be acted upon if and only if the votes cast by shareholders other than promoters in favour of the proposal amount to at least two times the number of votes cast by shareholders other than promoter shareholders against the proposal.

Migration to Main Board.

- 106I.** (1) An issuer, whose specified securities are listed on a SME Exchange and whose post issue face value capital is more than ten crore rupees and upto twenty five crore rupees, may migrate its specified securities to Main Board if its shareholders

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approve such migration by passing a special resolution through postal ballot to this effect and if such issuer fulfils the eligibility criteria for listing laid down by the Main Board:

Provided that the special resolution shall be acted upon if and only if the votes cast by shareholders other than promoters in favour of the proposal amount to at least two times the number of votes cast by shareholders other than promoter shareholders against the proposal.

- (2) Where the post issue face value capital of an issuer listed on SME exchange is likely to increase beyond twenty five crore rupees by virtue of any further issue of capital by the issuer by way of rights issue, preferential issue, bonus issue, etc. the issuer shall migrate its specified securities listed on SME exchange to Main Board and seek listing of specified securities proposed to be issued on the Main Board subject to the fulfilment of the eligibility criteria for listing of specified securities laid down by the Main Board:

Provided that no further issue of capital by the issuer shall be made unless –

- (a) the shareholders of the issuer have approved the migration by passing a special resolution through postal ballot wherein the votes cast by shareholders other than promoters in favour of the proposal amount to at least two times the number of votes cast by shareholders other than promoter shareholders against the proposal;
- (b) the issuer has obtained in- principle approval from the Main Board for listing of its entire specified securities on it.

Market Making.

- 106J.** (1) The merchant banker shall ensure compulsory market making through the stock brokers of SME exchange in the manner specified by the Board for a minimum period of three years from the date of listing of specified securities issued under this Chapter on SME exchange or from the date of migration from Main Board in terms of regulation 106H, as the case may be.
- (2) The merchant banker may enter into agreement with nominated investors for receiving or delivering the specified securities in the market making subject to the prior approval by the SME exchange where the specified securities are proposed to be listed.
- (3) The issuer shall disclose the details of arrangement of market making in the offer document.
- (4) The specified securities being bought or sold in the process of market making may be transferred to or from the nominated investor with whom the merchant banker has entered into an agreement for the market making:

Provided that the inventory of the market maker, as on the date of allotment of the specified securities, shall be at least five per cent. of the specified securities proposed to be listed on SME exchange.

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- (5) The market maker shall buy the entire shareholding of a shareholder of the issuer in one lot, where value of such shareholding is less than the minimum contract size allowed for trading on the SME exchange:

Provided that market maker shall not sell in lots less than the minimum contract size allowed for trading on the SME exchange.

- (6) Market maker shall not buy the shares from the promoters or persons belonging to promoter group of the issuer or any person who has acquired shares from such promoter or person belonging to promoter group, during the compulsory market making period laid down under sub-regulation (1).

- (7) The promoters' holding shall not be eligible for offering to the market maker under this Chapter during the period specified in sub-regulation (1):

Provided that the promoters' holding which is not locked-in as per these regulations can be traded with prior permission of the SME exchange, in the manner specified by the Board.

- (8) Subject to the agreement between the issuer and the merchant banker/s, the merchant banker/s who have the responsibility of market making may be represented on the board of the issuer."

[Applicable for November 2010 Examination]

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 14th October, 2009/Asvina 22, 1931 (Saka)

THE COMPETITION (AMENDMENT) ORDINANCE, 2009

No. 6 OF 2009

Promulgated by the President in the Sixtieth Year of the Republic of India. A Ordinance further to amend the Competition Act, 2002.

WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for her to take immediate action;

Now, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:—

Short title and Commencement

1. (1) This Ordinance may be called the Competition (Amendment) Ordinance, 2009.
- (2) It shall come into force at once.

Amendment of section 66 of Act 12 of 2003

2. In section 66 of the Competition Act, 2002,—
 - (a) in sub-section (1), the proviso and the Explanation thereto shall be omitted;
 - (b) in sub-section (3), for the words, brackets and figure "after the expiry of two years referred to in the proviso to sub-section (1)", the words, brackets and figures "on the commencement of the Competition (Amendment) Ordinance, 2009" shall be substituted;
 - (c) in sub-section (4), for the words, brackets and figure "on or before the expiry of two years referred to in the proviso to sub-section (1)", the words, brackets and figures "immediately-before the commencement of the Competition (Amendment) Ordinance, 2009, shall, on such commencement" shall be substituted;
 - (d) in sub-section (5), for the words, brackets and figure "after the expiry of two years referred to in the proviso to sub-section (1)", the words brackets and figures "on the commencement of the Competition (Amendment) Ordinance, 2009" shall be substituted.