FINAL COURSE

STUDY MATERIAL MODULES 1 – 2

PAPER : 4

CORPORATE AND ALLIED LAWS

(REVISED SYLLABUS)

[Relevant for May, 2015 Examination and onwards]

Module – 1

Chapter 1:	Declaration and payment of dividend	Chapter-9:	Revival and rehabilitation of sick companies
Chapter 2:	Accounts and audit	Chapter-10:	Winding up
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The Institute of Chartered Accountants of India

(Set up by an act of Parliament)

New Delhi

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FINAL COURSE STUDY MATERIAL

PAPER 4

CORPORATE AND ALLIED LAWS

(REVISED SYLLABUS)

[Relevant for May, 2015 Examination & onwards]

MODULE – 1

BOARD OF STUDIES
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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A WORD ABOUT STUDY MATERIAL

The liberalisation and globalisation of our economic policies in tune with the global changes brought several reforms in the Corporate and Allied Laws of our country. A scheme of well-structured Corporate and Allied Laws is sine qua non for the corporate growth. These laws are being amended and fine tuned from time to time in accordance with the changes that are taking place within the country as well as outside. This process will continue to be more dynamic in times to come, vibrant for corporate growth, infusing more capital into the country and at the same time protecting and safeguarding the interests of various stakeholders. The Companies Bill, 2012 which was pending for approval since the year 2008 received the assent of the Hon'ble President of India on 29th August, 2013 and notified in the Official Gazette on 30th August, 2013 for public information stating that different dates may be appointed for enforcement of different provisions of the Companies Act, 2013, through notifications. The new law (i.e., the Companies Act, 2013) is rule based legislation with 470 sections and seven schedules. The entire Act has been divided into 29 chapters. The Companies Act, 2013 aims to improve corporate governance, simplify regulations, strengthens the interests of minority investors and for the first time legislates the role of whistle-blowers.

The major developments under the Companies Act, 2013 are as follows:

(i) The Ministry of Corporate Affairs (MCA) has notified 98 sections of the Companies Act, 2013 on 12th September, 2013, which came into force with immediate effect i.e. from the issue date, 12th September, 2013.

(ii) The MCA has notified section 135 on 27th February, 2014 along with Companies (Corporate Social Responsibility Policy) Rules, 2014 and Revised Schedule VII effective from 1st April, 2014.

(iii) The MCA has further notified 183 new sections of the Companies Act, 2013 on 26th March, 2014 and the remaining six schedules effective from 1st April, 2014.

As more than 60% of the Companies Act, 2013 has been notified, it was imperative to revise the Company Law portion in the existing syllabus of this subject because the framework of the existing syllabus was based on the Companies Act, 1956 and with the enactment of the new Act, the syllabus has been thoroughly revised on the basis of the Companies Act, 2013.

The study material has been prepared on the basis of the revised syllabus incorporating the sections of the Companies Act, 2013 notified upto 30th September, 2014. The provisions of the Companies Act, 2013 have been presented in a lucid and comprehensive manner. As per the revised syllabus, the provisions of the Companies

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Act, 1956 which are still in force for which the corresponding or new provisions of the Companies Act, 2013 are not notified have also been added chapter-wise at the end of each chapter, if any. This material also incorporates the significant circulars and clarifications issued by the MCA. This publication is very important to the students to update themselves with respect to the new provisions of the notified sections of the Companies Act, 2013.

The first examination of this paper based on the revised syllabus will be held in May 2015. Relevant new sections of the Companies Act, 2013 notified till 30th September, 2014 would be applicable for May 2015 examinations; and further relevant new sections of the Companies Act, 2013 notified till 31st March, 2015 would be applicable for November, 2015 examinations. This study material includes all the relevant new sections of the Companies Act, 2013 notified upto 30th September, 2014 and is applicable for May 2015 examinations. If some more sections of the Companies Act, 2013 are notified from the period 1st October, 2014 till 31st March, 2015, students would be informed about the developments through supplementary study paper or revisionary test paper for November 2015 examination. Students are advised to check the Board of Studies portal regularly for further development.

Also, for the benefit of the students, the changes in the Allied Laws have been briefly indicated in the *Highlights* which all the students must go through in order to get updated and have grip on the subject. The amendments in section B i.e. Allied Laws have been incorporated into the study material in the bold cum italics form so that students may trace them easily.

We hope that students will find this study material very user friendly and in case of any queries that they may have while reading the material, the same may be addressed to the Board of Studies. While writing your queries, it is advisable to ensure that your queries on different subjects be mailed separately by mentioning in mail the subject and the level of the course, in order to enable us to reply as fast as possible. Also, it is advisable not to include any queries other than subject queries and this shall enable us to respond you quickly.

Students can also address their queries (subject and other queries separately) to the Director, Board of Studies ICAI Bhawan, Plot A/29, Sector 62, Noida-201309 (U.P.).

Happy Reading and Best Wishes!

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HIGHLIGHTS OF THE CHANGES IN THE REVISED EDITION

SECTION – A: COMPANY LAW

Thoughourly revised as per sections of the Companies Act, 2013 notified upto 30th September, 2014 including significant Circulars and Clarifications issued by MCA.

SECTION – B: ALLIED LAWS

S.NO.	CONTENT/AMENDMENT	TOPICS COVERED IN THE STUDY MATERIAL
1.	SEBI (Issue of Capital and Disclosure Requirement) (Amendment) Regulations, 2014 vide No. LAD-NRO/GN/2013-14/44/226 dated 4th February, 2014 issued by SEBI	Chapter 19: The Securities and Exchange Board of India (SEBI) Act, 1992 [Unit II i.e. SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2009]
2.	SEBI (Issue of Capital and Disclosure Requirement) (Second Amendment) Regulations, 2014 vide No. LAD-NRO/GN/2014-15/06/1372 dated 25th August, 2014 issued by SEBI	Chapter 19: The Securities and Exchange Board of India (SEBI) Act, 1992 [Unit II i.e. SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2009]
3.	Securities Laws (Amendment) Act, 2014 vide notification dated 25th August, 2014 issued by Ministry of Law and Justice.	Chapter 19: The Securities and Exchange Board of India (SEBI) Act, 1992 and Chapter 20: Securities Contracts (Regulation) Act, 1956
4.	Clarification under section 6(4) of the Foreign Exchange Management Act, 1999 vide A.P. (DIR Series) Circular No. 90 dated 9th January, 2014 issued by RBI	Chapter 21: Foreign Exchange Management Act, 1999 (para 21.5 i.e. Regulation and Management of Foreign Exchange)

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SYLLABUS

PAPER – 4: CORPORATE AND ALLIED LAWS

(One paper - Three hours - 100 marks)

SECTION A: COMPANY LAW (70 MARKS)

Level of Knowledge: Advanced knowledge

Objective:

To be able to analyze and apply various provisions of the Company Law in practical situations

Contents:

1. The Companies Act, 2013 and Rules framed thereunder in its entirety with specific reference to
   - (a) Declaration and payment of Dividend
   - (b) Accounts and audit
   - (c) Appointment and Qualifications of Directors
   - (d) Appointment and remuneration of Managerial Personnel
   - (e) Meetings of Board and its powers
   - (f) Inspection, inquiry and Investigation
   - (g) Compromises, Arrangements and Amalgamations
   - (h) Prevention of Oppression and Mismanagement
   - (i) Revival and Rehabilitation of Sick Companies
   - (j) Winding Up
   - (k) Producer Companies
   - (l) Companies incorporated outside India
   - (m) Offences and Penalties
   - (n) E-governance

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(o) National Company Law Tribunal and Appellate Tribunal

(p) Special Courts

(q) Miscellaneous Provisions

2. Corporate Secretarial Practice–Drafting of Resolution, Minutes, Notices and Reports

Note: The provisions of the Companies Act, 1956 which are still in force would form part of the syllabus till the time their corresponding or new provisions of the Companies Act, 2013 are enforced.

SECTION B: ALLIED LAWS (30 MARKS)

Objective:

To develop ability to analyse the requirements of laws stated in the Section.

Contents:

3. An overview of the following laws –

   (a) The Securities and Exchange Board of India Act, 1992, Rules, Regulations and Guidelines issued thereunder.

   (b) Securities Contracts (Regulation) Act, 1956

   (c) The Foreign Exchange Management Act, 1999

   (d) The Competition Act, 2002

   (e) The Banking Regulation Act, 1949, The Insurance Act, 1938. The Insurance Regulatory and Development Authority Act, 1999. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

   (f) The Prevention of Money Laundering Act, 2002

4. Interpretation of Statutes, Deeds and Documents.

Note: If new legislations are enacted in place of the existing legislations, the syllabus would include the corresponding provisions of such new legislations with effect from a date notified by the Institute.

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1

Declaration and Payment of Dividend

1.1 Meaning of Dividend

The literal meaning of the term 'dividend' stands for the sum payable as interest on loan or as share of profit to shareholders in a business of a company or a profit of a company to the creditors of the ruined property or as an individual's share of it. Whereas in commercial sense, dividend has two meanings: one in relation to companies as going concerns as a portion of profits earned and allocated as payable to the shareholders yearly or whenever declared, and the other arising in winding up as that part of the residuary balance left after settling all creditors in full to be divided as between the contributories according to their respective rights from out of the value of the assets realized. The term dividend is used in this chapter in the former sense i.e. portion of profits allocated to the holders of shares.

1.2 Declaration of dividend (Section 123 of the Companies Act, 2013)

A new section 123 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for declaration of dividend. According to this section:

(i) *Dividend shall be declared or paid by a company for any financial year only—*

(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of section 123(2), 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

[Note: Such depreciation shall be provided in accordance with the provisions of Schedule II.]

(c) out of both; or

(d) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government.

(ii) *Transfer to reserves*: A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Therefore, the company may transfer such percentage of profit to reserves before declaration of dividend as it may

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consider necessary. Such transfer is not mandatory and the percentage to be transferred to reserves is to be decided at the discretion of the company.

(iii) *Declaration of dividend out of accumulated profits*: Where a company, owing to inadequacy or absence of profits in any financial year, proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall be made only in accordance with prescribed rules. Such dividend shall be declared or paid by a company only from its free reserves. No other reserve can be utilized for the purposes of declaration of such dividend.

For declaration of dividend out of accumulated profits, the Ministry of Corporate Affairs has provided *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:

(a) 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:

However, this rule will not apply if a company has not declared any dividend in each of the three preceding financial year.

(b) 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.

Therefore,

Total amount that can be drawn from accumulated profits	$\leq$	1/10 of (Paid up share capital + Free reserves)

(c) The amount so drawn shall first be utilised 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.

(d) 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.

(e) No company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company of the current year. *[The Companies (Declaration and Payment of Dividend) Amendment Rules, 2014.]*

(iv) *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 five days from the date of declaration of such dividend.

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(v) *Payment of dividend:* According to section 123(5):

(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) Nothing in sub-section 5 of section 123, shall prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

(vi) *Prohibition on declaration of dividend:* The Act by virtue of Section 123 (6) specifically provides that a company which fails to comply with the provisions of section 73 (Prohibition on acceptance of deposits from public) and section 74 (Repayment of deposits, etc., accepted before the commencement of this Act) shall not, so long as such failure continues, declare any dividend on its equity shares.

Interim Dividend:

According to section 2(35), "dividend" includes any interim dividend.

According to section 123(3), the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 205 and 205A (3) of the Companies Act, 1956 i.e. 'Dividend to be paid only out of profits' and 'Unpaid dividend to be transferred to special account'.

(ii) According to the Companies Act, 2013, a company which fails to comply with the provisions of section 73 (Prohibition on acceptance of deposits from public) and section 74 (Repayment of deposits, etc., accepted before commencement of this Act) shall not, so long as such failure continues, declare any dividend on its Equity shares. However, according to the Companies Act, 1956 the restriction was imposed only in case of failure of redeem redeemable preference accepted before the commencement of the Companies Act, 1956.

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(iii) According to the New Act, a company can at its discretion transfer such % of profit to the reserves before declaring dividend as it deem necessary and such transfer is not mandatory. However, under the Old Act, it was mandatory to transfer a certain specified percentages before declaration of dividend.

(iv) According to the Companies Act, 1956, the Central Government may, in the public interest, allow any company to declare or pay dividend for any financial year out of the profits for that year or any previous financial year or years without providing for depreciation. However, under the New Act, no such provision is there.

(v) Under the New Act, it has been provided that no dividend shall be declared or paid by a company from its reserves other than free reserves. No such provision was there under the Old Act.

1.3 Right of dividend, rights shares and bonus shares to be held in abeyance pending registration of transfer of shares (Section 126 of the Companies Act, 2013)

A new section 126 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Right of dividend, rights shares and bonus shares to be held in abeyance pending registration of transfer of shares. According to this section:

Where any instrument of transfer of shares has been delivered to any company for registration and the transfer of such shares has not been registered by the company, the company shall —

(a) transfer the dividend in relation to such shares to the Unpaid Dividend Account referred to in section 124 unless the company is authorised by the registered holder of such share in writing to pay such dividend to the transferee specified in such instrument of transfer; and

(b) keep in abeyance in relation to such shares any offer of rights shares under clause (a) of sub-section (1) of section 62 and any issue of fully paid-up bonus shares in pursuance of first proviso to sub-section (5) of section 123.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 206A of the Companies Act, 1956 i.e. Right to dividend, right shares and bonus shares to be held in abeyance pending registration of shares.

1.4 Punishment for failure to distribute dividends (Section 127 of the Companies Act, 2013)

A new section 127 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for punishment for failure to distribute dividend on time. According to this section:

(i) Where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is

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knowingly a party to the default, be punishable with imprisonment which may extend to two years.

(ii) He shall also be liable for a fine which shall not be less than 1,000 rupees for every day during which such default continues.

(iii) 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.

(iv) However, the following are the exceptions under which no offence shall be deemed to have been committed:

(a) where the dividend could not be paid by reason of the operation of any law;

(b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him;

(c) where there is a dispute regarding the right to receive the dividend;

(d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder; or

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 207 of the Companies Act, 1956 i.e. penalty for failure to distribute dividends within thirty days. The provisions under the old and the new Acts are more or less similar.

(ii) Under the Companies Act, 1956, the director of the company, if he is knowingly a party to the default, shall be liable for the imprisonment which may extend to three years in case of failure to pay dividend within 30 days. The imprisonment for the default has now been reduced to two years under the Companies Act, 2013.

(iii) Earlier under the Companies Act, 1956, if a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with, then no offence shall be deemed to be committed. But under the Companies Act, 2013, it shall be deemed to be an offence. However, if the same (i.e. directions cannot be complied with) has been communicated to the shareholder, then no offence shall be deemed to be committed.

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RELEVANT SECTIONS OF THE COMPANIES ACT, 1956 APPLICABLE FOR EXAMINATIONS

1. Unpaid or Unclaimed Dividend (Section 205A of the Companies Act, 1956)

Where a dividend has been declared by a company but has not been paid, or claimed within thirty days from the date of the declaration, to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed within the said period of thirty days, to a special account to be opened by the company in that behalf in any scheduled bank, to be called "Unpaid Dividend Account of …….Company Limited/Company (Private) Limited".

The expression 'dividend which remains unpaid' means any dividend the warrant in respect thereof has not been encashed or which has otherwise not been paid or claimed.

Where the default is made in transferring the unpaid or unclaimed amount of dividend to the unpaid dividend account of the company, the company shall, from the date of such default, pay interest on so much of the amount as has not been transferred to the said account, at the rate of 12% per annum and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

Any money transferred to the unpaid dividend account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company to the Investor Education and Protection Fund established under sub-section (1) of section 205C of the Companies Act, 1956.

If a company fails to comply with any of the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 5000 for every day during which the failure continues.

2. Payment of Unpaid or Unclaimed Dividend (Section 205A (5) of the Companies Act, 1956)

According to Section 205A (5) of the Companies Act, 1956, any money transferred to the unpaid dividend account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company to the Investor Education and Protection Fund established under sub-section (1) of section 205C of the Companies Act, 1956.

No claims shall lie against the Investor Education and Protection Fund or the company in respect of individual amounts which were unclaimed and unpaid for a period of seven years from the dates that they first became due for payment and no payment shall be made in

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respect of any such claims. [Explanation to sub-section (2) of section 205A of the Companies Act, 1956]

3. Investor Education & Protection Fund (Section 205C of the Companies Act, 1956)

The Central Government shall establish a fund, called as Investor Education and Protection Fund. The Fund shall be utilized for promotion of investors' awareness and protection of the interests of investors in accordance with such rules as may be prescribed.

The following amounts shall be credited to the Fund:

(a) amounts in the unpaid dividend accounts of companies;

(b) the application moneys received by companies for allotment of any securities and due for refund;

(c) matured deposits with companies;

(d) matured debentures with companies;

(e) the interest accrued on the amounts referred to in (a) to (d) as above;

(f) grants and donations given to the Fund by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund; and

(g) the interest or other income received out of the investments made from the Fund:

However, the amounts referred to in clauses (a) to (d) shall not form the part of the Fund, unless such amounts have remained unclaimed and unpaid for a period of seven years from the date they became due for payment.

On the contrary no claims shall lie against the Investor Education and Protection Fund or the company in respect of individual amounts which were unclaimed and unpaid for a period of seven years from the dates that they first became due for payment and no payment shall be made in respect of any such claims.

4. Payment of Interest Out of Capital (Section 208 of the Companies Act, 1956)

Where any shares in a company are issued for the purpose of raising money to defray the expenses of the construction of any work or building, or the provision of any plant, which cannot be made profitable for a lengthy period, the company may—

(i) pay interest on so much of that share capital as is for the time being paid up, for the period and subject to certain conditions and restrictions.

(ii) charge the sum so paid by way of interest, to capital as part of the cost of construction of the work or building, or the provision of the plant.

No such payment shall be made unless it is authorised by the articles or by a special resolution.

No such payment, whether authorised by the articles or by special resolution, shall be made

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without the previous sanction of the Central Government.

Before sanctioning any such payment, the Central Government may, at the expense of the company, appoint a person to inquire into, and report to the Central Government on, the circumstances of the case; and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry.

The payment of interest shall be made only for such period as may be determined by the Central Government; and that period shall in no case extend beyond the close of the half-year next after the half-year during which the work or building has been actually completed or the plant provided.

The rate of interest shall, in no case, exceed four per cent per annum or such other rate as the Central Government may, by notification in the Official Gazette, direct.

The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

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2

Accounts and Audit

UNIT 1: ACCOUNTS OF COMPANIES

2.1 Books of account, etc., to be kept by company (Section 128 of the Companies Act, 2013)

A new section 128 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Books of account, etc., to be kept by company. According to this section:

(i) Maintenance of books of accounts [Section 128(1)]:

(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.

(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 Accounts shall be kept on accrual basis and according to the double entry system of accounting.

(ii) Place of maintenance of books of accounts [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 accounts at any other place in India as the Board of directors may decide. In such a case, the company should file with the Registrar of Companies, a notice in writing giving the full address of that place within 7 days of the Boards' decision.

(iii) Electronic form of Books of accounts:

(a) 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.

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(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.

(iv) Proper books of account in relation to a branch of the company:

(a) Proper books of account relating to the transactions effected at the branch office in India or outside India shall be kept at that branch office.

(b) 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.

(v) 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 *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

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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) 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.

(vi) 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 accounts shall be kept in 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 in respect of all such preceding years.

(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.

(vii) 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 such provisions, they shall be punishable with:

(1) Imprisonment for a term which may extend to 1 year; or

(2) Fine which shall not be less than ₹ 50,000 but which may extend to ₹5 lakh; or

(3) Both with imprisonment or fine.

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The MCA vide General Circular No. 08/2014 dated 4th April, 2014 has clarified that the financial statements (and documents required to be attached thereto), auditor's report and Board's report in respect of financial years that commenced earlier than 1st April, 2014 shall be governed by the relevant provisions/ Schedules/ rules of the Companies Act, 1956 and that in respect of financial years commencing on or after 1st April, 2014, the provisions of the Companies Act, 2013 shall apply.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 209 of the Companies Act, 1956 i.e. Books of Account to be kept by company.

(ii) Earlier under the old Act, list of books of accounts to be prepared was given but now under the new Act, the same has been provided by way of definition of "Books of Accounts".

(iii) Under the new Act, the books of accounts may be kept in electronic form also.

(iv) Earlier under section 209 of the old Act, the books of account and other books and papers shall be open to inspection by any director during business hours. But now under the new Act, the books of accounts 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, and 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 may be prescribed.

(v) Section 128 of the Companies Act, 2013 provides that 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.

(vi) 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. This was not present under section 209 of the Companies Act, 1956.

(vii) The punishment in case of contravention of provisions related to keeping of Books of Accounts has been increased.

2.2 Financial Statement (Section 129 of the Companies Act, 2013)

A new section 129 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for financial statement. According to this section:

(i) Form of Financial statements [Section 129(1)]:

(a) 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

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(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.

(b) The above provisions relating to nature and content of financial statement shall not apply to following companies:

(1) Insurance Companies

(2) Banking companies

(3) Company engaged in the generation or supply of electricity

(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.

(c) 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 -

Type of Company	Matters
Insurance Company	Matters which are not required to be disclosed by the Insurance Act, 1938, or the Insurance Regulatory and Development Authority Act, 1999
Banking company	Matters which are not required to be disclosed by the Banking Regulation Act, 1949
Company engaged in the generation or supply of electricity	Matters which are not required to be disclosed by the Electricity Act, 2003
Company governed by any other law	Matters which are not required to be disclosed by that law

(d) 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.

(ii) Laying of financial statements [Section 129(2)]:

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

(iii) 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

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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 and joint venture.

(e) According to *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.

(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.

(iv) 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

(v) 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.

(vi) Contravention [Section 129(7)]:

(a) 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

(1) Imprisonment for a term which may extend to 1 year; or

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(2) Fine which shall not be less than ₹50,000 but which may extend to ₹ 5 Lakhs; or

(3) Both with imprisonment and fine.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 210 of the Companies Act, 1956 i.e. Annual accounts and balance-sheet, section 211 of the Companies Act, 1956 i.e. Form and contents of balance sheet and profit and loss account and section 212 of the Companies Act, 1956 i.e. Balance sheet of holding company to include certain particulars as to its subsidiaries.

(ii) The term Balance Sheet & Profit & Loss Account as used under the old Act, has been defined collectively as financial statement under the new Act.

(iii) Now, 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*.

(iv) 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.

(v) Earlier, under the old Act, Central Government may exempt by way of notification any class or classes of companies from complying with any of the requirements of this clause or the rules made thereunder, if it is considered necessary to grant such exemption in the public interest. But now under the new Act, exemption by Central Government may be granted on an application by a class or classes of companies.

(vi) The punishment in case of contravention of the provisions related to financial statements has been increased.

(vii) Section 129 of the Companies Act, 2013 does not distinguish between the fact whether the default has been committed willfully or not, for the purpose of the imprisonment.

(viii) Section 129 of the Companies Act, 2013 does not prescribe whether financial year can be extended or not.

(ix) Under the new Act, private companies are also required to prepare consolidated Financial Statements and Cash Flow Statements.

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2.3 Central Government to prescribe Accounting Standards (Section 133 of the Companies Act, 2013)

Section 211 of the Companies Act, 1956 contains provisions relating to form and contents of balance sheet and profit and loss account. According to the section, balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall be in the form set out in part I of Schedule VI. Profit and loss account of a company shall give a true and fair view of the profit and loss of the company for the financial year and shall comply with the requirements of Part II of schedule VI.

According to Section 211(3B) of the Companies Act, 1956, where the profit and loss account and the balance sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and balance sheet, the following, namely:

(a) the deviation from the accounting standards;

(b) the reasons for such deviation; and

(c) the financial effect, if any, arising due to such deviation.

Earlier the meaning of expression "accounting standards" was given under section 211(3C) of the Companies Act, 1956 but this section has been repealed by *MCA vide Circular No. 16/2013 dated 18th September, 2013* and a new section 133 of the Companies Act, 2013 came into force on 12th September, 2013 which provides the provisions for Central Government to prescribe accounting standards. According to section 133 of the Companies Act, 2013:

"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 is limited to advise the Central Government on the accounting standards recommended by ICAI for adoption by companies.

The Ministry of Corporate Affairs (MCA) vide General Circular No. 15/2013 dated 13th September, 2013 has clarified that till the Standards of Accounting or any addendum thereto are prescribed by Central Government in consultation and recommendation of the National Financial Reporting Authority, the existing Accounting Standards notified under the Companies Act, 1956 shall continue to apply.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 211(3C) of the Companies Act, 1956.

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(ii) The National Advisory Committee on Accounting Standards has been replaced with National Financial Reporting Authority to give consultation to the Central Government on the accounting standards recommended by ICAI.

2.4 Financial Statement, Board's report, etc (Section 134 of the Companies Act, 2013)

A new 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:

(i) Authentication of Financial statements [Section 134(1), (2) & (7)]:

(a) 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:

(1) The chairperson of the company where he is authorised by the Board; or

(2) By two directors out of which one shall be managing director and

(3) The Chief Executive Officer, if he is a director in the company,

(4) The Chief Financial Officer, wherever he is appointed; and

(5) The company secretary of the company, wherever he is appointed.

(b) 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.

(c) The auditors' report shall be attached to every financial statement.

(d) 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—

(1) Any notes annexed to or forming part of such financial statement;

(2) The auditor's report; and

(3) The Board's report.

(ii) Board's report [Section 134(3) & (4)]:

(a) According to *Companies (Accounts) Rules, 2014*, the Board's Report shall be prepared based on the stand alone financial statements of the company and the report shall contain a separate section wherein a report on the performance and financial position of each of the subsidiaries, associates and joint venture companies included in the consolidated financial statement is presented.

(b) There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include —

(1) The extract of the annual return as provided under sub-section (3) of section 92;

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(2) Number of meetings of the Board;

(3) Directors' Responsibility Statement;

(4) a statement on declaration given by independent directors under sub-section (6) of section 149;

(5) in case of a company covered under sub-section (1) of section 178, 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;

(6) 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;

(7) particulars of loans, guarantees or investments under section 186;

(8) particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in *Form AOC-2*;

(9) the state of the company's affairs;

(10) the amounts, if any, which it proposes to carry to any reserves;

(11) the amount, if any, which it recommends should be paid by way of dividend;

(12) 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;

(13) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as prescribed under the *Companies (Accounts) Rules, 2014* which provides for:

  (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)-

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(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.

(14) 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;

(15) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year;

(16) Every listed company and every other public company having a paid up share capital of 25 crore rupees 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.

(17) The report of the Board shall also contain (as prescribed under the *Companies (Accounts) Rules, 2014* –

(i) the financial summary or highlights;

(ii) the change in the nature of business, if any;

(iii) the details of directors or key managerial personnel who were appointed or have resigned during the year;

(iv) the names of companies which have become or ceased to be its subsidiaries, joint ventures or associate companies during the year;

(v) the details relating to deposits like-

(a) accepted during the year;

(b) remained unpaid or unclaimed as at the end of the year;

(c) whether there has been any default in repayment of deposits or payment of interest thereon during the year and if so, number of such cases and the total amount involved-

(1) at the beginning of the year;

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(2) maximum during the year;

(3) at the end of the year;

(vi) the details of deposits which are not in compliance with the requirements of Chapter V of the Act;

(vii) the details of significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future;

(viii) the details in respect of adequacy of internal financial controls with reference to the Financial Statements.

(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.

(iii) Directors' Responsibility Statement [Section 134(5)]:

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

(1) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;

(2) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;

(3) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;

(4) the directors had prepared the annual accounts on a going concern basis; and

(5) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

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

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completeness of the accounting records, and the timely preparation of reliable financial information;

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

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

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

(v) Contravention [Section 134(8)]:

(a) If a company contravenes any provisions of this section, the company shall be punishable with fine which shall not be less than ₹50,000 but which may extend to ₹25 Lacs.

(b) Every officer of the company who is in default shall be punishable with:

(1) Imprisonment for a term which may extend to 3 years; or

(2) fine which shall not be less than ₹50,000 but which may extend to ₹ 5 Lacs; or

(3) Both with imprisonment and fine

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 215 of the Companies Act, 1956 i.e. authentication of balance sheet and profit and loss account, section 216 of the Companies Act, 1956 i.e. Profit and loss account to be annexed and auditors' report to be attached to balance sheet and section 217 of the Companies Act, 1956 provided the provisions for Board's report.

(ii) The requirement of authentication of financial statements under the new Act has been changed.

(iii) Various new disclosures have been included under the Board Report under the new Act.

(iv) Two new declarations have been included under the Director's Responsibility Statement of the new Act.

(v) The punishment in case of contravention of the provisions related to this section has been increased.

(vi) Section 134 of the Companies Act, 2013 does not distinguish between the fact whether the default has been committed willfully or not, for the purpose of the imprisonment.

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2.5 Corporate Social Responsibility (Section 135 of the Companies Act, 2013)

There was no provision under the Companies Act, 1956 for corporate Social Responsibility (CSR). The Companies Act, 2013 for the first time has introduced a welcome provision requiring corporate to mandatorily spend a prescribed percentage of their profits on certain specified areas of social upliftment in discharge of their social responsibilities. A new section 135 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for it.

Broadly, CSR implies a concept, whereby companies decide voluntarily to contribute to a better society and a cleaner environment – a concept, whereby the companies integrate social and other useful concerns in their business operations for the betterment of its stakeholders and society in general in a voluntary way.

Corporate Social Responsibility: *The Companies (CSR Policy) Rules, 2014* provides the exhaustive definition of CSR which provides that the CSR means and includes but is not limited to:-

(i) Projects or programs relating to activities specified in Schedule VII to the Act; or

(ii) Projects or programs relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act.

According to section 135 of the Companies Act, 2013:

(i) Which Company is required to constitute CSR committee:

(a) Every company including its holding or subsidiary, and a foreign company defined under section 2(42) of the Companies Act, 2013 having its branch office or project office in India, having

(1) net worth of rupees 500 crore or more, or

(2) turnover of rupees 1000 crore or more or

(3) a net profit of rupees 5 crore or more

during any financial year shall constitute a Corporate Social Responsibility Committee of the Board.

(b) The CSR Committee shall institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

(c) However, the net worth, turnover or net profit of a foreign company shall be computed in accordance with balance sheet and profit and loss account of such company as prepared in accordance with the provisions of section 381(1)(a) and section 198 of the Act.

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(ii) Exclusion of Companies

Every company which ceases to be a company covered under sub- section (1) of section 135 of the Act for three consecutive financial years

(1) shall not be required to constitute a CSR Committee, and

(2) is not required to comply with the provisions as per section 135

(iii) Composition of CSR Committee:

(a) The CSR Committee shall be consisting of three or more directors, out of which at least one director shall be an independent director.

(b) An unlisted public company or a private company which is not required to appoint an independent director shall have its CSR Committee without such director.

(c) A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

(d) With respect to a foreign company covered as above, the CSR Committee shall comprise of at least two persons of which one person shall be as specified under section 380(1)(d) of the Act and another person shall be nominated by the foreign company.

(e) The Board's report under sub-section (3) of section 134 shall disclose the composition of the CSR Committee.

(iv) Duties of CSR Committee:

The CSR Committee shall,—

(a) formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the CSR Policy of the company from time to time.

(v) Contents of the CSR Policy:

(a) List of CSR projects or programs which a company plans to undertake falling within the purview of the Schedule VII of the Act, specifying modalities of execution of such project or programs and implementation schedules for the same; and

(b) monitoring process of such projects or programs:

(c) However, the CSR activities do not include the activities undertaken in pursuance of normal course of business of a company.

(d) The Board of Directors shall ensure that activities included by a company in its CSR Policy are related to the activities included in Schedule VII of the Act.

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(c) The CSR Policy of the company shall specify that the surplus arising out of the CSR projects or programs or activities shall not form part of the business profit of a company.

(vi) Duties of the Board in relation to CSR:

The Board of every company referred to in sub-section (1) shall,—

(1) after taking into account the recommendations made by the CSR Committee, approve the CSR 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

(2) ensure that the activities as are included in CSR Policy of the company are undertaken by the company.

(vii) Amount of contribution towards CSR:

(a) 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, in pursuance of its CSR Policy.

(b) The company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities.

(c) If the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount

(d) Companies may build CSR capacities of their own personnel as well as those of their Implementing agencies through Institutions with established track records of at least three financial years. However, such expenditure *including expenditure on administrative overheads,* [inserted by the *Companies (Corporate Social Responsibility Policy) Amendment Rules, 2014*] shall not exceed five percent. of total CSR expenditure of the company in one financial year.

(viii) Exceptions to CSR Activities:

The *Companies (CSR Policy) Rules, 2014* provides for some activities which are not considered as CSR activities:

(1) The CSR projects or programs or activities undertaken outside India.

(2) The CSR projects or programs or activities that benefit only the employees of the company and their families.

(3) Contribution of any amount directly or indirectly to any political party under section 182 of the Act.

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(ix) Calculation of Average Net profit:

(a) Here, "average net profit" shall be calculated in accordance with the provisions of section 198.

(b) "Net profit" shall not include the following:

(1) Any profit arising from any overseas branch or branches of the company, whether operated as a separate company or otherwise; and

(2) Any dividend received from other companies in India, which are covered under and complying with the provisions of section 135 of the Act.

(c) However, net profits in respect of a financial year for which the relevant financial statements were prepared in accordance with the provisions of the Companies Act, 1956, shall not be required to be re-calculated in accordance with the provisions of the Act:

(d) It is further provided that in case of a foreign company covered under these rules, net profit means the net profit of such company as per profit and loss account prepared in terms of clause (a) of sub-section (1) of section 381 read with section 198 of the Act.

(x) CSR Reporting:

(a) The Board's Report of a company covered under these rules pertaining to a financial year commencing on or after the 1st day of April, 2014 shall include an annual report on CSR.

(b) In case of a foreign company, the balance sheet filed under section 381(1)(b) shall contain an Annexure regarding report on CSR.

(xi) Activities specified under Schedule VII:

Activities which may be included by companies in their CSR Policies Activities as specified under Schedule VII are as follows:

(1) eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation and making available safe drinking water;

(2) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;

(3) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;

(4) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and

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maintaining quality of soil, air and water;

(5) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;

(6) measures for the benefit of armed forces veterans, war widows and their dependents;

(7) training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;

(8) contribution to the Prime Minister's National Relief Fund or any other -fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;

(9) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;

(10) rural development projects;

(11) slum area development. [For the purposes of this item, the term 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.] [*Inserted by MCA vide Notification G.S.R. 568(E) dated 6th August, 2014.*]

The MCA vide General Circular No. 21/2014 dated 18th June, 2014 has provided many clarifications with regard to provisions of Corporate Social Responsibility under section 135 of the Companies Act, 2013 which are as under:

(i) The statutory provision and provisions of CSR Rules, 2014, is to ensure that while activities undertaken in pursuance of the CSR policy must be relatable to Schedule VII of the Companies Act 2013, the entries in the said Schedule VII must be interpreted liberally so as to capture the essence of the subjects enumerated in the said Schedule.

(ii) It is further clarified that CSR activities should be undertaken by the companies in project/ programme mode. One-off events such as marathons/ awards/ charitable contribution/ advertisement/ sponsorships of TV programmes etc. would not be qualified as part of CSR expenditure.

(iii) Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act.

(iv) Salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

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(v) "Any financial year" referred under Sub-Section (1) of Section 135 of the Act read with Companies CSR Rule, 2014, implies 'any of the three preceding financial years'.

(vi) Expenditure incurred by Foreign Holding Company for CSR activities in India will qualify as CSR spend of the Indian subsidiary if, the CSR expenditures are routed through Indian subsidiaries and if the Indian subsidiary is required to do so as per section 135 of the Act.

(vii) 'Registered Trust' would include Trusts registered under Income Tax Act 1956, for those States where registration of Trust is not mandatory.

(viii) Contribution to Corpus of a Trust/ society/ section 8 companies etc. will qualify as CSR expenditure as long as (a) the Trust/ society/ section 8 companies etc. is created exclusively for undertaking CSR activities or (b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section now provides for Corporate Social Responsibility. There was no such provision in the Companies Act, 1956.

2.6 Right of member to copies of Audited Financial Statement (Section 136 of the Companies Act, 2013)

A new section 136 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for right of member to copies of audited financial statement. According to this section:

(i) Who are entitled for audited financial statement?

(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, auditor's 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.

(d) In the case of a listed company:

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(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.

(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.

(ii) Manner of circulation of financial statements in certain cases:

(a) In case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent-

(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 despatch of physical copies through any recognised mode of delivery as specified under section 20 of the Act, in all other cases.

(b) 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.

(iii) Subsidiary Companies:

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.

(iv) 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.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 219 of the Companies Act, 1956 i.e. right of member to copies of balance-sheet and auditors' report.

(ii) As per section 136 of the Companies Act, 2013, 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. Further every Company is required to place separate audited accounts in respect of each of its subsidiary, on its website if any, which is maintained by or on behalf of the Company.

(iii) As per section 136 of the Companies Act, 2013, every members and debenture trustee shall be allowed to inspect the financial statements and other documents, at registered office, during business hours.

(iv) As per section 136 of the Companies Act, 2013, the Central Government may prescribe the manner of circulation of financial statements by Companies having such Net Worth and turnover, as may be prescribed.

(v) As per the old Act, certain persons need not be sent copies of aforesaid documents. This is not present under section 136 of the Companies Act, 2013.

(vi) The punishment in case of contravention of the provisions related to this section has been increased in case of default by company.

2.7 Copy of financial statement to be filed with Registrar (Section 137 of the Companies Act, 2013)

A new section 137 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for copy of financial statement to be filed with Registrar. According to this section:

(i) Filing of financial statements [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.

(ii) If Financial Statement are not adopted [Section 137(1)]:

(a) 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.

(b) The Registrar shall take them in his records as provisional till the financial

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statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.

(c) 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.

(iii) Filing by One Person Company [Section 137(1)]:

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

(iv) Company having subsidiaries [Section 137(1)]:

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

(v) 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 thirty 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.

(vi) Penalty [Section 137(3)]: If any of the provisions of this section are contravened,

(a) The company shall be punishable with fine of ₹1,000 for every day during which the failure continues but which shall not be more than ₹10 Lacs, 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 punishable with:

(1) Imprisonment for a term which may extend to 6 months or

(2) Fine which shall not be less than ₹1 lac but which may extend to ₹5 Lacs, or

(3) Both with imprisonment and fine.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
(i) This section corresponds to section 220 of the Companies Act, 1956 i.e. three copies of balance-sheet, etc., to be filed with Registrar.

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(ii) The new Act provides that 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. 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. 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.

(iii) Under the new Act, 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 statement within 180 days from the closure of the financial year.

(iv) Now, under the new Act, every Company at the time of filling their financial statements with the Registrar shall also 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.

(v) The punishment in case of contravention of the provisions related to this section has been increased in case of default.

2.8 Internal Audit (Section 138 of the Companies Act, 2013)

There was no provision under the Companies Act, 1956 for Internal Audit. A new section 138 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for it. According to section 138 of the Companies Act, 2013 and *the Companies (Accounts) Rules, 2014*:

(i) Companies required to appoint Internal Auditor:

(a) The following class of companies shall be required to appoint an internal auditor or a firm of internal auditors, namely:-

(1) every listed company;

(2) every unlisted public company having-

(A) paid up share capital of 50 crore rupees or more during the preceding financial year; or

(B) turnover of 200 crore rupees or more during the preceding financial year; or

(C) outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year; or

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(D) outstanding deposits of 25 crore rupees or more at any point of timeduring the preceding financial year; and

(3) every private company having-

(A) turnover of 200 crore rupees or more during the preceding financial year; or

(B) outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year.

(b) The Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, formulate the scope, functioning, periodicity and methodology for conducting the internal audit.

(ii) Transitional period:

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

(iii) Who is Internal Auditor

(a) Internal Auditor shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.

Here, the term "Chartered Accountant" shall mean a Chartered Accountant whether engaged in practice or not.

(b) The internal auditor may or may not be an employee of the company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
This section now provides for Internal Auditor. There was no such provision for mandatory internal audit in the old Act.

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2.9 Appointment of auditors (Section 139 of the Companies Act, 2013)

A new section 139 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for appointment of auditors. According to this section:

(i) Appointment of auditor [Section 139(1)]:

(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:

(1)

Categories of Companies	Competent authority	Responsibility of the competent authority
A company which is required to constitute an Audit Committee under section 177	Audit Committee	(i) The competent authority shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and whether such qualifications and experience are commensurate with the size and requirements of the company. (ii) It shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India or any competent authority or any Court. (iii) It may call for such other information from the proposed auditor as it may deem fit.
A Company which is not required to constitute an Audit Committee under section 177	Board	

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(2)

Categories of Companies	Competent authority	Responsibility of the competent authority
A company which is required to constitute an Audit Committee under section 177	Audit Committee	the committee shall recommend the name of an individual or a firm as auditor to the Board for consideration
A Company which is not required to constitute an Audit Committee under section 177	Board	the Board shall consider and recommend an individual or a firm as auditor to the members in the annual general meeting for appointment

(3) If the Board agrees with the recommendation of the Audit Committee, it shall further recommend the appointment of an individual or a firm as auditor to the members in the AGM.

(4) If the Board disagrees with the recommendation of the Audit Committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.

(5) If the Audit Committee, after considering the reasons given by the Board, decides not to reconsider its original recommendation, the Board shall record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the 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) The company shall place the matter relating to such appointment for ratification by members at every AGM. According to *the Companies (Audit and Auditors) Rules, 2014*, the appointment shall be subject to ratification in every annual general meeting till the 6th meeting by way of passing of an ordinary resolution.

If the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditor or auditors after following the procedure laid down in this behalf under the Act.

(e) 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.

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 –

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(A) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;

(B) the proposed appointment is as per the term provided under the Act;

(C) the proposed appointment is within the limits laid down by or under the authority of the Act;

(D) the list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

(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

Here, "appointment" includes reappointment.

(ii) Term of Auditor [Section 139(2)]:

(a) Section 139(2) provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint-

(1) an individual as auditor for more than one term of five consecutive years; and

(2) an audit firm as auditor for more than two terms of five consecutive years.

(b) *The Companies (Audit and Auditors) Rules, 2014* has prescribed the following classes of companies for the purposes of section 139(2):

(1) all unlisted public companies having paid up share capital of rupees 10 crore or more;

(2) all private limited companies having paid up share capital of rupees 20 crore or more;

(3) all companies having paid up share capital of below threshold limit mentioned in (2) and (3) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crores or more.

(c) Cooling off Period:

(1) An individual auditor who has completed his term (i.e. one term of five consecutive years) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

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(2) An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.

For Ex: XYZ Ltd. which is a listed company appoints Mr. Raghav as an auditor in its AGM dated 29th September, 2014. Mr. Raghav will hold office of Auditor from the conclusion of this meeting upto conclusion of sixth AGM i.e. AGM to be held in the year 2019. Now as per sub-section (2), Mr. Raghav shall not be re-appointed as Auditor in XYZ Ltd. for further term of five years i.e. he cannot be appointed as Auditor upto year 2024.

For Ex: XYZ Ltd. which is a listed company appoints M/s Raghav & Associates as an audit firm in its AGM dated 29th September, 2014. M/s Raghav & Associates will hold office from the conclusion of this meeting upto conclusion of sixth AGM to be held in the year 2019. Now as per sub-section (2), M/s Raghav & Associates can be appointed or re-appointed as auditor for one more term of five years i.e. upto year 2024. It shall not be re-appointed as Audit firm in XYZ Ltd. for further term of five years i.e. upto year 2029.

(d) Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

For ex: M/s Krishna & Associates is an audit firm having 2 partners namely Mr. Krishna and Mr. Shyam. Mr. Shyam is also a partner of another audit firm named M/s Kukreja & Associates. M/s Krishna & Associates was appointed as the auditors in the company Golden Smith Ltd. for two consecutive periods i.e. from year 2014 to year 2024. Now, if Golden Smith Ltd. wants to appoint M/s Kukreja & Associates as its audit firm, it can not do so because Mr. Shyam was the common partner between both the Audit firms. This prohibition is only for 5 years i.e. upto year 2029. After 5 years Golden Smith Ltd. may appoint M/s Kukreja & Associates as its auditors.

(e) Transitional period: 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 three years from the date of commencement of this provision.

(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.

(iii) Rotation of auditor [section 139(3) and (4)]:

(a) Members of a company may resolve to provide that—

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(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) the audit shall be conducted by more than one auditor.

(b) The Central Government may, by rules, prescribe the manner in which the companies shall rotate their auditors.

(c) Manner of rotation of auditors by the companies on expiry of their term as provided under t*he Companies (Audit and Auditors) Rules, 2014:*

(1) The Audit Committee shall recommend to the Board, the name of an individual auditor or of an audit firm who may replace the incumbent auditor on expiry of the term of such incumbent.

(2) Where a company is required to constitute an Audit Committee, the Board shall consider the recommendation of such committee, and in other cases, the Board shall itself consider the matter of rotation of auditors and make its recommendation for appointment of the next auditor by the members in annual general meeting.

(3) For the purpose of the rotation of auditors-

(i) in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of five consecutive years or ten consecutive years, as the case may be;

(ii) the incoming auditor or audit firm shall not be eligible if such auditor or audit firm is associated with the outgoing auditor or audit firm under the same network of audit firms.

The term "same network" includes the firms operating or functioning, hitherto or in future, under the same brand name, trade name or common control.

(iii) For the purpose of rotation of auditors,-

(A) a break in the term for a continuous period of five years shall be considered as fulfilling the requirement of rotation;

(B) if a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of five years.

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Illustration explaining rotation in case of individual auditor:

Number of consecutive years for which an individual auditor has been functioning as auditor in the same company [in the first AGM held after the commencement of provisions of section 139(2)]	Maximum number of consecutive years for which he may be appointed in the same company (including transitional period)	Aggregate period which the auditor would complete in the same company in view of column I and II
I	II	III
5 years (or more than 5 years)	3 years	8 years or more
4 years	3 years	7 years
3 years	3 years	6 years
2 years	3 years	5 years
1 year	4 years	5 years

Here,

(a) Individual auditor shall include other individuals or firms whose name or trade mark or brand is used by such individual, if any.

(b) Consecutive years shall mean all the preceding financial years for which the individual auditor has been the auditor until there has been a break by five years or more.

Illustration explaining rotation in case of audit firm

Number of consecutive years for which an audit firm has been functioning as auditor in the same company [in the first AGM held after the commencement of provisions of section 139(2)]	Maximum number of consecutive years for which the firm may be appointed in the same company (including transitional period)	Aggregate period which the firm would complete in the same company in view of column I and II
I	II	III
10 years (or more than 10 years)	3 years	13 years or more

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9 years	3 years	12 years
8 years	3 years	11 years
7 years	3 years	10 years
6 years	4 years	10 years
5 years	5 years	10 years
4 years	6 years	10 years
3 years	7 years	10 years
2 years	8 years	10 years
1 year	9 years	10 years

Here,

(a) Audit Firm shall include other firms whose name or trade mark or brand is used by the firm or any of its partners.

(b) Consecutive years shall mean all the preceding financial years for which the firm has been the auditor until there has been a break by five years or more.

(4) Where a company has appointed two or more individuals or firms or a combination thereof as joint auditors, the company may follow the rotation of auditors in such a manner that both or all of the joint auditors, as the case may be, do not complete their term in the same year.

(d) Here, the word "firm" shall include a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008.

(iv) 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.

For ex: Managing Director of PQR Ltd. himself wants to appoint Shri Ganpati, a practicing Chartered Accountant, as first auditor of the company. Comment on the proposed action of the Managing Director.

Provisions and Explanation: Section 139(6) of the Companies Act, 2013 lays down that "the first auditor or auditors of a company shall be appointed by the Board

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of directors within 30 days from the date of registration of the company". In the instant case, the appointment of Shri Ganapati, a practicing Chartered Accountant as first auditors by the Managing Director of PQR Ltd by himself is in violation of Section 139(6) of the Companies Act, 2013, which authorizes the Board of Directors to appoint the first auditor of the company.

Conclusion: In view of the above, the Managing Director of PQR Ltd should be advised not to appoint the first auditor of the company.

(v) Filling up casual vacancy [Section 139(8)]:

(a) The Board may fill any casual vacancy in the office of an auditor within 30 days but where such vacancy is caused by the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board.

(b) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

(vi) Appointment of auditors in case of Government Company or any other company having controlled by State Government or Central Government [Section 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.

(c) First auditor [section 139(7)]:

(1) in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor-General of India within 60 days from the date of registration of the company.

(2) 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.

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(3) Further, in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

(d) Casual vacancy [section 139(8)]:

(1) In the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, casual vacancy of an auditor be filled by the Comptroller and Auditor-General of India within 30 days.

(2) 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.

Clarification by MCA: The MCA vide General Circular No. 33/2014 dated 31st July, 2014 has clarified the following:

(i) Applicability of provisions of section 139(5) and 139(7) of the Companies Act, 2013 on deemed Government company: The MCA vide General Circular No. 33/2014 dated 31st July, 2014 has clarified that the new Act does not alter the position with regard to audit of such deemed Government companies (as per section 619B of the Companies Act, 1956) through C&AG and thus such companies are covered under sub-section (5) and (7) of section 139 of the Companies Act, 2013.

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:

(a) the Central Government and one or more Government companies;

(b) any State Government or Governments and one or more Government companies;

(c) the Central Government, one or more State Governments and one or more Government companies;

(d) the Central Government and one or more corporations owned or controlled by the Central Government;

(e) the Central Government, one or more State Governments and one or more corporations owned and controlled by the Central Government;

(f) one or more corporations owned or controlled by the Central Government or the State Government;

(g) more than one Government company.

(ii) Definition of control has to be read with: Further, it has also been observed that the words "any other company owned or controlled, directly or indirectly…… by the Central Government and partly by one or more State Governments" appearing in sub-sections (5) and (7) of section 139 of the new Act are to be read with the definition of 'control' in section 2(27) of the new Act. Thus, documents like articles of association and shareholders agreements etc envisaging control under section 2(27) are to be taken into account while deciding whether an individual company, other than deemed Government companies, is covered under section 139(5) /139(7) of the new Act.

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(iii) *Information to be communicated to C&AG:* Various clarifications has also been sought about the manner in which the information about incorporation of a company subject to audit by an auditor to be appointed by the C&AG is to be communicated to the C&AG for the purpose of appointment of first auditors under section 139(7). The MCA clarified that such responsibility rests with both, the Government concerned and the relevant company. To avoid any confusion, it was further clarified that it will primarily be the responsibility of the company concerned to intimate to the C&AG about its incorporation along with name, location of registered office, capital structure of such a company immediately on its incorporation. It is also incumbent on such a company to share such intimation to the relevant Government so that such Government may also send a suitable request to the C&AG.

(vii) Re-appointment of retiring auditor [section 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 re-appointed; and

(3) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.

(b) Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

(viii) Audit committee's recommendation [Section 139(11)]:

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

Various points of Comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 224 and 619 of the Companies Act, 1956 i.e. 'appointment and remuneration of auditors' and 'Application of sections 224 to 233 to Government companies' respectively.

(ii) The following key new provisions that have been introduced by the Companies Act, 2013 are as under:

(a) There is compulsory rotation of auditors in case of listed and other prescribed classes of companies.

(b) Casual Vacancy in the office of an auditor of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India is to be filled by the Comptroller and Auditor-General of India within 30 days.

(c) Now, appointment of auditors for 5 years tenure shall be subject to ratification at

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every AGM.

(d) Where a company is required to constitute an Audit Committee under section 177 of the Companies Act, 2013, all appointments, including the filling of casual vacancy of an auditor shall be made by after taking into account the recommendations of the Audit Committee.

(e) Time limit of 180 days from the commencement of the financial year has been provided for appointment of auditor of a company owned and controlled, directly or indirectly, by the Central Government, or by State Government, or partly by the Central government and partly by one or more State Governments.

(iii) According to the Old Act, the auditor has to inform the Registrar in writing that he has accepted, or refused to accept, the appointment within 30 of the receipt from the company of the intimation of his appointment. Under the New Act, the company shall inform the Registrar within 15 days of the meeting in which the auditor is appointed, by filing a notice of such appointment.

2.10 Removal, resignation of auditor and giving of special notice [except 2nd proviso to sub-section (4) and sub-section (5)] (Section 140 of the Companies Act, 2013)

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

(i) Removal of auditor before the expiry of his term [Section 140(1)]:

(a) The auditor appointed under section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government by making an application in *Form ADT-2* and shall be accompanied with the prescribed fees.

(b) The application shall be made to the Central Government within 30 days of the resolution passed by the Board.

(c) The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution.

(d) Giving opportunity of being heard *(Audi Alteram Partem):* Before taking any action for removal of auditor before the expiry of his term, the auditor concerned shall be given a reasonable opportunity of being heard.

(ii) Resignation by Auditor [Section 140(2) & (3)]

[1] *Second proviso to sub-section (4) and sub-section (5) of section 140 of the Companies Act, 2013 are yet to be notified.*

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(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 punishable with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5 Lacs.

(iii) Appointing Auditor other than the Retiring Auditor [Section 140(4)]

(a) If the retiring auditor has not completed a consecutive tenure of 5 years or, 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 225 of the Companies Act, 1956 i.e. resolutions for appointing or removing auditors.

(ii) Under the New Act, along with the approval of the Central Government, the permission of the shareholders by way of special resolution is also required for the removal of an

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Auditor before the expiry of his term.

(iii) Under the New Act, in case the copy of representation, if any, made by the Registrar of the Company, who is proposed to be removed, if not sent to the members in the prescribed manner, the Company should file the same with the Registrar of Companies. Under the Old Act, filing of the same with Registrar was not mentioned under section 225.

(iv) The New Act has introduced the following key new points related with the resignation of auditors:

(a) The auditor who has resigned shall within 30 days of resignation, file a statement in *Form ADT-3* with the company and the Registrar indication the reasons and other relevant facts with regard to his resignation.

(b) In case of companies mentioned under section 139(5) of the Companies Act, 2013, the auditor shall file such statement with the Comptroller and Auditor-General of India Also.

2.11 Eligibility, qualifications and disqualifications of auditors (Section 141 of the Companies Act, 2013)

A new section 141 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for eligibility, qualifications and disqualifications of auditors. According to this section:

(i) 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 practising 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.

(ii) Disqualifications of auditors [Section 141(3)]:

(a) The following persons shall not be qualified for appointment as auditor of a company-

(1) A body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;

(2) an officer or employee of the company;

(3) a person who is a partner, or who is in the employment, of an officer or employee of the company;

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For Ex: Mr. A, a Chartered accountant has been appointed as an auditor of Laxman Ltd. in the Annual General Meeting of the company held in September, 2013, in which he accepted the assignment. Subsequently in January, 2014 he joined B, another Chartered Accountant, who is the Manager Finance of Laxman Ltd., as partner.

Provisions and Explanation: Section 141(3) (c) of the Companies Act, 2013 prescribes that any person who is a partner or in employment of an officer or employee of the company will be disqualified to act as an auditor of a company. Sub-section (4) of Section 141 provides that an auditor who becomes subject, after his appointment, to any of the disqualifications specified in sub-sections (3) of Section 141, he shall be deemed to have vacated his office as an auditor.

Conclusion: In the present case, A, an auditor of M/s Laxman Ltd., joined as partner with B, who is Manager Finance of M/s Laxman Limited, has attracted clause (3) (c) of Section 141 and, therefore, he shall be deemed to have vacated office of the auditor of M/s Laxman Limited.

(4) a person who, or his relative or partner—

(A) is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company:

Provided that the relative may hold security or interest in the company of face value not exceeding 1,00,000 rupees 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 Lac. 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 Lac, the corrective action to maintain the limits as specified above shall be taken by the auditor within sixty days of such acquisition or interest.

Ex 1:"Mr. A", a practicing Chartered Accountant, is holding securities of "XYZ Ltd." having face value of ₹ 900/-. Whether Mr. A is qualified for appointment as an Auditor of "XYZ Ltd."?

As per section 141 (3)(d) (i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company:

In the present case, Mr. A. is holding security of ₹ 900 in the XYZ Ltd, therefore he is not eligible for appointment as an Auditor of "XYZ Ltd".

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Ex 2:"Mr. P" is a practicing Chartered Accountant and "Mr. Q", the relative of "Mr. P", is holding securities of "ABC Ltd." having face value of ₹ 90,000/-. Whether "Mr. P" is Qualified from being appointed as an Auditor of "ABC Ltd."?

As per section 141 (3)(d)(i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of ` 1,00,000.

In the present case, Mr. Q. (relative of Mr. P, an auditor), is having securities of ` 90,000 face Value in the ABC Pvt. Ltd., which is as per requirement of proviso to section 141 (3)(d)(i), Therefore, Mr. P will not be disqualified to be appointed as an auditor of ABCLtd.

Ex 3: "BC & Co." is an Audit Firm having partners "Mr. B" and "Mr. C", and "Mr. A" the relative of "Mr. C", is holding securities of "MWF Ltd." having face value of ₹ 1,01,000/-. Whether "BC & Co." is qualified from being appointed as an Auditor of "MWF Ltd."?

As per section 141 (3)(d) (i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of ` 1,00,000.

In the instant case BC & Co, will be disqualified for appointment as an auditor of MWF Ltd as the relative of Mr. C i.e. partner of BC & Co., is holding the securities in MWF Ltd which is exceeding the limit mentioned in proviso to section 141(3)(d)(i).

(B) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ₹ 5 Lacs; or

(C) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ₹ 1 Lac.

(5) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company. According to *the Companies (Audit and Auditors) Rules, 2014*, the term "business relationship" shall be construed as any transaction entered into for a commercial purpose, except –

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(A) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts;

(B) commercial transactions which are in the ordinary course of business of the company at arm's length price - like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.

(6) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel;

(7) a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies;

Ceiling numbers of audits : Before appointment is given to any auditor, the company must obtain a certificate from him to the effect that the appointment, if made, will not result in an excess holding of company audit by the auditor concerned over the limit laid down in section141 (3)(g) of the Companies Act, 2013 which prescribes that a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty companies;

Further, Council General Guidelines, 2008 (Chapter VIII): In exercise of the powers conferred by clause (ii) of Part II of the Second Schedule to the Chartered Accountants Act, 1949, the Council of the Institute of Chartered Accountants of India hereby specifies that a member of the Institute in practice shall be deemed to be guilty of professional misconduct, if he holds at any time appointment of more than the "specified number of audit assignments of the companies under Section 141(3)(g) of the Companies Act, 2013 i.e. 20.

Example: "ABC & Co." is an Audit Firm having partners "Mr. A", "Mr. B" and "Mr. C", Chartered Accountants. "Mr. A", "Mr. B" and "Mr. C" are holding appointment as an Auditor in 4, 6 and 10 Companies respectively.

(i) Provide the maximum number of Audits remaining in the name of "ABC & Co."

(ii) Provide the maximum number of Audits remaining in the name of individual partner i.e. Mr. A, Mr. B and Mr. C.

Fact of the Case: In the instant case, Mr. A is holding appointment in 4 companies, whereas Mr. B is having appointment in 6 Companies and Mr. C is

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having appointment in 10 Companies. In aggregate all three partners are having 20 audits.

Provisions and Explanations : As per section 141(3)(g) of the Companies Act, 2013, a person shall not be eligible for appointment as an auditor if he is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty companies;

As per section 141 (3)(g), this limit of 20 company audits is per person. In the case of an audit firm having 3 partners, the overall ceiling will be 3 × 20 = 60 company audits. Sometimes, a chartered accountant is a partner in a number of auditing firms. In such a case, all the firms in which he is partner or proprietor will be together entitled to 20 company audits on his account.

Conclusion:

(i) Therefore, ABC & Co. can hold appointment as an auditor of 40 more companies:

*Total Number of Audits available to the Firm = 20*3*	*= 60*
Number of Audits already taken by all the partners	
In their individual capacity = 4+6+10	*= 20*
Remaining number of Audits available to the Firm	*=40*

(ii) With reference to above provisions an auditor can hold more appointment as auditor = ceiling limit as per section 141(3)(g)- already holding appointments as an auditor. Hence (1) Mr. A can hold: 20 - 4 = 16 more audits. (2) Mr. B can hold 20-6 = 14 more audits and (3) Mr. C can hold 20-10 = 10 more audits.

(8) a person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction;

(9) any person whose subsidiary or associate company or any other form of entity, is engaged as on the date of appointment in consulting and specialised services as provided in section 144 (section 144 deals with certain services not to be tendered by auditor).

(iii) Vacation of office by an auditor [Section 141(4)]:

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

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Various points of Comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 226 of the Companies Act, 1956 i.e. Qualifications and disqualifications of auditors.

(ii) Under the Old Act, a firm could be appointed as an auditor only if all the partners practicing in India are qualified for appointment. However, under the New Act, the requirement has changed. Now, a firm whereof majority of partners practising in India are qualified for appointment as mentioned in section 141 may be appointed by its firm name to be auditor of a company.

(iii) The list for disqualification of auditors has been increased under the New Act.

2.12 Remuneration of auditors (Section 142 of the Companies Act, 2013)

A new section 142 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for remuneration of auditors. According to this section:

(i) The remuneration of the auditors of a company shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

(ii) In the case of first auditor, remuneration may be fixed by the Board.

(iii) The remuneration mentioned aforesaid shall, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him. But the remuneration does not include any remuneration paid to him for any other service rendered by him at the request of the company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 224 of the Companies Act, 1956 i.e. appointment and remuneration of auditors.

(ii) According to Companies Act, 1956, the remuneration of auditor:

  (a) may be fixed by the Board or the Central Government, in case of an auditor appointed by the Board or the Central Government, as the case may be,

  (b) may be fixed by the company in general meeting or in such manner as the company in general meeting may determine, in the case of an auditor appointed under section 619 of the Companies Act, 1956, by the Comptroller and Auditor-General of India.

  However, now under the New Act, the remuneration of the auditor shall be fixed in its general meeting or in such manner as may be determined therein.

(iii) Under the Old Act, the expression remuneration includes any sums paid by the company in respect of the auditors expenses. Under the New Act, remuneration 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 does not include any remuneration paid to him for any other service rendered by him at the request of the company. The New Act has specifically provided that remuneration shall, in addition to the fee payable to an auditor include any facility extended to him.

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2.13 Powers and duties of auditors and auditing standards (Section 143 of the Companies Act, 2013)

A new section 143 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for powers and duties of auditors and auditing standards. According to this section:

(i) Powers of Auditors [Section 143(1)]:

(a) *Access to books of accounts and vouchers*: Every auditor of a company shall have a right of access at all times to the books of accounts and vouchers of the company, whether kept at the registered office of the company or at any other place.

(b) *Entitled to have necessary information and explanation*: He shall be entitled to require from the officers of the company such information and explanations as the auditor may consider necessary for the performance of his duties as auditor.

(c) *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 in so far as it relates to the consolidation of its financial statements with that of its subsidiaries.

(ii) Duties of auditors [Section 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

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(2) On every financial statements which are required by or under this Act to be laid before the company in general meeting; and

(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 system in place and the operating effectiveness of such controls;

(10) such other matters as may be prescribed.

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(e) *The Companies (Audit and Auditors) Rules, 2014* provides that the auditor's report shall also include their views and comments on the following matters, namely:-

(1) whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement;

(2) whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts;

(3) whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.

(f) 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.

(g) Compliance with auditing standards:

(1) Every auditor shall comply with the auditing standards

(2) The Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the 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.

(h) 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 direct, the auditor's report shall also include a statement on such matters as may be specified therein.

(i) Reporting of frauds by auditors [Section 143(12)]:

(a) Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government immediately but not later than 60 days of his knowledge and after following the below mentioned procedure (as mentioned in *the Companies (Audit and Auditors) Rules, 2014*):

(1) 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;

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(2) 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 alongwith 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;

(3) 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 alongwith 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.

(4) 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.

(5) 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.

(6) The report shall be in the form of a statement as specified in *Form ADT-4*.

(b) 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.

(c) Penalty for non compliance of section 143(12): If any auditor, the cost accountant in practice conducting cost audit under section 148 or the company secretary in practice conducting secretarial audit under section 204 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 not be less than ₹ 1 Lacs but which may extend to ₹ 25 Lacs.

(iv) Audit of Government Companies [Section 143(5), (6) & (7)]:

(a) The auditor of a Government company is appointed by the Comptroller and Auditor-General of India under section 139(5) or section 139(7).

(b) 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.

(c) The audit report among other things, include the following:

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(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.

(d) 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.

(e) 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.

(f) 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.

(v) Audit of accounts of branch office of company [Section 143(8)]:

(a) Branch office in India:

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

(A) the company's auditor appointed under section 139, or

(B) by any other person qualified for appointment as an auditor of the company under section 139.

(b) Branch office outside India:

(1) If the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by:

(A) the company's auditor or

(B) by an accountant or

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(C) by any other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country.

(c) The duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor, if any, shall be as contained in sub-sections (1) to (4) of section 143.

(d) The branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

(e) The provisions of regarding reporting of fraud by the auditor shall also extend to such branch auditor to the extent it relates to the concerned branch.

(vi) The provisions of this section i.e. section 143 shall *mutatis mutandis* apply to—

(a) the cost accountant in practice conducting cost audit under section 148; or

(b) the company secretary in practice conducting secretarial audit under section 204.

Various points of Comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 227 and 228 of the Companies Act, 1956 i.e. 'powers and duties of auditors' and 'Audit of accounts of branch office of company' respectively.

(ii) Under the New Act, the following key new points have been introduced in the duties and powers of the auditors and auditing standards:

(a) The auditor shall comply with the auditing standards.

(b) The auditor shall report to the Central Government if in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company.

(c) The provisions related to powers and duties of auditors and auditing standards i.e. section 143, shall also apply *mutatis mutandis* to Cost Accountant conducting cost audit u/s 148 and Company Secretary conducting secretarial audit for bigger companies u/s 204.

(d) The auditor's report shall state whether the company has adequate internal financial controls system in place and operating effectiveness of such controls.

(e) The audit report shall provide for any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith.

(iii) According to the Old Act, the report of the auditor would state in thick type or in italics the observations or comments of the auditors which have any adverse effect on the functioning of the company. Under the New Act, such a requirement has been dispensed with.

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2.14 Auditor not to render certain services (Section 144 of the Companies Act, 2013)

There was no provision for the Auditor not to render certain services but a new section 144 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Auditor not to render certain services. According to this section:

(i) Prohibited services: An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be. But such services shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company), namely:—

(a) accounting and book keeping services;

(b) internal audit;

(c) design and implementation of any financial information system;

(d) actuarial services;

(e) investment advisory services;

(f) investment banking services;

(g) rendering of outsourced financial services;

(h) management services; and

(i) any other kind of services as may be prescribed.

Explanation: The term "directly or indirectly" shall include rendering of services by the auditor,—

(1) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or 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.

(ii) Transition period: If an auditor or audit firm who or which has been performing any non audit services on or before the commencement of the Companies Act, 2013, shall comply with the provisions of this section (i.e. section 144) before the closure of the first financial year after the date of such commencement.

Various points of Comparison in respect to old law i.e. the Companies Act, 1956
This section 144 of the Companies Act, 2013 has been introduced by the Companies Act, 2013.

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2.15 Auditors to sign audit reports, etc. (Section 145 of the Companies Act, 2013)

A new section 145 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for auditors to sign audit reports, etc. According to this section:

(i) The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company in accordance with the provisions of sub-section (2) of section 141 (i.e. in case of firm including LLP, only Chartered Accountants are authorised to act and sign).

(ii) The qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 229 and 230 of the Companies Act, 1956 i.e. 'signature of audit report, etc.' and 'Reading and inspection of auditor's report' respectively.

(ii) Under the Old Act, 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. Under the New Act, only 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.

2.16 Auditors to attend general meeting (Section 146 of the Companies Act, 2013)

A new section 146 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for auditors to attend general meeting. According to this section:

(i) All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company.

(ii) The auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting.

(iii) The auditor shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 231 of the Companies Act, 1956 i.e. Right of auditor to attend general meeting.

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(ii) Under the Old Act, auditor shall be entitled to attend any general meeting. However, under the New Act, the auditor shall attend the AGM either by himself or through his authorised representative. Thus, it is compulsory for him to attend the meeting unless otherwise exempted by the company.

2.17 Punishment for contravention (Section 147 of the Companies Act, 2013)

A new section 147 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for punishment for contravention. According to this section:

(i) Penalty on company [Section 147(1)]:

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

(ii) Penalty on officers [Section 147(1)]:

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

(1) imprisonment for a term which may extend to 1 year or

(2) With fine which shall not be less than ₹ 10,000 but which may extend to ₹ 1 Lacs; or

(3) Both with imprisonment and fine.

(iii) Penalty on auditor [Section 147(2) & (3)]:

(a) If an auditor of a company contravenes any of the provisions of section 139, section 143, 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.

(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 ₹ 1 Lac but which may extend to ₹ 25 Lacs.

(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 any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.

(iv) The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons. Such

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body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification. [Section 147(4)]

(v) Liability of Audit firm [Section 147(5)]:

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 232 and 233 of the Companies Act, 1956 i.e. 'Penalty for non-compliance with sections 225 to 231' and 'Penalty for non-compliance by auditor with sections 227 and 229' respectively.

(ii) Section 147 has provides specific and stringent penalties for contravention of provisions of sections 139 to 146 of the Companies Act, 2013.

(iii) The New Act has specifically provided that where an auditor has been convicted under section 147(2), he shall also be liable to refund the remuneration received by him to the company and pay for damages to the company, statutory bodies or authorities or to any person for the loss arising out of misleading or incorrect information in his audit report. Such a provision was not present in the Old Act.

2.18 Central Government to specify audit of items of cost in respect of certain companies (Section 148 of the Companies Act, 2013)

A new section 148 of the Companies Act, 2013 came into force from 1st April, 2014 which provides the provisions for Central Government to specify audit of items of cost in respect of certain companies. According to this section:

(i) Notwithstanding anything contained in the provisions related to audit and auditor (Chapter X), the Central Government may, by order, in respect of such class of companies engaged in the production of such goods or providing such services as may be prescribed, direct that particulars relating to the utilisation of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept under section 128 by that class of companies.

(ii) The Central Government shall, before issuing such order in respect of any class of companies regulated under a special Act, consult the regulatory body constituted or established under such special Act.

(iii) If the Central Government is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies, which are covered aforesaid

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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.

(iv) The cost audit shall be conducted by a Cost Accountant in practice who shall be appointed by the Board on such remuneration as may be determined by the members in such manner as may be prescribed.

(v) *The Companies (Audit and Auditors) Rules, 2014 provides that-*

(1) in the case of companies which are required to constitute an audit committee-

(A) the Board shall appoint an individual, who is a cost accountant in practice, or a firm of cost accountants in practice, as cost auditor on the recommendations of the Audit committee, which shall also recommend remuneration for such cost auditor;

(B) the remuneration recommended by the Audit Committee under (A) shall be considered and approved by the Board of Directors and ratified subsequently by the shareholders;

(2) in the case of other companies which are not required to constitute an audit committee, the Board shall appoint an individual who is a cost accountant in practice or a firm of cost accountants in practice as cost auditor and the remuneration of such cost auditor shall be ratified by shareholders subsequently.

Companies required to constitute Audit Committee	Companies not required to constitute Audit Committee
(a) The Board shall appoint the cost auditor on the recommendation of the Audit Committee. (b) The Audit Committee shall recommend the remuneration for cost auditor. (c) Such remuneration as recommended by the Audit Committee shall be considered and approved by the Board of Directors. (d) Then this remuneration subsequently to be ratified by the shareholders.	(a) The Board shall appoint the cost auditor. (b) The remuneration of such cost auditor shall be ratified by shareholders subsequently.

(vi) No person appointed under section 139 as an auditor of the company (i.e. company auditor) shall be appointed for conducting the audit of cost records.

(vii) Cost auditor to comply with cost auditing standards: The auditor conducting the cost audit shall comply with the cost auditing standards.

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Here, the expression "cost auditing standards" mean such standards as are issued by the Institute of Cost and Works Accountants of India, constituted under the Cost and Works Accountants Act, 1959, with the approval of the Central Government.

(viii) An audit conducted under section 148 shall be in addition to the audit conducted under section 143.

(ix) The qualifications, disqualifications, rights, duties and obligations applicable to auditors (i.e. applicable to company auditor) shall, so far as may be applicable, apply to a cost auditor appointed under section 148 and it shall be the duty of the company to give all assistance and facilities to the cost auditor appointed under this section for auditing the cost records of the company.

(x) The report on the audit of cost records shall be submitted by the cost accountant in practice to the Board of Directors (BoD) of the company.

(xi) A company shall within 30 days from the date of receipt of a copy of the cost audit report furnish the Central Government with such report along with full information and explanation on every reservation or qualification contained therein.

(xii) If, after considering the cost audit report and the information and explanation furnished by the company, the Central Government is of the opinion that any further information or explanation is necessary, it may call for such further information and explanation and the company shall furnish the same within such time as may be specified by that Government.

(xiii) Contravention: If any default is made in complying with the provisions of section 148,—

(a) The company and every officer of the company who is in default shall be punishable in the manner as provided in section 147(1);

(b) the cost auditor of the company who is in default shall be punishable in the manner as provided in sub-sections (2) to (4) of section 147.

Various points of Comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 233B of the Companies Act, 1956 i.e. 'Audit of cost accounts in certain cases.

(ii) According to the New Act, cost audit can be conducted only by a Cost Accountant in practice. However, under the Old Act, cost audit can be conducted also by Chartered Accountant, if in the opinion of Central Government sufficient numbers of Cost Accountants were not available.

(iii) Under the Old Act, an auditor conducting cost audit shall make his report to the Central Government and shall also at the same time forward a copy of the report to the company. Under the New Act, the report of the cost audit shall be submitted by the cost accountant in practice to the Board of Directors.

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(iv) The Old Act provided that the Central Government may direct the company whose cost accounts have been audited to circulate to its members, along with the notice the notice of the AGM, to be held for the first time after the submission of such report, the whole or such portion of the said report as the CG may specify in this behalf. This circulation condition has been dispensed with in the New Act.

(v) Under the New Act, the penalties have been increased.

(vi) The New Act has specifically provided that the cost audit shall comply with the cost auditing standards.

(vii) The Old Act prescribed the approval of Central Government for appointment of Cost auditor. However, such provision has been omitted under the New Act.

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3

Appointment and Qualifications of Directors

3.1 Company to have Board of Directors (Section 149 of the Companies Act, 2013)

A new section 149 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the provisions for companies to have a duly constituted Board of Directors. According to this section:

(i) 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) a minimum number of directors

(A) in the case of Public company- three directors,

(B) in the case of Private Company- two directors, and

(C) in case of One person company- one director

(b) a maximum of fifteen directors.

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

(c) Women director: At least one woman director shall be on the Board of such class or classes of companies as may be prescribed. [Second proviso to section 149(1)]

The *Companies (Appointment and Qualification of Directors) Rules, 2014* provides that the following class of companies shall appoint at least one woman director-

(1) every listed company;

(2) every other public company having -

(A) paid–up share capital of one hundred crore rupees or more;

or

(B) turnover of three hundred crore rupees 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.

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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.

For e.g., in XYZ Ltd., the vacancy of the women director arises on 15th June, 2014. Thus, the vacancy shall be filled-up by the Board at the earliest but not later than the date of the next Board meeting or three months from the date of such vacancy whichever is later.

⇒ *If the Board meeting was held on 14th August, 2014, then the vacancy shall be filled-up by 14th August, 2014 or by 14th Sept. 14 whichever is later. In this case it shall be filled up by 14th Sept. 14.*

⇒ *If the Board meeting was held on 14th October, 2014, then the vacancy shall be filled-up by 14th October, 2014 or by 14th Sept. 14 whichever is later. In this case it shall be filled up by 14th October 14.*

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

Transition period: Section 149(2) provides the transition period of one year from the date of commencement i.e. 1st April, 2014 to comply with section 149(1).

(d) Resident Director: Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. [Section 149(3)]

Transition period: Section 149(5) provides for the transition period of one year from the date of commencement i.e. 1st April, 2014 to comply with section 149(3).

The MCA vide General Circular No. 25/2014 dated 26th June, 2014 has given a clarification on applicability of requirement for resident director in the current calendar/ financial year. 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 clarified that 'residency requirement' would be reckoned from the date of commencement of section 149 of the Act i.e. 1st April, 2014. The first 'previous calendar year' for compliance with these provisions would, therefore, be calendar year 2014. The period to be taken into account for compliance with these provisions will be the remaining period of calendar year 2014 (i.e. 1st April to 31st December). Therefore, on a proportionate basis, the number of days for which the director(s) would need to be resident in India, during Calendar year 2014, shall exceed 136 days.

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

(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)]

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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 *Companies (Appointment and Qualification of Directors) Rules, 2014*, the following class or classes of companies shall have at least two directors as independent directors:

(1) the Public Companies having paid up share capital of ten crore rupees or more; or

(2) the Public Companies having turnover of one hundred crore rupees or more; or

(3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees.

However, in case a company covered as 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.

For e.g.: As per section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority. So, if for example, XYZ Ltd. is having 6 directors in its Audit Committee, then 4 directors out of 6 must be Independent Directors (4 is forming majority). Therefore, although in terms of the the Companies (Appointment & Qualification) Rules 2014 the company is required to have at least 2 Independent directors, in this case the limit of 2 will increase to 4 as the company is required to appoint a higher number of independent directors due to composition of its audit committee.

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.

For e.g., in XYZ Ltd., the vacancy of the independent director arises on 15th June, 2014. Thus, the vacancy 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.

⇒ *If the Board meeting was held on 14th August, 2014, then the vacancy shall be filled-up by 14th August, 2014 or by 14th Sept. 2014 whichever is later. In this case it shall be filled up by 14th Sept. 2014.*

⇒ *If the Board meeting was held on 14th October, 2014, then the vacancy shall be filled-up by 14th October, 2014 or by 14th Sept. 2014 whichever is later. In this case it shall be filled up by 14th October 2014.*

However, where a company ceases to fulfill any of three conditions laid downabove for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

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For the purpose of the above assessment, the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

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

(1) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(2) (A) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(B) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(3) who has or had no pecuniary relationship 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;

(4) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

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

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

(B) 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—

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

(ii) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 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

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(iv) is a Chief Executive or director, by whatever name called, of any non-profit 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

(6) who possesses such other qualifications as may be prescribed. According to the *Companies (Appointment and Qualification of Directors) Rules, 2014,* independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

(g) Declaration by Independent Director [Section 149(7)]: Every independent 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 circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (6).

(h) Code for independent directors [Section 149(8)]: The company and independent directors shall abide by the provisions specified in Schedule IV to the Companies Act, 2013.

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

(1) fee provided under sub-section (5) of section 197,

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

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

(j) Tenure [Section 149(10) & (11)]: Subject to the provisions of section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

No independent director shall hold office for more than two consecutive terms. However, such independent director shall be eligible for appointment after the expiration of three years of ceasing to be an independent director:

Provided that during the said period of three years, such independent director shall not, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

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For the purposes of sub-sections (10) and (11), any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under those sub-sections.

(k) Liability [Section 149(12)]: Notwithstanding anything contained in this Act, an independent director or a non-executive director not being promoter or key managerial personnel, shall be held liable only in respect of

(i) such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and

(ii) with his consent or connivance or

(iii) where he had not acted diligently.

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

(Note: The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 will be discussed later on in this chapter)

Here, "Nominee director" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

The MCA vide General Circular No. 14/2014 dated 9th June, 2014 has given some clarifications over manner relating to appointment and qualifications of directors and Independent Directors which are as under:

(i) Section 149(6)(c) : "pecuniary interest in certain transactions":

(a) This provision inter alia requires that an 'ID' should have no 'pecuniary relationship' with the company concerned or its holding/ subsidiary / associate company and certain other categories specified therein during the current and last two preceding financial years. Clarifications have been sought whether a transaction entered into by an 'ID' with the company concerned at par with any member of the general public and at the same price as is payable/paid by such member of public would attract the bar of 'pecuniary relationship' under section 149(6)(c). The matter has been examined and it is hereby clarified that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an 'ID' will not be said to have 'pecuniary relationship' under section 149(6)(c) in such cases.

(b) Stakeholders have also sought clarification whether receipt of remuneration, (in accordance with the provisions of the Act) by an 'ID' from a company would be considered as having pecuniary interest while considering his appointment in the holding company, subsidiary company or associate company of such company. The matter has been examined in consultation with SEBI and it is clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act.

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(ii) *Section 149: Appointment of 'IDs': Clarification has been sought if 'IDs' appointed prior to April 1, 2014 may continue and complete their remaining tenure, under the provisions of the Companies Act, 1956 or they should demit office and be re-appointed (should the company so decide) in accordance with the provisions of the new Act. The matter has been examined in the light of the relevant provisions of the Act, particularly section 149(5) and 149(10) & (11) .Explanation to section 149(11) clearly provides that any tenure of an 'ID' on the date of commencement of the Act shall not be counted for his appointment/holding office of director under the Act. In view of the transitional period of one year provided under section 149(5), it is hereby clarified that it would be necessary that if it is intended to appoint existing 'IDs' under the new Act, such appointment shall be made expressly under section 149(10)/(11) read with Schedule IV of the Act within one year from 1st April, 2014, subject to compliance with eligibility and other prescribed conditions.*

(iii) *Section 149(10) / (11)- Appointment of 'IDs' for less than 5 years:- Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years. It is clarified that section 149(10) of the Act provides for a term of "upto five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10) of the Act. Further, under section 149(11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.*

(iv) *Appointment of 'IDs' through letter of appointment:- With reference to Para IV(4) of Schedule IV of the Act (Code for IDs) which requires appointment of 'IDs' to be formalized through a letter of appointment, clarification has been sought if such requirement would also be applicable for appointment of existing 'IDs'? The matter has been examined. In view of the specific provisions of Schedule IV, appointment of 'IDs' under the new Act would need to be formalized through a letter of appointment.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 252 of the Companies Act, 1956 i.e. minimum number of directors, section 253 of the Companies Act, 1956 i.e. only individuals to be directors and section 259 of the Companies Act, 1956 i.e. increase in number of directors to require Government sanction.

(ii) Under the new Act, the provision for one director in case of one person company is provided which was not there in the old Act.

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(iii) The maximum limit of Directors in the Company has been increased to 15 from the 12 as provided under the old Act. The number may be increased beyond 15 by passing Special Resolution; no approval of Central Government is required.

(iv) Earlier under the old Act, the maximum limit of 12 directors was applicable to only public companies or a private company which is a subsidiary of a public company. Hence, the private companies may appoint any number of directors under the old Act. Now, under the new Act, the maximum limit of directors was applicable on every company.

(v) The concept of women director is introduced under the new Act. There was no provision for this under the old Act.

(vi) The concept of resident director is introduced under the new Act. There was no provision for this under the old Act.

(vii) The concept of Independent director is introduced under the new Act. There was no provision for this under the old Act.

3.2 Manner of selection of independent directors and maintenance of databank of independent directors (Section 150 of the Companies Act, 2013)

There was no provision for the manner of selection of independent directors and maintenance of databank of independent directors in the Companies Act, 1956 but a new section 150 of the Companies Act, 2013 which came into force from 1st April, 2014 provides for the manner of selection of independent directors and maintenance of databank of independent directors.

(i) According to section 150(1) of the Companies Act, 2013, an independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, subject to the provisions contained in section 149(5).

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

Further, the responsibility of exercising due diligence before selecting a person as an independent director from the data bank referred to above, shall lie with the company making such appointment [Proviso to section 150(1)].

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

(iii) The data bank referred to in sub-section (1), shall create and maintain data of persons willing to act as independent director in accordance with such rules as may be prescribed [Section 150(3)]

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(iv) The Central Government may prescribe the manner and procedure of selection of independent directors who fulfill the qualifications and requirements specified under section 149 [Section 150(4)]

Creation and maintenance of databank of persons offering to become independent directors:

(i) Any body, institute or association (referred as "the agency"), which has been authorised in this behalf by the Central Government shall create and maintain a data bank of persons willing and eligible to be appointed as independent director and such data bank shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be approved or notified by the Central Government.

(ii) The data bank shall contain the particulars in respect of each person included in the data bank to be eligible and willing to be appointed as independent director like DIN, the name and surname in full, details of LLPs in which he is or was a designated partner, the list of companies in which he is or was director, etc.

(iii) For further details regarding the procedure of creation and maintenance of databank of persons offering to become independent directors, pls refer *Companies (Appointment and Qualification of Directors) Rules, 2014.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956
There was no such provision in the Companies Act, 1956 on the manner of selection of independent directors and the creation and maintenance of data base in respect of such directors. This provision has been introduced by the new Companies Act 2013

3.3 Appointment of Directors elected by Small shareholders (Section 151 of the Companies Act, 2013)

A new Section 151 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the appointment of Directors by Small shareholders. According to this section:

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 twenty thousand rupees 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:

(i) 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.

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

(ii) 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 signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

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

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) No person shall hold the position of small shareholders' director in more than 2 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.

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(ix) 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
(i) This section corresponds to Section 252 of the Companies Act, 1956 i.e. minimum number of directors.
(ii) Under the Companies Act, 2013, only listed Companies may appoint one director elected by small shareholders.

3.4 Appointment of Directors (Section 152 of the Companies Act, 2013)

A new section 152 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for appointment of directors in companies.

According to section 152 of the Companies Act, 2013:

(i) Appointment of directors:

(a) 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)]

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

(c) 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)]

(d) 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)]

(e) 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 thirty days of his appointment in Form *DIR-12* along with the fee as prescribed [Section 152 (5)].

The *Companies (Appointment and Qualification of Directors) Rules, 2014* provides that every person who has been appointed to hold the office of a director shall on or before the appointment furnish to the company consent in writing to act as director in Form *DIR-2*. The proviso to Section 152 (5) states that in case of appointment of an independent director in the general meeting, an explanatory statement for such

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appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment.

(vi) Retirement by rotation [Section 152(6)]

(a) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall—

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

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

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

(c) 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.

(d) The directors to retire by rotation at every annual general meeting 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.

(e) 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.

For the purposes of the above provisions "total number of directors" shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

For e.g.: Company is having six directors.

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

No. of directors to retire: 4 1/3 i.e. 1.33 or nearest to one-third is 1.*

(vi) 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.

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(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—

(A) 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;

(B) the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;

(C) he is not qualified or is disqualified for appointment;

(D) a resolution, whether special or ordinary, is required for his appointment or re appointment by virtue of any provisions of this Act; or

(E) section 162 is applicable to the case.

For the purposes of section 152, the "retiring director" means a director retiring by rotation.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 254 of the Companies Act, 1956 i.e. subscribers of memorandum deemed to be directors, Section 255 of the Companies Act, 1956, i.e. appointment of directors and proportion of those who are to retire by rotation, sections 256 of the Companies Act, 1956 i.e. ascertainment of directors retiring by rotation and filling of vacancies, Section 259 of the companies Act, 1956 i.e. increase in number of directors to require Government sanction and Section 264 of the Companies Act, 1956 i.e. consent of candidate for directorship to be filed with the company and consent to act as director to be filed with the Registrar.

(ii) Under the new Act, an individual, before being appointed as Director, shall be required to furnish a declaration that they are not disqualified for being appointment as Director. Further, a person should have a valid DIN for being appointed as Director.

(iii) Under the new Act, every Director in a private Company also has to give his consent for appointment as such and the consent shall be filed with the Registrar of Companies. Earlier under the old Act, consent was not required for a director of a private company unless it is a subsidiary of a public company.

(iv) Under the new Act, in case of One Person Company, an individual being member shall be deemed to be its first Directors until the Director or Directors are duly appointed by the member in accordance with the provision of this clause.

(v) Under the new act, it has been specified that for the purpose of calculation of the retiring directors i.e. 2/3rd of the total number of Directors, independent directors shall not be included for the computation of total number of directors.

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3.5 Application for allotment of Director Identification Number (Section 153 of the Companies Act, 2013)

A new section 153 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Application for allotment of Director Identification Number. According to this section:

Every individual intending to be appointed as director of a company shall make an application for allotment of DIN to the Central Government in such form and manner and along with such fees as may be prescribed.

The *Companies (Appointment and Qualification of Directors) Rules, 2014* provides for the procedure for making application for allotment of DIN according to which:

(1) Every individual, who is to be appointed as director of a company shall make an application electronically in Form DIR-3, to the Central Government for the allotment of a DIN along with such fees as prescribed.

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

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

(i) photograph;

(ii) proof of identity;

(iii) proof of residence;

(iv) verification by the applicant for applying for allotment of DIN in Form DIR-4; and

(v) specimen signature duly verified.

(b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by -

(i) a chartered accountant in practice or a company secretary in practice or a cost accountant in practice; or

(ii) a company secretary in full time employment of the company or by the managing director or director of the company in which the applicant is to be appointed as director.

The MCA vide Notification No. S.O. 1354(E) dated 21st May, 2014 delegates the powers and functions of the Central Government in respect of allotment of Director Identification Number under section 153 of the Companies Act, 2013 to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266A of the Companies Act, 1956 i.e. application for allotment of Director Identification Number.

(ii) Under the Companies Act 1956, any person who has made application for allotment of Director Identification Number could have been appointed as Director of the Company till the time the same was allotted. This condition is now done away with in the Companies Act, 2013.

3.6 Allotment of Director Identification Number (Section 154 of the Companies Act, 2013)

A new section 154 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Allotment of DIN. According to section 154 of the Companies Act, 2013, the Central Government shall, within one month from the receipt of the application under section 153, allot a DIN to the applicant in such manner as may be prescribed.

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

(i) On the submission of the Form DIR-3 on the portal and payment of the requisite amount of fees through online mode, the provisional DIN shall be generated by the system automatically which shall not be utilized till the DIN is confirmed by the Central Government.

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

(iii) If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who has filed such application, directing the applicant to rectify such defects or incompleteness by resubmitting the application within a period of fifteen days of such placing on the website and email.

(iv) Provided that the Central Government shall –

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

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

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

(v) In case of rejection or invalidation of application, the provisional DIN so allotted by the system shall get lapsed automatically and the fee so paid with the application shall neither be refunded nor adjusted with any other application.

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(vi) 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.

(vii) 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.

The MCA vide Notification No. S.O. 1354(E) dated 21st May, 2014 delegates the powers and functions of the Central Government in respect of allotment of Director Identification Number under section 154 of the Companies Act, 2013 to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266B of the Companies Act, 1956 i.e. allotment of Director Identification Number.

(ii) There is no difference between the provisions of section 266B of the Companies Act, 1956 and section 154 of the Companies Act, 2013.

3.7 Prohibition to obtain more than one DIN (Section 155 of the Companies Act, 2013)

A new section 155 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the prohibition on obtaining more than one DIN by a person. According to this section, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266C of the Companies Act, 1956 i.e. prohibition to obtain more than one DIN.

(ii) There is no difference between the provisions of section 266C of the Companies Act, 1956 and section 155 of the Companies Act, 2013.

3.8 Director to intimate DIN (Section 156 of the Companies Act, 2013)

A new section 156 of the Companies Act, 2013 came into force from 1st April, 2014 which 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266D of the Companies Act, 1956 i.e. obligation of director to intimate DIN to concerned company or companies.

(ii) There is no difference between the provisions of section 266D of the Companies Act, 1956 and section 156 of the Companies Act, 2013.

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3.9 Company to inform DIN to Registrar (Section 157 of the Companies Act, 2013)

A new section 157 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for a company to inform the DIN to Registrar. According to this section:

(i) Every company shall, within fifteen 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)]

(ii) 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 twenty-five thousand rupees but which may extend to one lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees. [Section 157(2)]

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266E of the Companies Act, 1956 i.e. obligation of company to inform DIN to Registrar.

(ii) Under the new Act, every Company is required to intimate the DIN of its Directors to the Registrar within 15 days of the receipt of the same from the Directors, instead of 1 week as provided under the Old Act.

3.10 Obligation to indicate DIN (Section 158 of the Companies Act, 2013)

A new section 158 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for an obligation to indicate the DIN. According to this section:

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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266F of the Companies Act, 1956 i.e. obligation to indicate DIN.

(ii) There is no difference between the provisions of section 266F of the Companies Act, 1956 and section 158 of the Companies Act, 2013.

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3.11 Punishment for contravention (Section 159 of the Companies Act, 2013)

A new section 159 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Punishment for contravention of any of the provisions of section 152, 155 and 156 of the Act. According to this section:

If any individual or director of a company, contravenes any of the provisions of section 152, 155 and 156, such individual or director of the company shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 266G of the Companies Act, 1956 i.e. Penalty for contravention of provisions of section 266A or section 266C or section 266D or section 266E.

(ii) Under the new Act, the punishment for contravention has included imprisonment upto six months also which was not present under the old Act. The amount of fine has also been increased under the new act from Rs. 5,000 to Rs. 50,000.

3.12 Cancellation or surrender or Deactivation of DIN

The *Companies (Appointment and Qualification of Directors) Rules, 2014* lays down the procedure for cancellation or surrender or deactivation of DIN as under:

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

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

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

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

For this purpose

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

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

(c) of the death of the concerned individual;

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(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.

Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.

3.13 Intimation of changes in particulars specified in DIN application

The *Companies (Appointment and Qualification of Directors) Rules, 2014* provides for the procedure for Intimation of changes in particulars specified in the DIN application according to which:

(1) 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 thirty days of such change(s) in Form DIR-6 in the following manner, namely;-

(i) the applicant shall download Form DIR-6 from the portal and fill in the relevant changes, attach copy of the proof of the changed particulars and verification in the Form DIR-7 all of which shall be scanned and submitted electronically;

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

(iii) the applicant shall submit the Form DIR-6;

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

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

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

3.14 Right of persons other than retiring directors to stand for directorship (Section 160 of the Companies Act, 2013)

A new section 160 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Right of persons other than retiring directors to stand for directorship in a company. According to this section:

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(i) a person who is not a retiring director in terms of section 152 shall, subject to 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 fourteen 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 intention of such member to propose him as a candidate for that office.

(ii) Such notice must come along with the deposit of one lakh rupees or such higher amount as may be prescribed. Such deposit shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty-five per cent. Of the total valid votes cast either on show of hands or on poll on such resolution.

(iii) The company shall inform its members of the candidature of a person for the office of director under sub-section (1) in such manner as may be prescribed.

Notice of candidature of a person for directorship: The *Companies (Appointment and Qualification of Directors) Rules, 2014* lays down the procedure for giving notice of candidature by a person for directorship as under:

(i) The company shall, at least seven 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-

(1) 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

(2) by placing notice of such candidature or intention on the website of the company, if any.

(ii) 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 seven 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 257 of the Companies Act, 1956 i.e. Right of persons other than retiring directors to stand for directorship.

(ii) Under the New Act, the amount deposited at the time of nomination of any Director for appointment at a general meeting will also be refunded in case the person so proposed gets more than 25% of the total votes cast, irrespective of whether he is appointed or not.

(iii) Under the new Act, the amount to be deposited along with notice of nomination of any person for the office of Director has been increased from five hundred rupees to one lakh rupees or such higher sum as may be prescribed.

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3.15 Appointment of additional director, alternate director and nominee director (Section 161 of the Companies Act, 2013)

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

A new section 161(1) of the Companies Act, 2013 came into force on 12th September, 2013 which provides for appointment of additional director. According to this section:

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

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

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 260 of the Companies Act, 1956 i.e. Additional Director.

(ii) As per the Companies Act, 2013, a person who fails to get appointed as a Director in a general meeting cannot be appointed as an Additional Director. Such a provision was not there in the Companies Act, 1956.

(iii) Under the Companies Act, 1956, additional directors shall hold office only up to the date of the next annual general meeting of the Company but under the Companies Act, 2013, they shall hold office till next Annual General Meeting or the last date on which such meeting should have been held in accordance with law.

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

A new section 161(2) of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the appointment of Alternate director. According to this section:

(i) 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 three months from India.

(ii) A person who is holding any alternate directorship for any other director in the company cannot be considered for appointment as above.

(iii) 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.

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(iv) 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.

(v) 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 313 of the Companies Act, 1956 i.e. appointment and term of office of alternate directors.

(ii) Under the Companies Act, 1956, it was provided that Alternate director can be appointed in place of director who is absent from the state in which meetings of the Board are ordinarily held for not less than three months but under the Companies Act, 2013, Alternate director can only be appointed in case a director leaves India for not less than three months.

(iii) The person to be appointed as the Alternate director shall be the person who is not holding any alternate directorship for any other director in the company. This provision was not present under the Companies Act, 1956.

(iv) The Companies Act, 2013 has specifically provided that in case of appointment of an alternate director for Independent Director, that person shall be qualified to be appointed as an independent director under the provisions of this Act.

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

There was no provision for the appointment of nominee director in the Companies Act, 1956 but a new section 161(3) of the Companies Act, 2013 came into force on 12th September, 2013 which provides for appointment of Nominee director. According to this section:

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, subject to the articles of a company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section now provides for Nominee Director. It provides that subject to Articles, the Board can appoint director nominated by any institution in pursuance of any law or agreement as a Nominee director. There was no such provision in the Companies Act, 1956.

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

A new section 161(4) of the Companies Act, 2013 came into force on 12th September, 2013 which provides for appointment of director in casual vacancy. According to this section:

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(i) In the case of a public company, 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.

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 262 of the Companies Act, 1956 i.e. Filling of casual vacancies among directors.

(ii) Under the Companies Act, 1956, this provision was applicable to Public company or a private company which is a subsidiary of a public company but under the Companies Act, 2013, it is provided that the provision related to the Casual Vacancy is applicable to only public company. Section 2(71) of the Companies Act, 2013, clarifies that a subsidiary of a public company shall be deemed to be a public company even if such subsidiary continues to be a private company in its articles. This clarificatory provision was not there in the Companies Act, 1956.

3.16 Appointment of directors to be voted individually (Section 162 of the Companies Act, 2013)

A new section 162 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for appointment of directors to be voted individually. According to this section:

(i) Two or more directors of a company cannot be elected as directors by a single resolution.

(ii) Thus, each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement.

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

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 263 of the Companies Act, 1956 i.e. Appointment of directors to be voted on individually.

(ii) Under the Companies Act, 2013, the provision for appointment of directors to be voted individually shall be applicable to all the Companies including the private companies. Earlier, under the Companies Act, 1956, this provision was applicable to only public company or a private company which is a subsidiary of a public company.

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(iii) According to the provision of section 263 of the Companies Act, 1956, two or more directors of a company cannot be elected as directors by single resolution. Where resolution in contravention is passed, no provision for automatic re-appointment of the director retiring by rotation in default of another appointment shall apply. The proviso to section 263(2) of the Companies Act, 1956, has not been included under section 162 of the Companies Act, 2013. According to section 152(7)(b)(v) of the Companies Act, 2013, the provisions for automatic re-appointment shall not apply to cases where section 162 is applicable. Hence, section 162 of the Companies Act, 2013 needs to be harmoniously interpreted with the provisions of section 152(7)(b)(v) of the Companies Act, 2013.

3.17 Option to adopt principle of proportional representation for appointment of directors (Section 163 of the Companies Act, 2013)

A new section 163 of the Companies Act, 2013 came into force on 12th September, 2013 which provides the option to adopt principle of proportional representation for appointment of directors. According to this section:

(i) Notwithstanding anything contained in the Companies Act, 2013, 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.

(ii) Such appointments may be made once in every three 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.

(iii) Casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 265 of the Companies Act, 1956 i.e. option to company to adopt proportional representation for the appointment of directors.

(ii) Under the Companies Act, 1956, the articles of a public company or a private company which is a subsidiary of a public company may provide for appointment of directors by way of proportional representation but under the Companies Act, 2013, even the articles of the private companies may provide for it.

3.18 Disqualifications for appointment of director (Section 164 of the Companies Act, 2013)

Section 274 of the Companies Act, 1956 provided for disqualifications of directors. A new section 164 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Disqualifications for appointment of director. According to this section:

(i) A person cannot be appointed as director of a company in any of the following cases:

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

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(b) he is an undischarged insolvent;

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

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not 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 seven 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 six 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 five 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.

(ii) No person who is or has been a director of a company which—

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

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

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

(iii) 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.

However, the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall not take effect—

(a) for thirty days from the date of conviction or order of disqualification;

(b) 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 off; or

(c) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed off.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 274 of the Companies Act, 1956 i.e. disqualifications of directors.

(ii) In addition to the disqualification provided under the Companies Act, 1956, following new additional disqualifications to be appointed as director have been introduced under the new Act:

  (a) A person who has been convicted of any offence and sentenced in respect thereof to imprisonment for a period extending upto 7 years or more;

  (b) The person has been convicted of the offence dealing with related party transactions at any time during the last preceding 5 years.

  (c) The person has not obtained Director Identification Number.

(iii) Further, with respect to the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1), the time upto which the disqualification shall not take effect is prescribed.

(iv) Now, any person who is or has been a director of any company and not only Public Company as provided under the Companies Act 1956, who has not filed financial statements or Annual Returns for any continuous period of three financial years or has defaulted in repayment of deposits or interest there on or failed to redeem any debentures on due date or interest due there on or failed to pay dividend declared for one year or more, shall not be eligible for re-appointment as Director of that company or for appointment in other company for a period of five years from the date on which the said company fails to do so.

(v) Section 274(2) of the Companies Act, 1956 provided the power to Central Government to exempt, by notification in the Official Gazette, removal of particular disqualification incurred by any person. Section 164 of the Companies Act, 2013 does not contain such provision.

3.19 Number of directorship (Section 165 of the Companies Act, 2013)

A new section 165 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the maximum permissible number of directorships that a person can hold. According to this section:

(i) No person, after the commencement of this Act, shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. [Section 165(1)]

Provided that out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director. [Proviso to section 165(1)]

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

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(iii) Transition period for complying with sub-section (1) is one year and within this period, if any director is holding office as director in companies more than the specified limits, he shall -

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

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

(c) intimate the choice made by him under clause (a), to each of the companies in which he was holding the office of director before such commencement and to the Registrar having jurisdiction in respect of each such company. [Section 163(3)]

(iv) Any resignation made in pursuance of clause (b) of sub-section (3) shall become effective immediately on the dispatch thereof to the company concerned. [Section 163(4)]

(v) After dispatching the resignation of his office as director or non-executive director or after the completion of the transition period of one year, whichever is earlier, no such person shall act as director in more than specified number of companies.

(vi) If a person accepts an appointment as a director in contravention of sub-section (1) i.e. holding directorship in more than 20 companies or more than 10 public companies, he shall be punishable with fine which shall not be less than five thousand rupees but which may extend to twenty- five thousand rupees for every day after the first during which the contravention continues.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 275 of the Companies Act, 1956 i.e. person to be a director of more than fifteen companies, section 276 of the Companies Act, 1956 i.e. choice to be made by director of more than fifteen companies at commencement of Act, section 277 of the Companies Act, 1956 i.e. choice by person becoming director of more than fifteen companies after commencement of Act, section 278 of the Companies Act, 1956 i.e. exclusion of certain directorships for the purposes of sections 275, 276 and 277 and section 279 i.e. penalty.

(ii) Under the new Act, a person can become director in 20 companies instead of 15 as provided under the Companies Act 1956 and out of this 20, he can be a director of maximum 10 public companies. For the purpose of counting such directorship in public company, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

(iii) Under the new Act, the members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

(iv) The nature of punishment has been changed under this section. Earlier under the old Act, punishment was based on number of companies but now the same will be levied on basis of number of days the person continues to be Director of more than 20 companies.

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3.20 Duties of Directors (Section 166 of the Companies Act, 2013)

There was no provision for the Duties of directors in the Companies Act, 1956 but it has been defined in the company Law for the first time under section 166 of the Companies Act, 2013 which came into force from 1st April, 2014. The following duties have been prescribed for a director under section 166 of the Companies Act, 2013:

(i) He shall act in accordance with the articles of the company, subject to the provisions of this Act.

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

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

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

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

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

(vii) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The new Companies Act 2013 vide section 166 now provides for the duties of directors of companies. There was no provision in the Companies Act, 1956 which laid down the duties of directors.

3.21 Vacation of office of director (Section 167 of the Companies Act, 2013)

A new section 167 of the Companies Act, 2013 came into force from 1st April, 2014 which provides the provisions of vacation of office by directors. According to this section:

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

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

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

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

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

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

(f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months.

It is further provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

(g) he is removed in pursuance of the provisions of this Act;

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

(ii) 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 imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both. [Section 167(2)]

(iii) 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)]

(iv) 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)]

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to the section 283 of the Companies Act, 1956 which provides for vacation of office by director.

(ii) Under the new Act, the office of a director shall be vacated, if he is disqualified by an order of a Court or the Tribunal. But under the old Act, the office of a director became vacant if he was disqualified by an order of Court only under section 203 of the Companies Act, 1956.

(iii) Under the new Act, a director vacates the office, if he ceases to hold any office or other employment in the holding, subsidiary or associate company, pursuant to which he was appointed as director. Under the Companies Act, 1956, this was limited to holding any office or other employment in the Company.

(iv) Under the new Act, in case all the directors vacate their office under any of the disqualifications specified under sub-section (1), then the promoter or, in his absence, the Central Government shall appoint the required number of directors till the directors are appointed by Company in general meeting.

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(v) Under the new Act, the office of a director shall also be vacated in case the director incurs any of the disqualifications as specified under section 164 of the Companies Act, 2013.

(vi) Under the new Act, a director shall vacate his office, if he fails to attend all the meeting of board for consecutive period of 12 months with or without seeking leave of absence of the Board. Under the old Act, the office of a director becomes vacant if the director absents himself from three consecutive meetings of the Board or from all meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board.

(vii) The punishment in case of contravention of section related to vacation of office by Director has been increased under the new Act.

(viii) Under the new Act, a director who is either 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, shall vacate the office immediately inspite of the fact where an appeal against the order has been filed or not.

3.22 Resignation of Director (Section 168 of the Companies Act, 2013)

There was no provision for the resignation of directors in the Companies Act, 1956 but section 168 of the Companies Act, 2013 which came into force from 1st April, 2014 provides for it. According to this section:

(i) a director may resign from his office by giving a notice in writing to the company.

(ii) The Board shall on receipt of such notice take note of the same.

(iii) 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.

(iv) 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.

(v) Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days from the date of resignation in Form *DIR-11* along with the prescribed fee.

(vi) The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

(vii) It is further provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

(viii) Where all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section in the Companies Act 2013 provides for resignation of director. There was no such provision in the Companies Act, 1956.

3.23 Removal of Directors (Section 169 of the Companies Act, 2013)[except sub-section (4)]

A new section 169 of the Companies Act, 2013 came into force partially[1] from 1st April, 2014 which provides the provisions for removal of directors. According to this section:

(i) 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)]

(ii) It is further provided that the directors appointed on the principle of proportional representation under section 163 cannot be removed by an ordinary resolution as aforesaid. {Proviso to section 169(1)]

(iii) A special notice 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)]

(iv) On receipt of the notice of this resolution, 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)]

(v) The vacancy resulting from the aforesaid removal if he had been appointed by the company in general meeting or by the Board, may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given under sub section (2). [Section 169(5)]

(vi) A director so appointed shall hold office for the remaining period for which the director who has been removed would have held office if he had not been removed. [Section 169(6)]

(vii) 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)]

(viii) 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. [Section 169(8)(a)]

(ix) Nothing in this section shall be derogating from any power to remove a director under any other provisions of this Act. [Section 169(8)(b)]

[1] *Sub-section (4) to section 169 of the Companies Act, 2013 is yet to be notified.*

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to the Section 284 of the Companies Act, 1956 i.e. removal of directors.

3.24 Register of Directors and Key Managerial Personnel and their shareholding (Section 170 of the Companies Act, 2013)

A new section 170 of the Companies Act, 2013 came into force from 1st April, 2014 which provides the provisions for Register of Directors and Key Managerial Personnel and their shareholding as under:

(i) Every company shall keep at its registered office a register containing such particulars of its directors and key managerial personnel as may be prescribed and which shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies. [Section 170(1)]

(ii) Section 170(2) further provides that a return containing such particulars and documents as may be prescribed, of the directors and the key managerial personnel shall be filed with the Registrar

(a) within 30 days from the appointment of every director and key managerial personnel, as the case may be, and

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 303 of the Companies Act, 1956 i.e. Register of directors, etc. and section 307 of the Companies Act, 1956 i.e. Register of directors' shareholdings, etc.

(ii) Register of Director and Register of Directors Shareholding has been merged into one register.

(iii) Now the return for appointment or any change therein shall also be filed for appointment of Key Managerial Personnel other than Directors.

3.25 Members right to inspect (Section 171 of the Companies Act, 2013)

A new section 171 of the Companies Act, 2013 came into force from 1st April, 2014 which provides the members right to inspect. According to this section:

(i) The register of directors and Key Managerial personnel kept under section 170(1) shall be open for inspection during business hours and the members shall have the right to take extracts therefrom and copies thereof, on request and will be provided within 30 days free of cost. [Section 171(1)(a)]

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

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

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 304 of the Companies Act, 1956 i.e. inspection of the register.

(ii) Under the new Act, the members shall have a right to take extracts therefrom and copies thereof. The copies must be provided to them free of cost within thirty days.

(iii) Under the new Act, any person attending the Annual General Meeting can inspect the Register of Directors and Key Managerial Personnel and their shareholding.

(iv) If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the Registrar shall on an application made to him order immediate inspection and supply of copies required there under.

(v) In case of contravention of the provisions of this section, the punishment has been increased.

3.26 Punishment (Section 172 of the Companies Act, 2013)

Section 172 of the Companies Act, 2013 which came into force from 1st April, 2014 provides as under:

If a company contravenes any of the provisions of the sections i.e. from 149 to 171 (both inclusive) and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

There was no provision for punishment in case of contravention of the provisions of this chapter for which no specific punishment was specified, in the Companies Act, 1956. Under the Companies Act 2013, for those defaults of the sections included under this chapter XI relating to the appointment and qualifications of directors, for which no specific punishment is provided, punishment provided under this section shall apply. Therefore in case of a default which is not specifically dealt with for determining punishment, the Company and every office of the Company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees, but which may extend to five lakh rupees.

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4

Appointment and Remuneration of Managerial Personnel

4.1 Appointment of Managing Director, Whole Time Director or Manager (Section 196 of the Companies Act, 2013)

A new section 196 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the provisions for appointment of Managing Director, Whole Time Director or Manager. According to this section:

(i) A company shall not appoint or employ a managing director and a manager at the same time. [Section 196(1)]

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

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

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

(iii) Disqualification [section 196(3)]: No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who-

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

Provided that a person who has attained the age of seventy years may be appointed to such office by the passing of a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

(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.

Schedule V to the Companies Act, 2013, has prescribed additional conditions for managing or whole-time director or a manager to be eligible for appointment:

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(1) 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.

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

Provided that where the Central Government has given its approval to the appointment of a person convicted or detained under para (1) or para (2), as the case may be, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval.

(3) 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

(4) he is resident of India.

Explanation 1: Here, 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.

Procedure of appointment [section 196(4)]*:*

(i) Subject to the provisions of section 197 and Schedule V, 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.

(ii) 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.

(iii) 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.

(iv) 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.

(v) A return in the prescribed form (*Form No. MR.1)* along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

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

For ex: A managing director is appointed in board meeting on 1st June, 2014. General meeting was to be held on 7th June, 2014 for approval of the same. The General meeting was held accordingly on 7th June, 2014 but did not approve the appointment of Managing Director.

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In this case, acts done by the managing director from 1st June, 2014 to 7th June, 2014 i.e. upto the non approval of the general meeting, shall be valid subject to the provisions of this Act.

Managing Director [Section 2(54)]: 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:

(i) virtue of the articles of a company or

(ii) an agreement with the company or

(iii) a resolution passed in its general meeting, or by its Board of Directors,

and includes a director occupying the position of the managing director, by whatever name called.

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

(i) the power to affix the common seal of the company to any document or

(ii) to draw and endorse any cheque on the account of the company in any bank or

(iii) to draw and endorse any negotiable instrument or

(iv) to sign any certificate of share or

(v) to direct registration of transfer of any share

Whole Time Director [Section 2(94)]: "whole-time director" includes a director in the whole-time employment of the company.

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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to Section 197A of the Companies Act, 1956 i.e. company not to appoint or employ certain different categories of managerial personnel at the same time, section 267 i.e. certain persons not to be appointed managing directors, section 269 i.e. appointment of managing or whole-time director or manager to require Government approval only in certain cases, section 317 i.e. managing director not to be appointed for more than five years at a time, section 384 i.e. firm or body corporate not to be appointed manager, section 385 i.e. certain persons not to be appointed managers and section 388 i.e. application of sections 269, 310, 311, 312 and 317 to managers.

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(ii) Under the new Act, notice of board meeting convened for appointment of Managing Director, Whole Time Director or Manage shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, if any, of a Director or Directors in such appointments, if any.

(iii) Under the new Act, provision related to appointment of Managing Director or Whole Time Director or Manger shall now also apply to a Private Company.

(iv) Under the new Act, where special resolution to be passed in general meeting for appointment of Managing Director, Whole Time Director or Manager, who has attained the age of 70 years, the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

(v) The Return in the prescribed form shall be filed within 60 days instead of 90 days as provided earlier with Registrar for appointment of such Managing Director, Whole Time Director or Manager.

(vi) Age limit for appointment of any person as Managing Director, Whole Time Director or Manager has been changed. Now, the minimum age is 21 years instead of 25 as earlier provided.

(vii) Under the new Act, no re-appointment of Managing Director, Whole Time Director or Manager shall be made earlier than one year before the expiry of his term whereas under the old Act, no such re-appointment shall be made before the expiry of two years.

(viii) Under the new Act, no person can be appointed as Managing Director or Whole Time Director or Manager if he has at any time been convicted by a court of an offence and sentenced for a period of more than six months. Whereas under the old Act, conviction for offence should involve moral turpitude and no imprisonment period was prescribed.

(ix) Under the new act, in addition to the Statues prescribed under Schedule XIII in the Companies Act 1956, a person shall also be ineligible for appointment as Managing or Whole Time Director or Manager if he/she has been sentenced to imprisonment for any period or to a fine exceeding one thousand rupees under the Prevention of Money Laundering Act, 2002. Under the new Act, in Schedule V, the Companies Act, 1956 has been replaced by the Companies Act, 2013, the Monopolies and Restrictive Trade Practices Act, 1969 has been replaced by the Competition Act, 2002, the Foreign Exchange Regulation Act, 1973 has been replaced by the Foreign Exchange Management Act, 1999.

4.2 Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits (Section 197 of the Companies Act, 2013)

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 which came into force from 1st April, 2014. According to this section:

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

(a) The overall managerial remuneration to the Directors including managing director, whole time director and manager is summarized as under:

S.No.	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)
(i)	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 with approval of Central Government subject to provisions of Schedule V may pay remuneration in excess of 11% of the net profits of the company
(ii)	One Managing director/ Whole time director/ manager	5% of the net profits of the company for that year	With the approval of the company in general meeting this limit may be exceeded.
(iii)	More than one Managing director/ Whole time director/ manager	10% of the net profits	With the approval of the company in general meeting this limit may be exceeded.
(iv)	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 in general meeting is required
(v)	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 in general meeting is required

(b) 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.

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

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

(i) by the articles of the company, or

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(ii) by a resolution or,

(ii) if the articles so require, by a special resolution, passed by the company in general meeting, and

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

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

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

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

(iii) Sitting Fees to directors [Section 197(5)]:

(a) 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.

(b) The sitting fees shall not exceed one lakh rupees per meeting of the Board or committee thereof. [As per the *Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014*]

However, for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

(c) 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.

(d) Different fees for different classes of companies and fees in respect to independent directors may be such as may be prescribed.

(iv) 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.

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

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

(b) 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.

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(c) 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.

(vii) Remuneration of Independent Director [Section 197(7)]

Notwithstanding anything contained in any other provision of this Act but subject to the provisions of this section, an independent director shall not be entitled to any stock option and may receive remuneration by way of

(1) sitting fees in terms of section 197(5),

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

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

(viii) 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 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)]

(ix) Disclosure by listed company [Section 197(12)]:

(a) Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed. The details are prescribed under *the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.*

(b) The board's report shall include a statement showing the name of every employee 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 sixty lakh rupees;

(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 five lakh 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

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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.

(c) 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.

(x) Insurance for indemnification [Section 197(13)]:

(a) Where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

(b) Provided that, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

(xi) Receiving Commission [Section 197(14)]:

Subject to the provisions of this section, 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.

(xii) Contravention [Section 197(15)]:

If any person contravenes the provisions of section 197, he shall be punishable with fine which shall not be less than ₹ 1 Lakh but which may extend to ₹ 5 Lakhs.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 198 of the Companies Act, 1956 i.e. Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits and section 309 of the Companies Act, 1956 i.e. Remuneration of directors.

(ii) Under the new Act, an independent director shall not be entitled to any stock option and may receive remuneration by way of sitting fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

(iii) Now 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.

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(iv) under the new Act, subject to the provisions of this section, 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.

(v) In case of nil or inadequate profit, the conditions under which the Company can pay remuneration to managerial person has been changed.

4.3 Calculation of profits (Section 198 of the Companies Act, 2013)

According to section 198 of the Companies Act, 2013:

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

Profit as per Profit and Loss Account for the year ended 31st March, 20---	
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 (*a*) profits, by way of premium on shares or debentures of the company, which are issued or sold by the company; (b) profits on sales by the company of forfeited shares; (c) profits of a capital nature including profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof; (d) profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets: Provided that where the amount for which any fixed asset is sold exceeds the written-down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written- down

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	value; (e) 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.
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	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 sub-section (*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.

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	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.	

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 349 of the Companies Act, 1956 i.e. determination of profits.

(ii) Under the new Act, following item has been introduced in addition to the existing items for which Credit shall not be given:

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.

(iii) Under the new Act, following item has been introduced in addition to the existing items which shall not be deducted:

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.

(iv) Under the new Act, following item has been deleted (which was present under the old Act) from the items which shall be deducted as per section 198(4) of the Companies Act, 2013:

Amount paid as cess under section 441A.

4.4 Recovery of managerial remuneration in certain cases (Section 199 of the Companies Act, 2013)

There was no provision for recovery of remuneration in certain cases under the old Act but a new section 199 of the Companies Act, 2013 came into force from 1st April, 2014 which

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provides for recovery of remuneration in certain cases. According to section 199 of the Companies Act, 2013:

Without prejudice to any liability incurred under the provisions of this Act or any other law for the time being in force, 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 recover 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section now provides for recovery of managerial remuneration in certain cases. There was no such provision in the Companies Act, 1956.

4.5 Central Government or company to fix limit with regard to remuneration (Section 200 of the Companies Act, 2013)

According to section 200 of the Companies Act, 2013, notwithstanding anything contained in this Chapter, 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, as it may deem fit and while fixing such remuneration the Central Government shall have regard to:

(a) the financial position of the company;

(b) the remuneration or commission drawn by the individual concerned in any other capacity;

(c) the remuneration or commission drawn by him from any other company;

(d) professional qualifications and experience of the individual concerned;

(e) any other matters as may be prescribed

According to the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, for the purposes of clause (e) above the Central Government or the company shall have regard to the following matters, namely:-

(1) the Financial and operating performance of the company during the three 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.

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(5) the securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 637AA of the Companies Act, 1956 i.e. power of Central Government to fix a limit with regard to remuneration.

(ii) Under the new Act, while fixing the remuneration, the Central Government or the company shall have regard to other matters which have been prescribed under Rules. This was not in the Companies Act, 1956.

(iii) Earlier under the old Act, while fixing the remuneration under section 637AA of the Companies Act, 1956, the Central Government shall have regard to public policy relating to the removal of disparities in income. This factor is not present under section 200 of the Companies Act, 2013.

4.6 Forms of, and procedure in relation to, certain applications (Section 201 of the Companies Act, 2013)

According to section 201 of the Companies Act, 2013:

(i) Every application made to the Central Government under this Chapter shall be in Form No. *MR.2* and shall be accompanied by fee as may be specified for the purpose.

(ii) Before any application is made by a company to the Central Government under any of the sections aforesaid, there shall be issued by or on behalf of the company a general notice to the members thereof, indicating the nature of the application proposed to be made.

(iii) Such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district, and at least once in English in an English newspaper circulating in that district.

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

(v) The *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, prescribes that the companies other than listed companies and subsidiary of a listed company may without Central Government approval pay remuneration to its managerial personnel, in the event of no profit or inadequate profit beyond ceiling specified in Section II, Part II of Schedule V, subject to complying with the following conditions namely:-

(a) Payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee, if any. While doing so, the clear reason and justification for payment of remuneration beyond the said limit has to be recorded in writing.

(b) The company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon, preference shares and dividend on preference shares for a continuous period of thirty days in the preceding financial year before the date of payment to such managerial personnel.

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(c) The approval of shareholders by way of a special resolution at a general meeting of the company for payment of remuneration for a period not exceeding three years.

(d) a statement along-with a notice calling the general meeting referred to above point (c), shall contain the information as per sub clause (iv) of second proviso to clause (B) of section II of part-II of Schedule V of the Act including reasons and justification for payment of remuneration beyond the said limit.

(e) The company has filed Balance Sheet and Annual Return which are due to be filed with the Registrar of Companies.

(f) Every such application seeking approval shall be made to the Central Government within a period of ninety days from the date of such appointment.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 640B of the Companies Act, 1956 i.e. Forms of, and procedure in relation to, certain applications.

4.7 Compensation for loss of office of managing or whole-time director or manager (Section 202 of the Companies Act, 2013)

A new section 202 of the Companies Act, 2013 came into force on 12th September, 2013 which provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:

(i) 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.

(ii) No payment of compensation shall be made in the following cases:

(a) where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation 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 resulting from the amalgamation;

(b) where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

(c) where the office of the director is vacated under sub-section (1) of section 167;

(d) 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;

(e) 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

(f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

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(iii) The compensation payable to such managing director or whole-time director or manager 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, then for such shorter period.

(iv) 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.

(v) 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 318 of the Companies Act, 1956 i.e. compensation for loss of office not permissible except to managing or whole-time directors or to directors who are managers.

(ii) The provisions of both the sections i.e. section 318 of the Companies Act, 1956 and section 202 of the Companies Act, 2013 are same.

4.8 Appointment of Key Managerial Personnel (Section 203 of the Companies Act, 2013)

Section 203 of the Companies Act, 2013 lays down the provisions for appointment of Key Managerial Personnel of companies.

(i) Who is KMP [section 203(1)]: Every company belonging to such class or classes of companies as may be prescribed, shall have the following whole time key managerial personnel:-

(a) Managing Director, or Chief Executive Officer or Manager and in their absence, a Whole-time Director;

(b) Company Secretary; and

(c) 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 crore or more shall have whole-time key managerial personnel.

Further, as per *the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2014*, a company other than a company covered under Rule 8 above, which has a paid up share capital of ₹ 5 crore or more shall have a whole-time company secretary.

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With the insertion of Rule 8 A to the above rules, it is now mandatory of every other company to have a whole time company secretary if it's paid up share capital is Rs 5 Crores or more.

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

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,—

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

(b) 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)]

The MCA vide Notification No. S.O. 1913(E) dated 25th July, 2014 notifies that public companies having paid-up share capital of ₹100 crore or more and annual turnover of ₹1,000 or more which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business shall be the class of companies for the purpose of the second proviso to sub-section (1) of section 203 of the said Act.

Explanation- For the purpose of this notification, the paid-up share capital and the annual turnover shall be decided on the basis of the latest audited balance sheet.

(iii) Conditions for appointment:

(a) 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)]

(b) 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.

(iv) Transitional period: If the whole-time KMP is holding office in more than one company at the same time on the commencement of this Act, he shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of KMP.

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

(a) 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, other company.

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(b) Such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting.

(c) It is further provided that specific notice of such meeting, and of the resolution to be moved thereat has been given to all the directors then in India.

(vi) 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.

(vii) Penalty for contravention [Section 203(5)]:

(a) On company: If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than ₹ 1 lac but which may extend to ₹ 5 Lacs.

(b) On director and KMP: Every director and KMP of the company who is in default shall be punishable with fine which may extend to ₹ 50,000 and where the contravention is a continuing one, with a further fine which may extend to ₹ 1,000 for every day after the first during which the contravention continues.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The concept of KMP and a comprehensive set of legal provisions have been newly introduced in the Companies Act 2013 although some provisions of Section 269 of the Companies Act, 1956, i.e. appointment of managing or whole-time director or manager to require Government approval only in certain cases, section 316 i.e. number of companies of which one person may be appointed managing director, section 383A i.e. certain companies to have secretaries, section 386 i.e. number of companies of which a person may be appointed manager were present.

4.9 Secretarial audit for bigger companies (Section 204 of the Companies Act, 2013)

A new section 204 of the Companies Act, 2013 came into force from 1st April, 2014 which provides the provisions for secretarial audit for bigger companies which are as under:

(i) Companies that are required to conduct secretarial audit: Under Section 204(1), every listed company and a company belonging to other class of companies as may be prescribed, shall annex with its Board's report made in terms of section 134 (3), a secretarial audit report, given by a company secretary in practice, in such form as may be prescribed.

The Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that for the purposes of section 204 (1), the other class of companies shall be as under:

(a) Every public company having a paid up share capital of ₹ 50 crore or more; or

(b) Every public company having a turnover of ₹ 250 crore or more.

The format of the Secretarial Audit Report shall be in Form No. *MR 3.*

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(ii) Duty of the company:

(a) It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company [Section 204(2)].

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

(iii) Contravention [Section 204(4)]:

If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, then

(a) the company; or

(b) every officer of the company; or

(c) the company secretary in practice,

who is in default, shall be punishable with fine which shall not be less than ₹ 1 Lac but which may extend to ₹ 5 Lacs.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

Earlier the Companies Act, 1956 did not contain any provision for Secretarial audit for bigger companies. Section 204 of the Companies Act, 2013 provides for it.

4.10 Functions of company secretary (Section 205 of the Companies Act, 2013)

A new section 205 of the Companies Act, 2013 came into force from 1st April, 2014 which lays down the functions of company secretary as under:

(i) Functions of the company secretary: According to Section 205(1) read with the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, the functions of the company secretary shall include,—

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

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

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

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

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

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

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

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

(i) to discharge such other duties as have been specified under the Act or rules; and

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

Here, the expression "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.

(ii) According to Section 205 (2) the provisions contained in section 204 and section 205 shall not affect the duties and functions of the Board of Directors, chairperson of the company, managing director or whole-time director under this Act, or any other law for the time being in force.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any specific provisions for functions of the Company secretary. Section 205 of the Companies Act, 2013 provides for it.

4.11 Managerial Remuneration as per Part II, Part III and Part IV of Schedule V

Part II

(i) Remuneration payable by companies having profits:

Subject to the provisions of section 197, a company having profits in a financial year may pay remuneration to a managerial person or persons not exceeding the limits specified in such section.

(ii) Section II — Remuneration payable by companies having no profit or inadequate profit without Central Government approval:

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding the higher of the limits under (*A*) and (*B*) given below:—

(A):

	(1)	(2)
	Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
(i)	Negative or less than 5 crores	30 lakhs
(ii)	5 crores and above but less than 100 crores	42 Lakhs
(iii)	100 crores and above but less than	60 lakhs

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	250 crores	
(iv)	250 crores and above	60 lakhs *plus* 0.01% of the effective capital in excess of ₹ 250 crores:

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

Explanation.—It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

(B) In the case of a managerial person who was not a security holder holding securities of the company of nominal value of rupees five lakh or more or an employee or a director of the company or not related to any director or promoter at any time during the two years prior to his appointment as a managerial person, — 2.5% of the current relevant profit:

Provided that if the resolution passed by the shareholders is a special resolution, this limit shall be doubled:

Provided further that the limits specified under this section shall apply, if—

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

(ii) the company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person;

(iii) a special resolution has been passed at the general meeting of the company for payment of remuneration for a period not exceeding three years;

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

I. General Information:

(1) Nature of industry

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

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

(4) Financial performance based on given indicators

(5) Foreign investments or collaborations, if any.

II. Information about the appointee:

(1) Background details

(2) Past remuneration

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(3) Recognition or awards

(4) Job profile and his suitability

(5) Remuneration proposed

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

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

III. Other information:

(1) Reasons of loss or inadequate profits

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

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

IV. Disclosures:

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the financial statement:—

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

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

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

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

Section III— Remuneration payable by companies having no profit or inadequate profit without Central Government approval in certain special circumstances:

In the following circumstances a company may, without the Central Government approval, pay remuneration to a managerial person in excess of the amounts provided in Section II above:—

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

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such amount or amounts is within permissible limits under section 197.

(b) where the company—

(i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or

(ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction or National Company Law Tribunal, for a period of five years from the date of sanction of scheme of revival,

it may pay remuneration up to two times the amount permissible under Section II.

(c) where remuneration of a managerial person exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal:

Provided that the limits under this Section shall be applicable subject to meeting all the conditions specified under Section II and the following additional conditions:—

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

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

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

(d) a company in a Special Economic Zone as notified by Department of Commerce from time to time which has not raised any money by public issue of shares or debentures in India, and has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in any financial year, may pay remuneration up to ₹ 2,40,00,000 per annum.

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Section IV— Perquisites not included in managerial remuneration:

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

   (a) contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-tax Act, 1961 (43 of 1961);

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

   (c) encashment of leave at the end of the tenure.

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

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

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

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

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

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Explanation II.

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

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

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

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

(a) take into account, financial position of the company, trend in the industry,

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

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

Explanation VI.— For the purposes of this Schedule:—

(*A*) "current relevant profit" means the profit as calculated under section 198 but without deducting the excess of expenditure over income referred to in sub-section 4

(I) thereof in respect of those years during which the managerial person was not an employee, director or shareholder of the company or its holding or subsidiary companies.

(*B*) "Remuneration" means remuneration as defined in clause (*78*) of section 2 and includes reimbursement of any direct taxes to the managerial person.

Section V—Remuneration payable to a managerial person in two companies:

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

PART III- Provisions applicable to Parts I and II of this Schedule

1. The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in general meeting.

2. The auditor or the Secretary of the company or where the company is not required to appointed a Secretary, a Secretary in whole-time practice shall certify that the requirement of

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this Schedule have been complied with and such certificate shall be incorporated in the return filed with the Registrar under sub-section (*4*) of section 196.

PART IV- Exemption by the Central Government

The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule.

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5
Meetings of Board and Its Powers

5.1 Introduction

Two main organs, the shareholders in general meetings and the directors acting as a Board conduct the affairs of a company. Therefore, directors frequently meet up to discuss various matters relating to the management and administration of the affairs of the company in the interest of the public and the shareholders. The modern practice is to confer upon the directors the right to exercise all company's powers except for those matters, which are by law required to be exercised by the company in general meeting. The Board of directors oversees management of the company to ensure that the interests of shareholders are protected.

5.2 Meetings of Board (Section 173 of the Companies Act, 2013)

A new section 173 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Meetings of Board. According to this section:

(i) Frequency of Board Meetings [Section 173 (1)]:

(a) First Board meeting: Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its Incorporation.

(b) Subsequent Board meetings: Every company shall hold minimum of 4 meetings every year provided that the gap between two consecutive board meetings shall not be more than 120 days.

However, the Central Government may by notification, direct that these provisions will not apply in relation to any class or descriptions of companies or will apply in relation thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

(ii) Participation in Board meeting [Section 173 (2)]:

(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 as may be prescribed.

(b) Such audio visual means should be capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

(c) However, the Central Government may by notification specify such matters which shall not be dealt with in a meeting through video conferencing and other audio visual means.

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"Video conferencing or other audio visual means" means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

(d) Some of the key points related to meetings of Board that are held through conferencing or other audio visual means, as provided in *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-

(A) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(B) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

(C) to record proceedings and prepare the minutes of the meeting;

(D) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year.

(E) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means;

(F) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting.

However, the differently abled persons may make a request to the Board to allow a person to accompany him.

(3) (A) The notices of the meeting shall be sent to all the directors in accordance with the provisions of Section 173 (3) of the Act;

(B) The notice of the meeting shall inform the directors regarding the options available to them to participate through video conferencing mode or other audio visual means, alongwith all other information to enable the directors to participate through such mode;

(C) A director intending to participate through video conferencing mode or other audio visual means shall communicate his intention to the chairman or the company secretary of the company.

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(D) If a director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect, to enable the company to make arrangements in this behalf.

(E) 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.

(F) In the absence of any such intimation from the director, it shall be assumed that he will attend the meeting in person.

(4) Process of a roll call at the Board Meeting: A director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.

(5) The scheduled venue of the meeting as mentioned in the notice convening the meeting, shall be deemed to be the venue of the meeting which is conducted through video conferencing or other audio visual means authorized under these rules and all recordings at such meeting shall be deemed to have been made at that place.

(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.

Matters not to be dealt with in a meeting through video conferencing or other audio visual means as provided in *the Companies (Meetings of Board and its Powers) Rules, 2014 are as under:*

(1) the approval of the annual financial statements;

(2) the approval of the Board's report;

(3) the approval of the prospectus;

(4) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by the Board under sub-section (1) of section 134 of the Act; and

(5) the approval of the matter relating to amalgamation, merger, demerger acquisition and takeover.

(iii) Notice of the Board meeting [Section 173 (3)]:

(a) According to section 173(3), 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.

(b) Provided that a 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

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present at such a meeting of the Board 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.

(c) The *Companies (Meetings of Board and its Powers) Rules, 2014* further provides that 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.

(d) 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.

(e) 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) Penalty for failure to give notice: 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.

(v) Exceptions [Section 173(5)]:

(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.

(b) Provided that, a One Person Company in which there is only one director on its Board of Directors shall not be required to hold at least one Board meeting in each half of a calendar year. Thus, it is exempt from following the provisions of section 173(5).

For further details related to "Meetings of Board through video conferencing or other audio visual means", refer the Companies (Meetings of Board and its Powers) Rules, 2014.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 285 and 286 of the Companies Act, 1956 i.e. 'Board to meet at least once in every three calendar months' and 'Notice of meetings'.

(ii) Under the new Act, some of the key new provisions related to board meeting and notice for board meeting have been introduced, which are as follows:

  (a) the First Board Meeting should be held within 30 days of the Incorporation.

  (b) A notice of at least 7 days in writing is required to call a Board meeting.

  (c) Notice of meeting to all Directors shall be given, whether he is in India or outside India by hand delivery or by post or by electronic means.

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(d) Meeting may be called at shorter notice for urgent business if at least 1 Independent Director is present in the meeting and if he is not present, then decision of the meeting shall be circulated to all directors and it shall be valid only after final ratification of decision by at least one Independent Director.

(e) In case of One Person Company, small Company and Dormant Company, at least 1 meeting of the Board of Directors must be held in each half of a calendar year and the gap between the 2 meetings shall not be less than 90 days.

(f) Participation of directors through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognizing the participation of the Directors and of recording and storing the proceedings of such meetings along with date and time is newly introduced.

(iii) Earlier under the Old Act, there was requirement of holding the meeting every quarter. However, under the New Act, at least 4 meeting should be held in each year and not more than 120 days shall elapse between two meetings. Further, 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. A One Person Company in which there is only one director on its Board of Directors is not required to conduct meeting in each half of a calendar year.

5.3 Quorum for meetings of Board (Section 174 of the Companies Act, 2013)

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.

A new section 174 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Quorum for meetings of Board. According to this section:

(i) The quorum for a Board Meeting shall be one-third of its total strength or two directors, whichever is higher.

(ii) The directors who participate by video conferencing or by other audio visual means shall also be counted for the purpose of determining the quorum at the meeting.

Further, the explanation as given in *the Companies (Meetings of Board and its Powers) Rules,* 2014 provides that the a director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.

(iii) The continuing directors may notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or 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.

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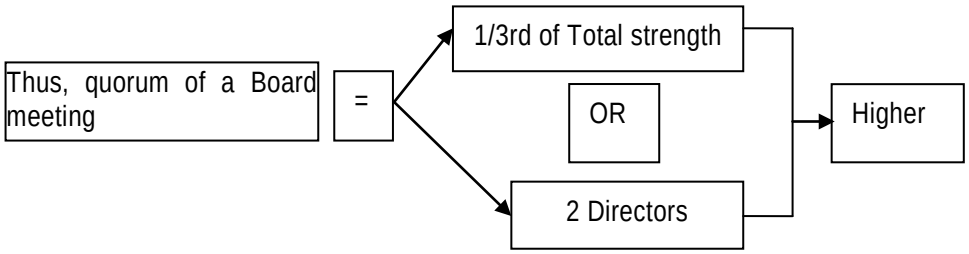
(iv) Where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of Directors, the quorum shall be the number of directors who are present at the meeting and not interested directors and are not be less than 2.

"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:

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.



(v) Meeting could not be held for want of quorum: Where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

Notes:

1. The provisions of section 174 are not applicable on One Person Company in which there is only one director on its Board of directors.
2. For the purpose of calculating quorum, any fraction of a number shall be rounded off as one
3. "Total strength" shall not include directors whose places are vacant.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 287 and 288 of the Companies Act, 1956 i.e. 'Quorum for meetings' and 'Procedure where meeting adjourned for want of quorum'.

(ii) The New Act allows the directors participating in the meeting through Video conferencing and other audio visual means, to be counted for the purposes of quorum.

5.4 Passing of resolution by circulation (Section 175 of the Companies Act, 2013)

A new section 175 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Passing of resolution by circulation. According to this section:

(i) 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:

(a) 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,

(b) at their addresses registered with the company in India,

(c) by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and

(d) and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

The Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax. If at least 1/3rd of third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).

(ii) 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 289 of the Companies Act, 1956 i.e. passing of resolutions by circulation.

(ii) Under the New Act, if at least 1/3rd of third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board instead of being decided by circulation.

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5.5 Defects in appointment of directors not to invalidate actions taken (Section 176 of the Companies Act, 2013)

A new section 176 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Defects in appointment of directors not to invalidate actions taken. According to this section:

(i) No act done by a person as a director shall be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.

(ii) Nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or to have terminated.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 290 of the Companies Act, 1956 i.e. Validity of acts of directors.

5.6 Audit committee (Section 177 of the Companies Act, 2013)

A new section 177 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Audit committee. According to this section:

(i) Formation of an Audit Committee: An audit committee shall be constituted by the Board of directors of:

(a) Every listed company, and

(b) Such other class or classes of companies as may be prescribed.

The Companies (Meetings of Board and its Powers) Rules, 2014 have prescribed the following classes of companies that shall constitute Audit Committee:

(a) all public companies with a paid up capital of 10 crore rupees or more;

(b) all public companies having turnover of 100 crore rupees or more;

(c) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

Explanation.- The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

"Provided that public companies covered under this rule which were not required to constitute Audit Committee under section 292A of the Companies Act, 1956 shall constitute their Audit Committee within one year from the commencement of these rules or appointment of independent directors by them, whichever is earlier:

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Provided further that public companies covered under this rule shall constitute their Nomination and Remuneration Committee within one year from the commencement of these rules or appointment of independent directors by them, whichever is earlier".

(ii) Composition of an Audit committee: 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.

Provided that the majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand the financial statement.

Disclosure of composition of Audit Committee: The composition of the Audit Committee shall be disclosed in the Board's report under section 134(3).

(iii) Transition period: This Act shall, within one year of such commencement, be reconstituted in accordance with the new composition of an Audit Committee as provided for in sub section (2) above.

(iv) Responsibilities of an Audit Committee: According to sub section (4) of section 177, every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, *inter alia*, include,—

(a) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;

(b) review and monitor the auditor's independence and performance, and effectiveness of audit process;

(c) examination of the financial statement and the auditors' report thereon;

(d) approval or any subsequent modification of transactions of the company with related parties;

(e) scrutiny of inter-corporate loans and investments;

(f) valuation of undertakings or assets of the company, wherever it is necessary;

(g) evaluation of internal financial controls and risk management systems;

(h) monitoring the end use of funds raised through public offers and related matters.

(v) Investigation by Audit Committee: According to sub section (6) of section 177, the Audit Committee shall have authority to investigate into any matter in relation to the items specified in sub-section (4) or referred to it by the Board and for this purpose shall have power to obtain professional advice from external sources and have full access to information contained in the records of the company.

(vi) Disclosure in Board's report:

(a) The composition of the Audit Committee shall be disclosed in the Board's report under section 134(3).

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(b) Where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in Board's report under section 134(3), along with the reasons therefor.

(vii) Role of auditor in Audit Committee:

(a) According to section 177(5), the Audit Committee is empowered to:

(1) call for the comments of the auditors about:

(A) internal control systems,

(B) the scope of audit, including the observations of the auditors,

(C) review of financial statement before their submission to the Board,

(2) discuss any related issues with the internal and statutory auditors and the management of the company.

(b) Right to be heard in the meeting of Audit Committee: According to section 177(7), the auditors of a company and the key managerial personnel shall have a right to be heard in the meetings of the Audit Committee when it considers the auditor's report but shall not have the right to vote.

(vii) Penalty for contravention [Section 178(8)]

(a) The company shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees, and,

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, or with both.

Vigil mechanism

(i) Formation of vigil mechanism: According to section 177(9), a Vigil mechanism shall be formed in:

(a) Every listed company, and

(b) Such other prescribed classed of companies.

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.

(ii) Objective of formation of vigil mechanism:

(a) A vigil mechanism shall be formed for directors and employees to report genuine concerns in such manner as may be prescribed.

(b) The vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the

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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.

According to the *Companies (Meetings of Board and its Powers) Rules, 2014*:

(1) "Persons who use such mechanism" means employees and directors who avail the vigil mechanism.

(2) The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand

(3) 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.

(4) 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.

(5) 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.

(iii) Penalty for contravention [Section 178(8)]: Same as penalty mentioned in the topic of Audit Committee.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 292A of the Companies Act, 1956 i.e. Audit Committee.

(ii) Under the Old Act, every public company having paid-up capital of not less than five crores of rupees was mandatory required to constitute an Audit committee. Under the New Act, every listed company and other prescribed classes of companies are mandatorily required to constitute an Audit committee.

(iii) Under the New Act, the composition of Audit Committee has been changed. It shall now comprise of minimum 3 directors with majority of the Independent Directors. Further, the majority of members of committee shall be person with ability to read and understand financial statements.

(iv) Under the New Act, the Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit. Such a provision was not present under section 292A of the Old Act.

(v) Under the Old Act, the chairman of the Audit Committee was required to attend the annual general meeting of the company to provide any clarification on matters relating to audit. However, under the New Act, there is no compulsory requirement to attend the AGM.

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(vi) Under the Old Act, the company, and every officer who is in default, was punishable with imprisonment for a term which may extend to one year, or with fine which may extend to ₹ 50,000, or with both. However, according to the New Act, separate penalties have been provided for the 'company' (fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000) and 'Every officer of the company who is in default' (punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000, or with both.)

(vii) The New Act has introduced the provisions of Vigil Mechanism.

5.7 Nomination and Remuneration Committee and Stakeholders Relationship Committee (Section 178 of the Companies Act, 2013)

A new section 178 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Nomination and Remuneration Committee and Stakeholders Relationship Committee. According to this section:

Sections 178 (1) to (4) lay down the provisions in respect of the Nomination and Remuneration Committee as under:

Nomination and Remuneration Committee

(i) Formation of nomination and remuneration committee: A nomination and remuneration committee shall be constituted by the Board of directors of:

(a) Every listed company, and

(b) Such other class or classes of companies as may be prescribed.

The Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following classes of companies that shall constitute Nomination and Remuneration Committee of the Board:

(1) all public companies with a paid up capital of ten crore rupees or more;

(2) all public companies having turnover of one hundred crore rupees or more;

(3) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

Explanation.- The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

"Provided that public companies covered under this rule which were not required to constitute Audit Committee under section 292A of the Companies Act, 1956 shall constitute their Audit Committee within one year from the commencement of these rules or appointment of independent directors by them, whichever is earlier:

Provided further that public companies covered under this rule shall constitute their Nomination and Remuneration Committee within one year from the commencement of these rules or appointment of independent directors by them, whichever is earlier".

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(ii) Composition of nomination and remuneration committee:

(a) This committee shall consist of 3 or more non-executive directors out of which not less than one-half shall be independent directors.

(b) The Chairman (whether executive or non-executive) of the company shall not chair such a committee. However, he may be appointed as a member to the committee.

(c) The chairperson or in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

(iii) Constitution of the committee [Sub section (2)]:

(a) The Nominations and Remuneration Committee shall

(b) identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down.

(c) recommend to the Board their appointment and removal of directors and senior management carry out evaluation of every director's performance.

(iv) The Nominations and Remuneration Committee shall formulate the criteria for determining qualifications; positive attributes and independence of a director recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees [Sub section (3)].

(v) According to section 178(4), the Nomination and Remuneration Committee shall, while formulating the policy under sub-section (3) of section 178 ensure that—

(a) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;

(b) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and

(c) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

It is imperative to disclose such a policy in Board's Report.

(vi) Penalty for contravention: Same as penalty mentioned in the topic of Audit Committee.

Section 178 (5) and (6) lay down the provisions relating to the formation, constitution and functioning of the Stakeholders Relationship Committee as under:

(i) Formation and constitution of stakeholder's relationship committee: The Board of Directors of a company which consists of more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee.

(ii) Objective of the committee: The Stakeholders Relationship Committed shall consider and resolve the grievances of security holders of the company. This committee shall protect the interests of all security holders, not merely the equity investors.

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(iii) Chairperson of stakeholder's relationship committee: It shall be headed by a chairperson who shall be a non-executive director and consist of such other members as may be decided by the Board.

Section 178 (7) provides that the chairperson of each of the above committees constituted under this section or, in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

Section 178 (8) provides for the penalty for contravention of any of the provisions of either section 177 or 178 and has been explained above (after section 177).

Provided that the non-consideration of a resolution of any grievance by the Stakeholders Relationship Committee in good faith shall not constitute a contravention of section 178.

Here, for the purposes of section 178, the expression ''senior management'' means personnel of the company who are members of its core management team excluding Board of Directors comprising all members of management one level below the executive directors, including the functional heads.

Penalty for contravention: Same as penalty mentioned in the topic of Audit Committee.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
This is a new provision introduced by the Companies Act, 2013.

5.8 Powers of Board (Section 179 of the Companies Act, 2013)

A new section 179 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Powers of Board. According to this section:

(i) 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 authorised to exercise and do.

However, while 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.

(ii) 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.

(iii) 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.

(iv) Powers of the Board to be exercised by the Board by means of the resolution passed at a duly convened Board meeting:

(a) to make calls on shareholders in respect of money unpaid on their shares;

(b) to authorise buy-back of securities under section 68;

(c) to issue securities, including debentures, whether in or outside India;

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(d) to borrow monies;

(e) to invest the funds of the company;

(f) to grant loans or give guarantee or provide security in respect of loans;

(g) to approve financial statement and the Board's report;

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

(j) to take over a company or acquire a controlling or substantial stake in another company;

(k) any other matter which may be prescribed

Additionally, *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 take note of appointment(s) or removal(s) of one level below the Key Management Personnel;

(4) to appoint internal auditors and secretarial auditor;

(5) to take note of the disclosure of director's interest and shareholding;

(6) to buy, sell investments held by the company (other than trade investments), constituting 5% or more of the paid up share capital and free reserves of the investee company;

(7) to invite or accept or renew public deposits and related matters;

(8) to review or change the terms and conditions of public deposit;

(9) to approve quarterly, half yearly and annual financial statements or financial results as the case may be.

(v) 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).

However, 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, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be

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deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

Explanation I.—Nothing in point (d) above shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.

Explanation II.—In respect of dealings between a company and its bankers, the exercise by the company of the power specified in point (d) above shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(vi) 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 291 and 292 of the Companies Act, 1956 i.e. 'General Powers of Board' and 'certain powers to be exercised by Board only at meeting'.

(ii) The New Act has added the following new powers to the exercised at the Board meeting only:

- (a) to give guarantee or provide security in respect of loans;
- (b) to approve financial statement and the Board's report;
- (c) to diversify the business of the company;
- (d) to approve amalgamation, merger or reconstruction;
- (e) to take over a company or acquire a controlling or substantial stake in another company;
- (f) to issue securities whether in India or outside India;
- (g) any other matter which may be prescribed.

5.9 Restrictions on powers of Board (Section 180 of the Companies Act, 2013)

A new section 180 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Restrictions on powers of Board. According to this section:

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

(a) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

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"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 twenty per cent. of the total income of the company during the previous financial year;

The expression "substantially the whole of the undertaking" in any financial year shall mean twenty per cent. or more of the value of the undertaking as per the audited balance sheet of the preceding financial year;

(b) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

(c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, 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;

(d) To remit, or give time for the repayment of, any debt due from a director.

(ii) 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.

(iii) Nothing contained in above point (a) shall affect—

(1) 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

(2) 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.

(iv) Any special resolution passed by the company consenting to the transaction as is referred to in above point (a) may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions.

Provided that, this sub section shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the provisions contained in this Act.

(v) No debt incurred by the company in excess of the limit imposed by above point (c) 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.

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The MCA vide General Circular No. 15/2013 dated 13th September, 2013 has clarified that in respect of requirements of special resolution under Section 180 of the said Act, as against ordinary resolution required by the Companies Act 1956, if notice for any such general meeting was issued prior to 12th September, 2013, then such resolution may be passed in accordance with the requirement of the Companies Act 1956.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 293 of the Companies Act, 1956 i.e. Restrictions on powers of Board.

(ii) This section is now applicable to all the companies instead of only public company and private company which is a subsidiary of a public company as provided under the Companies Act, 1956.

(iii) The board of directors of company shall exercise the specified powers only with the consent of the company by a special resolution as compared to ordinary resolution provided in the Companies Act, 1956.

(iv) "Undertaking" and "substantially the whole of the undertaking" has been specifically defined under the Companies Act, 2013.

(v) Now the approval of general meeting is only required when the Board wants to invest otherwise in trust securities, the compensation received by it as a result of Merger or amalgamations only and not on compulsory acquisition of any undertaking as provided under the Companies Act, 1956.

(vi) The power to contribute to charitable and other funds directly relating to the business of the company or the welfare of its employees in excess of fifty thousand rupees or five per cent of its average net profits whichever is higher (which was in Companies Act, 1956) is not included in the Companies Act, 2013. What is included in Section 181 of Companies Act, 2013 is company to contribute bona fide to charitable funds. Prior permission of company in general meeting shall be required if amount of contribution in any financial year exceeds 5 per cent of average net profit for three immediately preceding financial years.

5.10 Company to contribute to bona fide and charitable funds, etc. (Section 181 of the Companies Act, 2013)

A new section 181 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Company to contribute to bona fide and charitable funds, etc. According to this section:

(i) The Board of Directors of a company may contribute to bona fide charitable and other funds.

(ii) Prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceeds five per cent of its average net profits for the three immediately preceding financial years.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 293(1)(e) of the Companies Act, 1956 i.e. Restrictions on powers of Board.

(ii) A separate clause has been provided under the Companies Act, 2013, to deal with the powers of the company to contribute to bonafide charitable and other funds.

(iii) Under the Companies Act, 2013, this section is applicable to all the companies instead of only public company and private company which is a subsidiary of a public company as it was under the Companies Act, 1956.

(iv) Consent of the company in general meeting shall be required for contribution to charitable and other funds not directly relating to the business of the company or the welfare of its employees in excess of the amount given under section 293(1)(e) of the Companies Act, 1956. Under the Companies Act, 2013, prior permission of the company in the general meeting shall be required for such contribution in excess of amount given under section 181. Though, under both the Acts, the consent/permission of the general meeting is necessary before contributing in excess of the amount specified under the law, the word "Prior" has been used specifically under the Companies Act, 2013.

(v) Under the Companies Act, 1956, permission shall only be required where contribution to charitable and other funds exceeds the limit of 5% of the average net profits for the three immediately preceding financial years or ₹ 50, 000, whichever is greater. But under the Companies Act, 2013, the permission shall only be required where contribution to political party exceeds the limit of 5% of the average net profits for the three immediately preceding financial years and the limits of ₹ 50,000 as covered under the Companies Act, 1956 has been dispensed with.

5.11 Prohibitions and restrictions regarding political contributions (Section 182 of the Companies Act, 2013)

A new section 182 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Prohibitions and restrictions regarding political contributions. According to this section:

(i) Notwithstanding anything contained in any other provision of this Act, 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.

(ii) The following companies are not allowed to contribute to any political party:

(a) a Government company; and

(b) a company which has been in existence for less than three financial years.

(iii) The aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent. of its average net profits during the three immediately preceding financial years.

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(iv) No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

(v) Without prejudice to the generality of the provisions of sub-section (1),

(a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;

(b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed,—

(1) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

(2) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

(vi) 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, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed. [Section 182(3)]

(vii) If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

The MCA vide General Circular 19/ 2013 dated 10th December 2013, issued a clarification on disclosures to be made under section 182 relating to 'Prohibition and restrictions regarding political contributions' of the Companies Act, 2013.

The circular says that, with the coming into force of the scheme relating to 'Electoral Trust Companies' under the Income Tax Act, 1961 read with Ministry of Finance Notification No. S.O. 309(E) dated 31st January, 2013, it will be expedient to explain the requirements of disclosure on part of a company of any amount or amounts contributed by it to any political parties under section 182(3) of the Companies Act, 2013.

The Ministry hereby clarifies that:

(i) Companies contributing any amount or amounts to an 'Electoral Trust Company' for contributing to a political party or parties are not required to make disclosures required under section 182(3) of Companies Act 2013. It will be sufficient, if the Accounts of the company disclose the amount released to an Electoral Trust Company.

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(ii) *Companies contributing any amount or amounts directly to a political party or parties will be required to make the disclosures laid down in section 182(3) of the Companies Act, 2013.*

(iii) *Electoral trust companies will be required to disclose all amounts received by them from other companies/sources in their Books of Accounts and also disclose the amount or amounts contributed by them to a political party or parties as required by section 182(3) of Companies Act, 2013.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 293A of the Companies Act, 1956 i.e. Prohibitions and restrictions regarding political contributions.

(ii) Under the Companies Act, 1956, a company may contribute any amount directly or indirectly to any political party or for any political purpose to any person. Now under the Companies Act, 2013, a company may contribute any amount directly or indirectly to any political party. Contribution to any person for political purpose is not allowed under the new Act.

(iii) The limits for political contribution by company have been changed. Now instead of 5% as provided under the Companies Act, 1956, contribution shall not exceed 7.5% of the average net profits of the company during the three immediately preceding financial years.

(iv) The punishment for contravention of provision related to political contribution has been increased, wherein in case of default, the company shall be punishable with fine which may extend to 5 times the amount so contributed and every officer who is in default shall be punishable with imprisonment for a term which may extend to 6 months and with fine which may extend to 5 times the amount so contributed.

5.12 Power of Board and other persons to make contributions to national defence fund, etc. (Section 183 of the Companies Act, 2013)

A new section 183 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power of Board and other persons to make contributions to national defence fund, etc. According to this section:

(i) The Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, notwithstanding anything contained in sections 180, 181 and section 182 or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

(ii) Every company shall disclose in its profits and loss account the total amount or amounts contributed by it to the Fund referred to in point (i) as specified above, during the financial year to which the amount relates.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 293B of the Companies Act, 1956 i.e. Power of Board and other persons to make contributions to the National Defence Fund, etc.

(ii) The provisions of both the sections i.e. section 293B of the Companies Act, 1956 and section 183 of the Companies Act, 2013 are same.

5.13 Disclosure of interest by director (Section 184 of the Companies Act, 2013)

A new section 184 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Disclosure of interest by director. According to this section:

Section 184 is applicable on all directors of the company and all types of Companies.

(i) When to disclose: Every director shall:

(a) At the First meeting of the Board in which he participates as a director, and

(b) Thereafter, at the first meeting of the Board in every financial year, or

(c) Whenever there is any change in the disclosures already made, then at the first Board meeting held after such change.

(ii) What to disclose: Every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as may be prescribed.

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.

(iii) 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—

(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.

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

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becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested.

(iv) Consequences of non disclosure:

(a) *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.

(b) *Penalty*: If a director of the company contravenes the provisions of sub-section (1) or subsection (2) of section 184, such director shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees, or with both.

(v) No restriction on directors: Nothing in section 184 shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company.

(vi) 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 299 of the Companies Act, 1956 i.e. Disclosure of interests by director.

(ii) Under the new Act, even in case of private companies, the interested directors cannot vote or take part in the discussion relating to any matter in which he is interested.

(iii) Under the New Act, Disclosing concern or interest in any company or companies or bodies corporate, firms, or other association of individuals including the shareholding and disclosure of interest or concern in contract or arrangement or proposed contract or arrangement are distinct requirements and both need to be complied with. Under the Old Act, a general notice given to the Board by a director, to the effect that he is a director or a member of a specified body corporate or is a member of a specified firm and is to be regarded as concerned or interested in any contract or arrangement which may, after the date of notice, be entered into with that body corporate or firm, shall be deemed to be a sufficient disclosure of concern or interest in relation to any contract or arrangement so made.

(iv) Under the New Act, the notice of interest has to be given at the Board Meeting by the Directors. Under the Old Act, it can also be brought up and read at the Board meeting.

(v) The punishments have been increased significantly under the New Act.

(vi) The condition whereby general notice of interest is given by Directors and in case the same needs to be renewed, a fresh notice is required to be given in the last month of the financial year in which it would otherwise expired, has been dispensed with.

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5.14 Loan to directors, etc. (Section 185 of the Companies Act, 2013)

A new section 185 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Loan to directors, etc. According to this section:

(i) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

(ii) 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 bank rate declared by the Reserve Bank of India.

(iii) The expression "to any other person in whom director is interested" means—

(a) any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;

(b) any firm in which any such director or relative is a partner;

(c) any private company of which any such director is a director or member;

(d) 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

(e) 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.

(iv) 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- 5 lakhs and maximum- 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- 5 lakhs and maximum- 25 lakhs, or,

Both imprisonment and fine.

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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 principle 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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 295 of the Companies Act, 1956 i.e. Loans to directors, etc.

(ii) The given restrictions under the Companies Act, 2013 is applicable to both Public and Private companies unlike the existing Companies Act, 1956 where it was applicable only to Public Companies [Section 295 (2)].

(iii) The requirement of permission of Central Government for giving loan to director as required under the Companies Act, 1956 has been dispensed with.

(iv) Company can give loan to MD or WTD without approval of shareholders when the loan is given as a part of the conditions of service extended by the company to all its employees.

(v) The exemption given to loan granted, guarantee or security provided by any Holding company to its subsidiary or the exemptions granted to private company and a banking company has been dispensed with.

(vi) Any company which in the ordinary course of its business can provide loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

(vii) The punishment for contravention has been increased. Now the company will also be punishable in case of contravention of these provisions. The director or any other person in default shall be punishable with imprisonment which may extend to 6 months or with fine which shall not be less than 5 lakh rupees but which may extend to 25 lakh rupees, or with both as compared to simple imprisonment for a term which may extend to 6 months or punishment which may extend to 50,000 rupees as provided under the Companies Act, 1956.

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5.15 Loan and Investment by Company (Section 186 of the Companies Act, 2013)

A new section 186 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Loan and Investment by Company. According to this section:

This section is applicable on both public as well as private company.

(i) According to section 186(1), without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than 2 layers of investment companies:

However, the provisions of sub-section (1) shall not affect,—

(a) 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;

(b) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

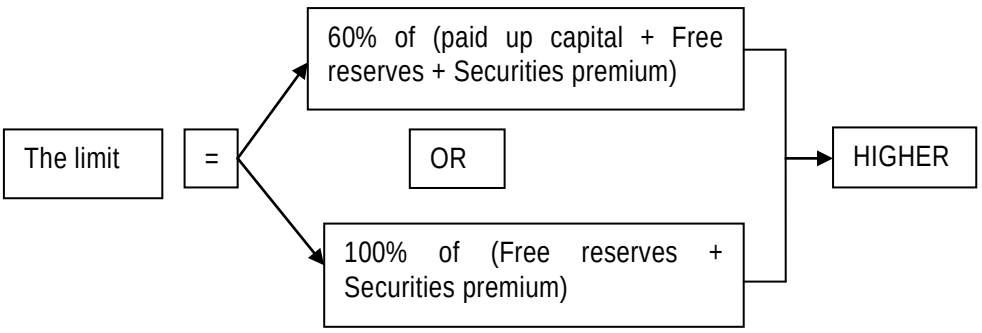
(ii) According to section 186 (2) of the Companies Act, 2013, no company shall directly or indirectly —

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.



(iii) Prior approval for exceeding limit [Section 186(3)]: Prior approval by means of a special resolution passed at a general meeting shall be necessary where the giving of any

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loan or guarantee or providing any security or the acquisition exceeds the limits specified above.

According to the *Companies (Meetings of Board and its Powers) Rules, 2014,* where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of sub-section (3) of section 186 shall not apply:

Provided that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4) of section 186.

The *Companies (Meetings of Board and its Powers) Rules, 2014*, also provides that:

(a) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under section 186, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Explanation.-For the purpose of this rule, it is clarified that it would sufficient compliance if such special resolution is passed within one year from the date of notification of this section.

(b) A resolution passed at a general meeting in terms of sub-section (3) of section 186 to give any loan or guarantee or investment or providing any security or the acquisition under sub section (2) of section 186 shall specify the total amount up to which the Board of Directors are authorised to give such loan or guarantee, to provide such security or make such acquisition:

Provided, that the company shall disclose to the members in the financial statement the full particulars in accordance with the provision of sub-section (4) of section 186.

(iv) Disclosure to members [Section 186(4)]: It is necessary for the company to disclose to the members in the financial statement the full particulars of:

(a) loan given,

(b) investment made or guarantee given or security provided,

(c) the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.

(v) Unanimous resolution [Section 186 (5)]: Any investment shall be made or loan or guarantee or security given by the company only after when the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting. The prior approval of the public financial institution concerned where any term loan is subsisting shall also be obtained.

However, 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

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security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in section 186(2) and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(vi) Further, 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. [Section 186 (6)]

According to *the Companies (Meetings of Board and its Powers) Rules, 2014,* no company registered under section 12 of the Securities and Exchange Board of India Act, 1992 and also covered under such class or classes of companies which may be notified by the Central Government in consultation with the Securities and Exchange Board, shall take any inter-corporate loan or deposits, in excess of the limits specified under the regulations applicable to such company, pursuant to which it has obtained certificate of registration from the Securities and Exchange Board of India.

(vii) Rate of interest on loan: A loan under this section shall not be given at a rate of interest lower than the prevailing yield of one year, 3 year, 5 year or 10 year Government Security closest to the tenor of the loan. [Section 186 (7)]

(viii) No loan till default is subsisting: 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. [Section 186 (8)]

(ix) Maintenance of register: 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. [Section 186 (9)]

According to the *Companies (Meetings of Board and its Powers) Rules, 2014*:

(a) Every company giving loan or giving guarantee or providing security or making an acquisition of securities shall, from the date of its incorporation, maintain a register in *Form MBP 2* and enter therein separately, the particulars of loans and guarantees given, securities provided and acquisitions made as aforesaid.

(b) The entries in the register shall be made chronologically in respect of each such transaction within 7 days of making such loan or giving guarantee or providing security or making acquisition.

(c) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorised by the Board for the purpose.

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(d) The entries in the register (either manual or electronic) shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

(e) The register can be maintained either manually or in electronic mode.

(f) The extracts from such register maintained may be furnished to any member of the company on payment of such fee as may be prescribed in the Articles of the company which shall not exceed 10 rupees for each page.

The MCA vide General Circular No. 15/2014 dated 9th June, 2014 has clarified that registers maintained by companies pursuant to section 372A of the Companies Act, 1956, may continue as per requirements and the new format vide Form MBP 2 shall be used for particulars entered in such registers on and from 1.4.2014.

(x) Register to be kept at registered office:

(a) This register shall be kept at the registered office of the company.

(b) It shall be open to inspection at such office and extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed. [Section 186 (10)]

(xi) Nothing contained in section 186, except sub-section (1) of section 186, shall apply—

(a) 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 companies or of providing infrastructural facilities;

According to *the Companies (Meetings of Board and its Powers) Rules, 2014,* the expression "business of financing of companies" shall include, with regard to a Non-Banking Financial Company registered with the Reserve Bank of India, "business of giving of any loan to a person or providing any guaranty or security for due repayment of any loan availed by any person in the ordinary course of its business".

(b) to any acquisition—

(1) made by a non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities:

Provided that exemption to non-banking financial company shall be in respect of its investment and lending activities;

(2) made by a company whose principal business is the acquisition of securities;

(3) of shares allotted in pursuance of section 62(1)(a) [Section 186 (11)]

(xii) Power of Central Government to make Rules: The Central Government may make rules for the purposes of this section. [Section 186 (12)]

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(xiii) Penalty: If a company contravenes the provisions of section 186, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than 25,000 rupees but which may extend to 1,00,000 rupees. [Section 186 (13)]

(xiv) For the purposes of section 186,

(a) the expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities;

(b) the expression "infrastructure facilities" means the facilities specified in Schedule VI.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 372A of the Companies Act, 1956 i.e. Inter-corporate loans and investments.

(ii) Some of the new provisions that have been introduced by the New Act are:

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

(b) Now no Stock Broker, Sub-broker, Share Transfer Agent, Banker to issue, Registrar to an issue, Merchant Banker, Underwriter, Portfolio Manager, Investment Advisor or any Intermediary Associated with capital market shall take inter corporate loans and deposits exceeding the limits which will be prescribed.

(c) 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. Such a company shall furnish in its financial statement the details of the inter-corporate loan or deposits.

(d) No company which has defaulted in payment of any deposit accepted before the commencement of this Act or payment of interest shall give any loan or provide any guarantee or security or make any acquisition till the default is subsisting.

(iii) Under the New Act, loan under this section shall not be provided at a rate of interest lower than the prevailing yield of 1 year, 3 year, 5 year or 10 year Government Security closest to the tenor of the loan.

(iv) Under section 372A of the Old Act, the provision was applicable to "any loan to any other body corporate". Under the New Act, section 186 is applicable to "any loan to any person or other body corporate". Hence, under the New Act, the section is applicable to any loans to any persons and not merely to inter-corporate loans.

(v) Under the Old Act, one could escape punishment of imprisonment by fully repaying the inter-corporate loan contravening section 372A of the 1956 Act. This is not possible under the New Act.

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5.16 Investments of company to be held in its own name (Section 187 of the Companies Act, 2013)

A new section 187 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Investments of company to be held in its own name. According to this section:

(i) 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:

However, 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.

(ii) Nothing in this section shall be deemed to prevent a company—

(a) from depositing with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon; or

(b) 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:

Provided that if within a period of 6 months from the date on which the shares or securities are transferred by the company to, or are first held by the company in the name of, the State Bank of India or a scheduled bank as aforesaid, no transfer of such shares or securities takes place, the company shall, as soon as practicable after the expiry of that period, have the shares or securities re-transferred to it from the State Bank of India or the scheduled bank or, as the case may be, again hold the shares or securities in its own name; or

(c) from depositing with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it;

(d) 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.

(iii) Where in pursuance of clause (d) of sub-section (ii), 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 subject to such reasonable restrictions as the company may by its articles or in general meeting impose.

(iv) If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, or with both.

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According to the *Companies (Meetings of Board and its Powers) Rules, 2014*,

(a) Every company shall, from the date of its registration, maintain a register in Form *MBP3* and enter therein, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name and the company shall also record the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person.

(b) The company shall also record whether such investments are held in a third party's name for the time being or otherwise.

(c) The register shall be maintained at the registered office of the company. The register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board for the purpose.

(d) The entries in the register shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 49 of the Companies Act, 1956 i.e. investments of the company to be held in its own name.

(ii) The New Act specifically provides that all investments made or held by a Company in any property, security or other asset shall be held in its own name. Under the Old Act, some of the investments enjoyed exemptions.

(iii) Penalty for contravention has been increased under the New Act.

5.17 Related Party Transactions (Section 188 of the Companies Act, 2013)

A new section 188 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for related party transactions. According to this section:

(i) Contracts with related parties which are covered under section 188 [Section 188(1)]: Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions[1] as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to—

(a) sale, purchase or supply of any goods or materials;

(b) selling or otherwise disposing of, or buying, property of any kind;

(c) leasing of property of any kind;

(d) availing or rendering of any services;

[1] For details regarding prescribed conditions please refer sub rule (1) of rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014.

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(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:

However, no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a special resolution. [First proviso to section 188(1)]

According to *the Companies (Meetings of Board and its Powers) Rules, 2014* except with the prior approval of the company by a special resolution, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into,—

(1) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188, with criteria as mentioned below -

(A) sale, purchase or supply of any goods or materials, directly or through appointment of agent, exceeding 10% of the turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188;

(B) selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent, exceeding 10% of net worth of the company or rupees 100 crore, whichever is lower, as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188;

(C) leasing of property of any kind exceeding ten per cent. of the net worth of the company or 10%. of turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (c) of sub-section (1) of section 188;

(D) availing or rendering of any services, directly or through appointment of agent, exceeding 10% of the turnover of the company or rupees 50 crore, whichever is lower, as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188:

Explanation.—It is hereby clarified that the limits specified in sub-clauses (i) to (iv) shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

(2) is for appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding 2.5 lakh rupees as mentioned in clause (f) of subsection (1) of section 188; or

(3) is for remuneration for underwriting the subscription of any securities or derivatives thereof, of the company exceeding 1% of the net worth as mentioned in clause (g) of sub-section (1) of section 188.

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Explanation -

- The Turnover or Net Worth referred in the above sub-rules shall be computed on the basis of the Audited Financial Statement of the preceding financial year.
- In case of a wholly owned subsidiary, the special resolution passed by the holding company shall be sufficient for the purpose of entering into the transactions between the wholly owned subsidiary and the holding company.

(4) The explanatory statement to be annexed to the notice of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:—

(a) name of the related party ;

(b) name of the director or key managerial personnel who is related, if any;

(c) nature of relationship;

(d) nature, material terms, monetary value and particulars of the contract or arrangement;

(e) any other information relevant or important for the members to take a decision on the proposed resolution."

No voting by related member: Further no member of the company shall vote on such special resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party. [Second proviso to section 188(1)]

The MCA vide General Circular No. 30/2014 dated 17th July, 2014 has clarified the scope of second proviso to section 188(1). The second proviso to subsection (1) of section 188 requires that no member of the company shall vote on a special resolution to approve the contract or arrangement (referred to in the first proviso), if such a member is a related patty. It is clarified that 'related party' referred to in the second proviso has to be construed with reference only to the contract or arrangement for which the said special resolution is being passed. Thus, the term 'related party' in the above context refers only to such related party as may be a related party in the context of the contract or arrangement for which the said special resolution is being passed.

According to *the Companies (Meetings of Board and its Powers) Rules, 2014,* where any director is interested in any contract or arrangement with a related party, such director shall not be present at the meeting during discussions on the subject matter of the resolution relating to such contract or arrangement.

(ii) Transaction to be at arm's length prices: Nothing as provided above shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

(iii) Explanation.—

(a) the expression "office or place of profit" means any office or place—

(1) where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the

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remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(2) where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(b) the expression "arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

(iv) Related party transaction to be mentioned in Board's report [Section 188 (2)]: Every contract or arrangement entered into under sub section (1) as mentioned above, shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.

(v) Related party transaction can be voidable at the option at the Board [Section 188 (3)]: A contract or arrangement shall be voidable at the option of the Board:

(a) Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a special resolution in the general meeting as required under section 186(1), and

(b) if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into.

Further, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

(vi) Section 188 (4) provides that without prejudice to anything contained in sub-section (3) of section 188, it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

(vii) Penalty for contravention [Section 188 (5)]: Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall,—

(a) in case of listed company, be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees, or with both; and

(b) in case of any other company, be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.

(viii) 'Related Party' means

(a) a director or his relative;

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(b) a key managerial personnel or his relative;

(c) a firm, in which a director, manager or his relative is a partner;

(d) a private company in which a director or manager is a member or director;

(e) a public company in which a director or manager is a director or holds along with his relatives, more than 2% of its paid-up share capital;

The Companies 1st (Removal of Difficulties) Order, 2014 clarifies that a Public Company in which a director or manager is a director and holds along with his relatives, more than 2% of its paid-up share capital shall be a related party.

(f) any body corporate of which a director or manager of the company is a shadow director;

(g) any shadow director of the company (i.e., any person on whose advice, directions or instructions a director or manager of the company is accustomed to act) ;

(h) any company which is—

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

(B) a subsidiary of a holding company to which it is also a subsidiary.

(i) such other person as may be prescribed.

Rule 3 of the *Companies (Specification of Definitions Details) Rules, 2014* provides that for the purposes of sub-clause (ix) of clause (76) of section 2 of the Act, a director or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party.

The persons covered in items (f) and (g) above shall not be related parties if advice, directions or instructions are given by them in a professional capacity.

Applicability of Section 188 to corporate restructuring, amalgamations etc.: The MCA vide General Circular No. 30/2014 dated 17th July, 2014 has clarified that transactions arising out of Compromises, Arrangements and Amalgamations dealt with under specific provisions of the Companies Act, 1956/Companies Act, 2013, will not attract the requirements of section 188 of the Companies Act, 2013.

Requirement of fresh approvals for past contracts under Section 188: The MCA vide General Circular No. 30/2014 dated 17th July, 2014 has clarified that Contracts entered into by companies, after making necessary compliances under Section 297 of the Companies Act, 1956, which already came into effect before the commencement of Section 188 of the Companies Act, 2013, will not require fresh approval under the said section 188 till the expiry of the original term of such contracts. Thus, if any modification in such contract is made on or after 1st April, 2014, the requirements under section 188 will have to be complied with.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 297 and 314 of the Companies Act, 1956 i.e. 'Board's sanction to be required for certain contracts in which particular directors are interested' and 'Director etc., not to hold office or place of profit.'

(ii) Under section 297 of the Old Act, if the company entering into a transaction had a paid up capital of more than ₹ 1 crore, approval of the Central Government was also required. Under the New Act, the condition of obtaining approval from the Central Government has been done away with.

(iii) Under the Old Act, restrictions applied only to transactions with specified persons/parties, namely, a director of the company or his relative, a firm in which such a director or relative is a partner, any other partner in such a firm, or a private company of which the director is a member or director. However, under the new Act, the list of persons covered under related party has been widened.

(iv) Under the new Act, every contract or arrangement entered into with the related party will be referred to in the Board's report to shareholders, along with justification for entering into such transaction. Such a disclosure was not present under the old Act.

(v) According to the old Act, Contracts with contracting parties covered are:

(a) for the sale, purchase or supply of any goods, materials or services; or

(b) for underwriting the subscription of any shares in, or debentures of, the company:

According to the new Act, Contracts with contracting parties covered are:

(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 agents 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.

Thus, additional contracts have been added under the new Act.

(vi) Under the new Act, instead of general punishment, specific punishment has been now been provided in case of contravention of provisions related to related party transaction. In case of default any Director or other employee of a company, who had authorized the contract or arrangement in violation of the provisions of this section shall,-

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(a) in case of Company other than the Company whose shares are not listed in any stock exchange, be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees; and

(b) in case of listed Public Company, be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees, or with both.

5.18 Register of contracts or arrangements in which directors are interested (Section 189 of the Companies Act, 2013)

A new section 189 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Register of contracts or arrangements in which directors are interested. According to this section:

(i) Maintenance of register of contracts or arrangements [Section 189(1)]: Section 189 of the Companies Act, 2013 makes it mandatory for all companies to keep one or more registers giving separately the particulars of all contracts or arrangements as required under:

(a) section 184(2) [interested director] or

(b) section 188 [related party].

(ii) Registers to be signed [Section 189(1)]: The register shall be prepared in such manner and containing such particulars as may be prescribed and after entering the particulars, the duly filled and updated register or registers shall be placed before the next meeting of the Board and signed by all the directors present at the meeting.

(iii) Such register shall be prepared in such manner and contain such particulars as may be prescribed. [Section 189(1)]

According to *the Companies (Meetings of Board and its Powers) Rules, 2014*, such company shall, from the date of its incorporation, maintain a register in *Form MBP 2* and enter the particulars of loans and guarantees given, securities provided and acquisitions made. Further, the entries in the register shall be made chronologically in respect of each such transaction within seven days of making such loan or giving guarantee or providing security or making acquisition.

(iv) Disclosure to be made by director or KMP [Section 189(2)]: Every director or key managerial personnel shall, within a period of 30 days of his appointment, or relinquishment of his office, as the case may be, disclose to the company the particulars specified in section 184(1) relating to his concern or interest in the other associations which are required to be included in the register under that sub-section or such other information relating to himself as may be prescribed.

(v) Register to be kept at registered office [Section 189(3)]: The register shall be kept at the registered office of the company and it shall be open for inspection at such office during business hours.

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(vi) Extracts from register [Section 189(3)]: Extracts may be taken from the register, and copies thereof as may be required by any member of the company shall be furnished by the company to such extent, in such manner, and on payment of such fees as may be prescribed.

According to *the Companies (Meetings of Board and its Powers) Rules, 2014*, such fee will be as provided in the articles of the company, subject to the maximum of ₹ 10 for each page.

(vii) Register to be produced at AGM [Section 189(4)]: The register shall also be produced at the commencement of every annual general meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting. Thus, even a proxy has the rights to inspect the Register.

(viii) Exceptions [Section 189(5)]: Nothing contained in section 189(1) shall apply to any contract or arrangement-

(a) for the sale, purchase or supply of any goods, materials or services if the value of such goods and materials or the cost of such services does not exceed 5,00,000 rupees in the aggregate in any year; or

(b) by a banking company for the collection of bills in the ordinary course of its business.

(ix) Penalty [Section 189(6)]: Every director who fails to comply with the provisions of this section and the rules made thereunder shall be liable to a penalty of 25,000 rupees.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 301 of the Companies Act, 1956 i.e. Register of contracts, companies and firms in which directors are interested.

(ii) Section 301 of the Old Act, exempted from entry in the 'Register of contracts or arrangements in which directors are interested' any contract or arrangement for the sale, purchase or supply of any goods, materials or services if the value of such goods and materials or the cost of such services does not exceed ₹ 1,000 in the aggregate in any year. However, according to section 189 of the New Act, the limit of ₹ 1,000 has been increased to ₹ 5,00,000.

(iii) The New Act requires that the register to be kept shall also be produced at the commencement of every AGM of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting. Such a provision was not present under the Old Act.

(iv) Under the New Act, besides the Director, Key Managerial Personnel shall also disclose their interest relating to disclosure of interest or such other information regarding him as may be prescribed within 30 days of their appointment and the same shall be entered there.

5.19 Contract of employment with managing or whole- time directors (Section 190 of the Companies Act, 2013)

A new section 190 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Contract of employment with managing or whole- time directors. According to this section:

(i) Every company shall keep at its registered office,—

(a) where a contract of service with a managing or whole-time director is in writing, a copy of the contract; or

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(b) where such a contract is not in writing, a written memorandum setting out its terms.

(ii) The copies of the contract or the memorandum shall be open to inspection by any member of the company without payment of fee.

(iii) Penalty for default: The Company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for each default.

(iv) The provisions of this section shall not apply to a private company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
This section corresponds to section 302 of the Companies Act, 1956 i.e. 'Disclosure to members of director's interest in contract appointing manager, managing director'.

5.20 Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares (Section 191 of the Companies Act, 2013)

A new section 191 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares. According to this section:

(i) Section 191 lays down elaborate provisions for regulating payment of compensation to directors for loss of office, etc., in connection with transfer of undertaking, property or shares.

(ii) These provisions apply to all companies.

(iii) According to sub section (1), no director of a company shall, in connection with

(a) the transfer of the whole or any part of any undertaking or property of the company; or

(b) the transfer to any person of all or any of the shares in a company being a transfer resulting from—

(1) an offer made to the general body of shareholders.

(2) an offer made by or on behalf of some other body corporate with a view to a company becoming a subsidiary company of such body corporate or a subsidiary company of its holding company;

(3) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than 1/3rd of the total voting power at any general meeting of the company; or

(4) any other offer which is conditional on acceptance to a given extent, receive any payment by way of compensation for loss of office or as consideration for retirement from office, or in connection with such loss or retirement from such company or from the transferee of such undertaking or property, or from the transferees of shares or from any other person, not being such company, unless particulars as may be prescribed with respect to the payment proposed to be made by such transferee or

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person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

However, nothing in sub-section (1) shall affect any payment made by a company to a managing director or whole-time director or manager of the company by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement subject to limits or priorities, as may be prescribed. [sub – section (2)].

(iv) If the above payment is not approved for want of quorum either in a meeting or an adjourned meeting, the proposal shall not be deemed to have been approved.

(v) Where a director of a company receives payment of any amount in contravention of sub-section (1) or the proposed payment is made before it is approved in the meeting, the amount so received by the director shall be deemed to have been received by him in trust for the company.

(vi) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(vii) Nothing in this section shall be taken to prejudice the operation of any law requiring disclosure to be made with respect to any payment received under this section or such other like payments made to a director.

According to *the Companies (Meetings of Board and its Powers) Rules, 2014*,

(1) No director of a company shall receive any payment by way of compensation in connection with any event mentioned in sub-section (1) of section 191 unless the following particulars are disclosed to the members of the company and they pass a resolution at a general meeting approving the payment of such amount —

   (a) name of the director;

   (b) amount proposed to be paid;

   (c) event due to which compensation become payable;

   (d) date of Board meeting recommending such payment;

   (e) basis for the amount determined;

   (f) reason or justification for the payment;

   (g) manner of payment - whether payable in cash or otherwise and how;

   (h) sources of payment; and

   (i) any other relevant particulars as the Board may think fit.

(2) Any payment made by a company by way of compensation for the loss of office or as a consideration for retirement from office or in connection with such loss or retirement, to a managing director or whole time director or manager of the company shall not exceed the limit as set out under section 202.

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(3) No payment shall be made to the managing director or whole time director or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement if —

(a) the company is in default in repayment of public deposits or payment of interest thereon;

(b) the company is in default in redemption of debentures or payment of interest thereon;

(c) the company is in default in repayment of any liability, secured or unsecured, payable to any bank, public financial institution or any other financial institution;

(d) the company is in default in payment of any dues towards income tax, VAT, excise duty, service tax or any other tax or duty, by whatever name called, payable to the Central Government or any State Government, statutory authority or local authority (other than in cases where the company has disputed the liability to pay such dues);

(e) there are outstanding statutory dues to the employees or workmen of the company which have not been paid by the company (other than in cases where the company has disputed the liability to pay such dues); and

(f) the company has not paid dividend on preference shares or not redeemed preference shares on due date.

Explanation : Pending notification of sub-section (1) of section 247 of the Act and finalisation of qualifications and experience of valuers, valuation of stocks, shares, debentures, securities etc. will be conducted by an independent merchant banker who is registered with the Securities and Exchange Board of India or an independent chartered accountant in practice having a minimum experience of 10 years.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 319, 320 and 321 of the Companies Act, 1956 i.e. 'Payment to director, etc., for loss of office, etc., in connection with transfer of undertaking of property', 'Payment to director for loss of office, etc., in connection with transfer of shares' and 'Provisions supplementary to sections 318, 319 and 320'.

(ii) Under the New Act, the punishment for contravention of section 191 of the Companies Act, 2013 has provided in the section itself. Thus, specific punishment is provided for the contravention.

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5.21 Restriction on non-cash transactions involving directors (Section 192 of the Companies Act, 2013)

A new section 192 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Restriction on non-cash transactions involving directors. According to this section:

(i) No company shall enter into an arrangement by which—

(a) a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or

(b) the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

(ii) The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

(iii) Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless-

(a) the restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or

(b) any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
The Companies Act, 1956 did not contain any provision relating to restrictions on non-cash transactions involving directors which has been introduced by the Companies Act, 2013.

5.22 Contracts by One Person Company (Section 193 of the Companies Act, 2013)

A new section 193 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Contracts by One Person Company. According to this section:

(i) Where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. However, if contracts are

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entered into by the company in the ordinary course of its business then such ensurance shall not be necessary.

(ii) The company shall inform the Registrar about every such contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors within a period of 15 days of the date of approval by the Board of Directors.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
The Companies Act, 1956 did not contain any provision relating to Contracts by One Person Company which has been introduced bythe Companies Act, 2013.

5.23 Prohibition on forward dealings in securities of company by director or key managerial personnel (Section 194 of the Companies Act, 2013)

A new section 194 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Prohibition on forward dealings in securities of company by director or key managerial personnel. According to this section:

(i) No director of a company or any of its key managerial personnel shall buy in the company, or in its holding, subsidiary or associate company—

(a) a right to call for delivery or a right to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures; or

(b) a right, as he may elect, to call for delivery or to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures.

(ii) If a director or any key managerial personnel of the company contravenes the above provisions, such director or key managerial personnel shall be punishable with imprisonment for a term which may extend to two years or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(iii) Where a director or other key managerial personnel acquires any securities in contravention, he shall along with fine and imprisonment mentioned above, also be liable to surrender the same to the company and the company shall not register the securities so acquired in his name in the register, and if they are in dematerialised form, it shall inform the depository not to record such acquisition and such securities, in both the cases, shall continue to remain in the names of the transferors.

(iv) ''relevant shares'' and ''relevant debentures'' mean shares and debentures of the company in which the concerned person is a whole-time director or other key managerial personnel or shares and debentures of its holding and subsidiary companies.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision prohibiting forward dealings in securities of company by director or key managerial personnel which has been introduced by the Companies Act, 2013.

5.24 Prohibition on insider trading of securities (Section 195 of the Companies Act, 2013)

A new section 195 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Prohibition on insider trading of securities. According to this section:

(i) No person including any director or key managerial personnel of a company shall enter into insider trading. But if any communication is required in the ordinary course of business or profession or employment or under any law, then the above prohibition does not apply.

(ii) "Insider trading" means—

(a) an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company; or

(b) An act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person;

(iii) "price-sensitive information" means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

(iv) If any person contravenes the provisions of this section, he shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or with both.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to prohibition on insider trading of securities which has been introduced by the Companies Act, 2013.

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6

Inspection, Inquiry and Investigation

6.1 Power to call for information, inspect books and conduct inquiries (Section 206 of the Companies Act, 2013)

A new section 206 of the Companies Act, 2013 came into force from 1st April, 2014 provides for the power to call for information, inspect books and conduct inquiries. According to this section:

(i) Power of the Registrar to call for information, explanation or documents: 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.

(ii) Duty of the company and its officers: On the receipt of a notice under sub-section (1) of section 206, 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 [Section 206 (2)].

Duty of past officers of the company: According to the proviso to sub-section (2) of section 206, where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

(iii) Additional written notice by the Registrar [Section 206 (3)]: The Registrar may by another written notice call on the company to produce for his inspection such further books of account, books, papers and explanations as he may require at such place and at such time as he may specify in the notice:

(a) If no information or explanation is furnished to the Registrar within the time specified under Section 206 (1); or

(b) If the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate; or

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(c) If the Registrar is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and the information or documents do not disclose a full and fair statement of the information required.

Provided that, before any notice is served under this sub-section, the Registrar shall record his reasons in writing for issuing such notice.

(iv) Inquiry by the Registrar [Section 206 (4)]:

(a) The Registrar maycall on the company to furnish in writing any information or explanation on matters specified in the order within such time as he may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard, if the Registrar is satisfied:

(1) on the basis of information available with or furnished to him; or

(2) on a representation made to him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act; or

(3) the grievances of investors are not being addressed,

(b) Before calling the company to furnish in writing any information or explanations and carrying out inquiry, the Registrar has to inform the company of the allegations made against it by a written order.

(c) The Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar or an inspector appointed by it for the purpose to carry out the inquiry under this sub-section.

(d) It is further provided that where business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447.

(v) Inspection by Central Government: Without prejudice to the foregoing provisions of this section, the Central Government may, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an inspector appointed by it for the purpose [Section 206 (5)].

(vi) The Central Government may, having regard to the circumstances by general or special order, authorise any statutory authority to carry out the inspection of books of account of a company or class of companies [Section 206 (6)].

(vii) Failure to furnish information: If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company, who is in default shall be punishable with a fine which may extend to 1 lakh rupees and in the case of a continuing failure, with an additional fine which may extend to 500 rupees for every day after the first during which the failure continues [Section 206 (7)].

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 209A and 234 of the Companies Act, 1956 i.e. 'Inspection of books of account, etc., of companies' and 'Power of Registrar to call for information or explanation'.

(ii) The following new points have been added by the New Act:

(a) Where required information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

(b) Where it is observed that the business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447.

(c) The Registrar shall record his reasons for doing so, before service of the second notice to produce for inspection such further books of account, books, papers and explanations as he may require.

(iii) Section 234(7) of the Companies Act, 1956, provided that if upon inquiry the Registrar is satisfied that any representation on which he took action under section 234(7) was frivolous or vexatious, he shall disclose the identity of his informant to the company. This provision has been dispensed with in the New Act.

(iv) The penalty for contravention has been increased.

6.2 Conduct of inspection and inquiry (Section 207 of the Companies Act, 2013)

A new section 207 of the Companies Act, 2013 came into force from 1st April, 2014 provides for the conduct of inspection and inquiry as follows:

(i) Duty of director, officer or employee [Sub-Section (1)]: Where a Registrar or inspector calls for the books of account and other books and papers under section 206, it shall be the duty of every director, officer or other employee of the company:

(a) to produce all such documents to the Registrar or inspector; and

(b) to furnish him with such statements, information or explanations in such form as the Registrar or inspector may require; and

(c) to render all assistance to the Registrar or inspector in connection with such inspection.

(ii) Powers of the Registrar or inspector [Sub-section (2) and (3)]:

(a) The Registrar of inspector making an inspection or inquiry under section 206 may, during the course of such inspection or inquiry, as the case may be,—

(1) make or cause to be made copies of books of account and other books and papers; or

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(2) place or cause to be placed any marks of identification in such books in token of the inspection having been made.

(b) 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:—

(1) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or inspector making the inspection or inquiry;

(2) summoning and enforcing the attendance of persons and examining them on oath; and

(3) inspection of any books, registers and other documents of the company at any place.

(iii) Penalty for Contravention [sub-section (4)]: If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to 1 year and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees.

If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 209A and 234 of the Companies Act, 1956 i.e. 'Inspection of books of account, etc., of companies' and 'Power of Registrar to call for information or explanation'.

(ii) The penalty for contravention has been increased.

(iii) Under section 207(4) of the New Act, the section specifically mentions the word 'Director' also who can be penalized if he disobeys the direction issued by the Registrar or the inspector. However, under the Old Act, section 209A(8) the word 'Director' was not specifically mentioned.

6.3 Report on inspection made (Section 208 of the Companies Act, 2013)

A new section 208 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the submission of the report on inspection made. According to this section:

The Registrar or inspector shall, after the inspection of the books of account or an inquiry under section 206 and other books and papers of the company under section 207, submit a report in writing to the Central Government along with such documents, if any and such report may, if necessary, include a recommendation that further investigation into the affairs of the company is necessary giving his reasons in support.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 209A and 234 of the Companies Act, 1956 i.e. 'Inspection of books of account, etc., of companies' and 'Power of Registrar to call for information or explanation'.

(ii) Under the New Act, the Registrar after making his inquiry under section 206/207, as part of its Report, can recommend further investigation into the affairs of the company. However, under the Old Act, the Registrar was only required to report the circumstances of an unsatisfactory state of affairs.

6.4 Search and seizure (Section 209 of the Companies Act, 2013)

A new section 209 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Search and seizure. According to this section:

(i) Circumstances for seizure [Sub-section (1)]: Where, upon information in his possession or otherwise, the Registrar or inspector has reasonable ground to believe that the books and papers of

(a) a company, or relating to

(b) the key managerial personnel or

(c) any director or

(d) auditor or

(e) company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

(1) enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and

(2) seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

(ii) Period of seizure [Sub-section (2)]:

Original period of seizure: The Registrar or inspector shall return the books and papers seized under sub-section (1), as soon as may be, and in any case not later than 180th day after such seizure, to the company from whose custody or power such books or papers were seized.

Further period of seizure: The books and papers may be called for by the Registrar or inspector for a further period of 180 days by an order in writing if they are needed again.

(iii) Taking of copies, placing identification marks [second proviso to sub-section (2)]: The Registrar or inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

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(iv) Applicability of the provisions of the Code of Criminal Procedure, 1973 [Sub-section (3)]: The provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures shall apply, mutatis mutandis, to every search and seizure made under this section.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 234A of the Companies Act, 1956 i.e. Seizure of documents by Registrar.

(ii) Under the Old Act, if the Registrar had reasonable ground to believe that books and papers of, or relating to, any company or other body corporate or managing director or manager of such company or other body corporate, may be destroyed, mutilated, altered, falsified or secreted, he could ask for seizure. However, under the New Act, if the Registrar or inspector has reasonable ground to believe that the books and papers of a company, or relating to the key managerial personnel or any director or auditor or company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted he can ask for seizure.

Thus, under the New Act, the Registrar or inspector cannot search and seize the books and documents of any Bodies Corporate other than the Company.

(iii) Under the New Act, the powers of Registrar /Inspector to search and seizure, has been extended to the places of Key Managerial Personnel, Auditors and Company Secretary in practice

(iv) Section 234A of the Old Act required the Registrar to apply to the Magistrate of the First Class/the Presidency Magistrate having jurisdiction for an order for the seizure of such books and papers. Under the New Act, Registrar can exercise his powers after obtaining order of the Special Court.

(v) Under the Old Act, the Registrar could not keep the books and papers seized on any day later than the thirtieth day, after such seizure. However, such period has been increased from 30 days to 180 days under the New Act.

Further, under the New Act, papers may be called for by the Registrar or inspector for a further period of 180 days by an order in writing if they are needed again. Such a provision was not available under the Old Act.

6.5 Investigation into affairs of company (Section 210 of the Companies Act, 2013)

A new section 210 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Investigation into affairs of company. According to this section:

(i) Investigation in the opinion of Central Government: Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company,—

(a) on the receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or

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(c) in public interest,

it may order an investigation into the affairs of the company. [Sub-section (1)]

(ii) Investigation on the order by a court or the Tribunal: 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 [Sub-section (2)].

(iii) Appointment of inspectors: For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct [Sub-section (3)].

According to the *Companies (Inspection, investigation and inquiry) Rules, 2014:*

(i) The Central Government may before appointing an inspector under sub-section (3) of Section 210, require the applicant to give a security not exceeding 25,000 rupees for payment of the costs and expenses of investigation as per the criteria given in the said rule.

(ii) Further, the above referred security shall be refunded to the applicant if the investigation results in prosecution.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 235 and 237 of the Companies Act, 1956 i.e. 'Investigation of affairs of a company' and 'Investigation of company's affairs in other cases'.

(ii) Under the Old Act, specified number of members could make an application to the Tribunal for investigation into the affairs of the Company. However, under the New Act, such a condition has been dispensed with.

6.6 Establishment of Serious Fraud Investigation Office (Section 211 of the Companies Act, 2013)

A new section 211 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for the establishment of Serious Fraud Investigation Office.

(i) Setting up of Serious Fraud Investigation Office (SFIO) [Section 211 (1)]: The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company.

(ii) Continuation of earlier SFIO: Until the SFIO as mentioned above is established, the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

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(iii) Composition of SFIO [Section 211 (2)]: The SFIO shall be:

(a) Headed by a Director, and

(b) Consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in,—

(1) banking;

(2) corporate affairs;

(3) taxation;

(4) forensic audit;

(5) capital market;

(6) information technology;

(7) law; or

(8) such other fields as may be prescribed.

(iv) The Central Government shall, by notification, appoint a Director in the SFIO, who shall be an officer not below the rank of a Joint Secretary to the Government of India having knowledge and experience in dealing with matters relating to corporate affairs [Section 211 (3)].

(v) The Central Government may appoint such experts and other officers and employees in the SFIO as it considers necessary for the efficient discharge of its functions under this Act [Section 211 (4)].

According to the *Companies (Inspection, Investigation and Inquiry) Rules, 2014,* the Central Government may appoint persons having expertise in the fields of investigations, cyber forensics, financial accounting, management accounting, cost accounting and any other fields as may be necessary for the efficient discharge of Serious Fraud Investigation Office (SFIO) functions under the Act.

(vi) Terms and conditions of service: The terms and conditions of service of Director, experts, and other officers and employees of the SFIO shall be such as may be prescribed [Section 211 (5)].

The terms and conditions of service of the above mentioned officers have been laid down in the *Companies (Inspections, Investigations and Inquiry) Rules, 2014.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956
The Companies Act, 1956 did not contain any provision relating to Establishment of Serious Fraud Investigation Office which has been introduced by the Companies Act, 2013.

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6.7 Investigation into affairs of Company by Serious Fraud Investigation Office (Section 212 of the Companies Act, 2013) [except references of sub-section (10) of section 66, sub-section (5) of section 140, section 213, sub-section (1) of section 251 and sub-section (3) of section 339 made in sub-section (6) and also sub-sections (8) to (10)]

A new section 212 of the Companies Act, 2013 was partially[1] notified on 26th March, 2014 effective from 1st April, 2014 provides for Investigation into affairs of Company by the Serious Fraud Investigation Office (SFIO). According to this section:

(i) According to section 212(1), without prejudice to the provisions of section 210, where the Central Government -

(a) on receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government,

is of the opinion that it is necessary to investigate into the affairs of a company by the SFIO, the Central Government may, by order, assign the investigation into the affairs of the said company to the SFIO.

On receipt of such order, the Director, SFIO may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(ii) Where any case has been assigned by the Central Government to the SFIO for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act. In case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to SFIO [Sub section (2)].

(iii) Where the investigation into the affairs of a company have been assigned by the Central Government to SIFO, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) and submit its report to the Central Government within such period as may be specified in the order [Sub section (3)]

(iv) The Director, SFIO shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217 [Sub section (4)]

[1] *The references of sub-section (10) of section 66, sub-section (5) of section 140, section 213, sub-section (1) of section 251 and sub-section (3) of section 339 made in sub-section (6) of Section 212 and the sub-sections (8) to (10) of Section 212 of the Companies Act, 2013 are yet to be notified.*

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(v) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation [Sub section (5)]

(vi)[2] As per sub-section (6), notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offences covered under sub-sections (5) and (6) of section 7, section 34, section 36, sub-section (1) of section 38, sub-section (5) of section 46, sub-section (7) of section 56, sub- section (10) of section 66, sub-section (5) of section 140, sub-section (4) of section 206, section 213, section 229, sub-section (1) of section 251, sub-section (3) of section 339 and section 448 which attract the punishment for fraud provided in section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

However, a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

Provided further that the Special Court shall not take cognizance of any offence referred in point (vi) except upon a complaint in writing made by—

(a) the Director, SFIO; or

(b) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(vii) The limitation on granting of bail specified in sub section (6) above is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail [Sub section (7)].

(viii) The SFIO shall submit an interim report to the Central Government, if the Central Government so directs [Sub section (11)].

(ix) The SIFO shall submit the investigation report to the Central Government on completion of the investigation [sub section (12)].

(x) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court [Sub section (13)].

[2] *[The references of sub-section (10) of section 66, sub-section (5) of section 140, section 213, sub-section (1) of section 251 and sub-section (3) of section 339 made in point (vi) above, have yet to be notified]*

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(xi) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the SFIO to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company [Sub section (14)].

(xii) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 [Sub section (15)].

(xiii) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by SFIO under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed [Sub section (16)].

(xiv) In case SFIO has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the SFIO [Sub section (17) (a)].

(xv) The SFIO shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law [Sub section (17) (b)].

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to Investigation into affairs of Company by Serious Fraud Investigation Office which have been introduced by the Companies Act, 2013. .

6.8 Security for payment of costs and expenses of investigation (Section 214 of the Companies Act, 2013)

A new section 214 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Security for payment of costs and expenses of investigation as under:

Where an investigation is ordered by the Central Government in pursuance of clause (b) of sub-section (1) of section 210, or in pursuance of an order made by the Tribunal under section 213, the Central Government may before appointing an inspector under sub-section (3) of section 210 or clause (b) of section 213, require the applicant to give such security not exceeding 25,000 rupees as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation. Such security shall be refunded to the applicant if the investigation results in prosecution.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 236 and 245 of the Companies Act, 1956 i.e. 'Application by members to be supported by evidence and power of call for security' and 'Expenses of investigation.'

(ii) The amount of deposit has been increased from 1,000 rupees to 25,000 rupees in the New Act.

6.9 Firm, body corporate or association not to be appointed as inspector (Section 215 of the Companies Act, 2013)

A new section 215 of the Companies Act, 2013 came into force from 1st April, 2014 which provides that no firm, body corporate or other association shall be appointed as an inspector.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 238 of the Companies Act, 1956 i.e. Firm, body corporate or association not to be appointed as inspector. No difference with the earlier Act.

6.10 Investigation of ownership of company (Section 216 of the Companies Act, 2013)

A new section 216 of the Companies Act, 2013 came into force partially[3] from 1st April, 2014 which provides for Investigation of ownership of company as under:

(i) As per sub section (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.

(ii) While appointing an inspector under sub-section (1), the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may limit the investigation to matters connected with particular shares or debentures [Sub section (3)]

(iii) Subject to the terms of appointment of an inspector, his powers shall extend to the investigation of any circumstances suggesting the existence of any arrangement or understanding which, though not legally binding, is or was observed or is likely to be observed in practice and which is relevant for the purposes of his investigation [Sub section (4)]

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 247 of the Companies Act, 1956 i.e. Investigation of ownership of company.

(ii) The provisions are broadly similar.

[3] *Sub-section (2) of section 216 of the Companies Act, 2013 is yet to be notified.*

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6.11 Procedure, powers, etc., of inspectors (Section 217 of the Companies Act, 2013)

A new section 217 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Procedure, powers, etc., of inspectors. According to this section:

(i) As per sub- section (1), it shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person—

(a) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(ii) The inspector may require any body corporate, other than a body corporate referred in point (i) to furnish such information to, or produce such books and papers before him or any person authorised by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation [Sub section (2)].

(iii) The inspector shall not keep in his custody any books and papers produced under point (i) or point (ii) for more than 180 days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced [Sub section (3)].

However, the books and papers may be called for by the inspector if they are needed again for a further period of 180 days by an order in writing.

(iv) As per sub-section (4), an inspector may examine on oath—

(a) any of the persons referred to in point (i); and

(b) any other person with the prior approval of the Central Government,

in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally.

However, in case of an investigation under section 212, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient under point (b) above (instead of the Central Govt).

(v) As per sub- section (5), notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government making an investigation under this chapter, shall have all the powers as are

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vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—

(a) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;

(b) summoning and enforcing the attendance of persons and examining them on oath; and

(c) inspection of any books, registers and other documents of the company at any place.

(vi) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees [Sub section (6) (i)].

If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company [Sub section (6) (ii)].

(vii) The notes of any examination under sub section (4) above, shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him [Sub section (7)].

(viii) As per sub-section (8), if any person fails without reasonable cause or refuses—

(a) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under point (i) or point (ii) to produce;

(b) to furnish any information which is his duty under point (ii) to furnish;

(c) to appear before the inspector personally when required to do so under point (iv) or to answer any question which is put to him by the inspector in pursuance of that point; or

(d) to sign the notes of any examination referred to in sub section (7) above,

he shall be punishable with imprisonment for a term which may extend to 6 months and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, and also with a further fine which may extend to 2,000 rupees for every day after the first during which the failure or refusal continues.

(ix) The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require [Sub section (9)].

(x) The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State [Sub section (10)].

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(xi) Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973 if, in the course of an investigation into the affairs of the company, an application is made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request [Sub section (11)].

Provided that, the letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

Provided further that every statement recorded or document or thing received under this sub-section shall be deemed to be the evidence collected during the course of investigation.

According to *the Companies (Inspection, investigation and inquiry) Rules, 2014*, the 'letter of request', in terms of section 217, shall be transmitted in such manner as specified by the Ministry of Corporate Affairs.

(xii) Upon receipt of a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon summon the person before it and record his statement or cause any document or thing to be produced, or send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within 30 days or such extended time as the court may allow for further action [Sub section (12)].

Provided that, the evidence taken or collected as above or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 240 of the Companies Act, 1956 i.e. Production of documents and evidence.

(ii) The following new points have been added in the New Act:

(a) Along with the officer and employees of a Company, former employees, officer and agents of the Company are also made liable to provide all requisite information and assistance to the Inspector, to produce the necessary books and papers and to provide the necessary assistance, as may be required by the Inspector under any investigation.

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(b) All the powers under the Code of Civil Procedure, 1908 regarding discovering and production of books of account and other document at specified time and place, summoning and enforcing the attendance of person and examining them on oath and inspection of any books, register and other document of the Company at any place have been granted to the Inspector under this clause.

(c) Central Government may enter into any agreement with the government of a foreign State for reciprocal arrangements to assist in any inspection and investigations under this Act or under any corresponding law in force in that state.

(d) Central Government is authorized under CRPC and this Act to issue letter of request to court or competent authority outside India to provide report, statement or document in case so desired under specified circumstances.

(e) Inspector may further recall the books and papers for the period of 180 days by order in writing.

(iii) The definitions of officer, agent and officers & other employees which was present under section 240 of the Old Act has been done away with in section 217 of the New Act.

6.12 Power of inspector to conduct investigation into affairs of related companies, etc. (Section 219 of the Companies Act, 2013)

A new section 219 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for power of inspector to conduct investigation into affairs of related companies, etc. as under:

(i) Investigation into affairs of related companies: If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, can also investigate the affairs of—

(a) 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;

(b) 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;

(c) 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

(d) any person who is or has at any relevant time been the company's managing director or manager or employee.

(ii) Report of inspector: The inspector shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the

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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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 239 of the Companies Act, 1956 i.e. Power of inspectors to carry investigation into affairs of related companies, or of managing agent or associate etc.

6.13 Seizure of documents by inspector (Section 220 of the Companies Act, 2013)

A new section 220 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Seizure of documents by inspector as under:

(i) Seizure of books and papers [Sub section (1)]: Where in the course of an investigation under this Chapter, the inspector has reasonable grounds to believe that the books and papers of, or relating to, any company or other body corporate or managing director or manager of such company are likely to be destroyed, mutilated, altered, falsified or secreted, the inspector may—

(a) enter, with such assistance as may be required, the place or places where such books and papers are kept in such manner as may be required; and

(b) seize books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books and papers at its cost for the purposes of his investigation.

(ii) Time period for keeping books and papers [Sub section (2)]: The inspector shall keep in his custody the books and papers seized under this section for such a period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized.

(iii) Extracts of books and papers: The inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such manner as he considers necessary.

(iv) The provisions of the Code of Criminal Procedure, 1973, relating to searches or seizures shall apply *mutatis mutandis* to every search or seizure made under this section.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 240A of the Companies Act, 1956 i.e. Seizure of documents by inspector.

(ii) Under the Old Act, the inspector could exercise his powers of search and seizure after making an application to the Magistrate of First Class or, as the case may be, the Presidency Magistrate, having jurisdiction and obtaining an order for seizure of such books and papers. However, under the New Act, the inspector does not require such approval.

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6.14 Inspector's report (Section 223 of the Companies Act, 2013)

A new section 223 of the Companies Act, 2013 came into force from 1st April, 2014 which lays down the following provisions in respect of the Inspector's report on investigation conducted under this chapter:

(i) Submission of interim report and final report [Sub section (1)]: An inspector appointed under this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.

(ii) Report to be writing or printed [Sub section (2)]: Every report made under sub section (1) above, shall be in writing or printed as the Central Government may direct.

(iii) Obtaining copy or report [Sub section (3)]: A copy of the above report may be obtained by making an application in this regard to the Central Government.

(iv) Authentication of report [Sub section (4)]: The report of any inspector appointed under this Chapter shall be authenticated either—

(a) by the seal of the company whose affairs have been investigated; or

(b) by a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872,

and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

(v) Exceptions [Sub section (5)]: Nothing in this section shall apply to the report referred to in section 212 of the Companies Act, 2013.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 241 and 246 of the Companies Act, 1956 i.e. 'Inspectors' report' and 'Inspectors' report to be evidence.'

(ii) Under the Old Act, The Central Government had to forward a copy of any report made by the inspectors to the company at its registered office, and also to any body corporate dealt with in the report by virtue of section 239 of the Companies Act. However, under the New Act, no such compulsion is there on the Central Government.

6.15 Actions to be taken in pursuance of inspector's report (Section 224 of the Companies Act, 2013)

A new section 224 of the Companies Act, 2013 was partially[4] notified on 26th March, 2014 effective from 1st April, 2014 provides the following provisions in respect of the actions to be taken in pursuance of inspector's report:

(i) 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

[4] *Sub-sections (2) and (5) of section 224 of the Companies Act, 2013 are yet to be notified.*

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of any offence for which he is criminally liable, the Central Government may prosecute such person for the offence and it shall be the duty of all officers and other employees of the company or body corporate to give the Central Government the necessary assistance in connection with the prosecution [Sub section (1)].

(ii) As per sub-section (3), if from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated under this Chapter—

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate; or

(b) for the recovery of any property of such company or body corporate which has been misapplied or wrongfully retained,

the Central Government may itself bring proceedings for winding up in the name of such company or body corporate.

(iii) 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)].

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 565 of the Companies Act, 1956 i.e. Companies capable of being registered.

6.16 Expenses of investigation (Section 225 of the Companies Act, 2013)

A new section 225 of the Companies Act, 2013 came into force from 1st April, 2014 which lays down the following provisions in respect of expenses of investigation:

(i) As per sub-section (1), the expenses of, and incidental to, an investigation by an inspector appointed by the Central Government under this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) other than expenses of inspection under section 214 (Security for payment of costs and expenses of investigation) shall be defrayed in the first instance by the Central Government, but shall be reimbursed by the following persons to the extent mentioned below, namely:—

(a) 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;

(b) 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;

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(c) unless, as a result of the investigation, a prosecution is instituted under section 224,—

(1) any company, body corporate, managing director or manager dealt with by the report of the inspector; and

(2) the applicants for the investigation, where the inspector was appointed under section 213,

to such extent as the Central Government may direct.

(ii) Any amount for which a company or body corporate is liable under clause (b) above shall be a first charge on the sums or property mentioned in that clause [Sub section (2)].

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 245 of the Companies Act, 1956 i.e. Expenses of investigation.

(ii) Under the New Act, Any amount for which the Company or Body Corporate is liable shall be recovered as first charge on the property recovered during investigation.

(iii) The following points have been dispensed with in the New Act, which were earlier present under section 245 of the Old Act:

(a) The amount of expenses in respect of which any company, body corporate, managing director or manager is liable to reimburse the Central Government shall be recoverable from that company, body corporate, managing director or manager, as an arrear of land revenue.

(b) In so far as the expenses to be defrayed by the Central Government are not recovered, they shall be paid out of moneys provided by Parliament.

6.17 Investigation etc of foreign companies (Section 228 of the Companies Act, 2013)

A new section 228 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Investigation etc. of foreign companies. According to this section:

The provisions of this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) shall apply *mutatis mutandis* to inspection, inquiry or investigation in relation to foreign companies.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to Investigation etc. of foreign companies. The same have been introduced by the Companies Act, 2013

6.18 Penalty for furnishing false statement, mutilation, destruction of documents (Section 229 of the Companies Act, 2013)

A new section 229 of the Companies Act, 2013 came into force from 1st April, 2014 which lays down the following penalty for furnishing false statement, mutilation, destruction of documents:

Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,—

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(a) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate;

(b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or

(c) provides an explanation which is false or which he knows to be false, he shall be punishable for fraud in the manner as provided in section 447.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to Penalty for furnishing false statement, mutilation, destruction of documents. The Companies Act, 2013 has provided a new section for it.

RELEVANT SECTIONS OF THE COMPANIES ACT, 1956 APPLICABLE FOR EXAMINATIONS

1. Investigation of company's affairs in other cases (Section 237 of the Companies Act, 1956)

Without prejudice to its powers under section 235, the Central Government -

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if -

(i) the company, by special resolution ; or

(ii) the Court, by order,

declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government ; and

(b) may do so if, in its opinion or in the opinion of the Company Law Board, there are circumstances suggesting -

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;

(ii) that 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

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information

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relating to the calculation of the commission payable to a managing or other director, or the manager, of the company.

2. Investigation of ownership of company [Section 247(1A) of the Companies Act, 1956]

According to sub-section (1A) of section 247, the Central Government shall appoint one or more inspectors under sub-section (1) of section 247, if the Company Law Board, in the course of any proceedings before it, declares by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the 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 materially to influence the policy of the company.

3. Imposition of restrictions upon shares and debentures and prohibition of transfer or shares or debentures in certain cases (Section 250 of the Companies Act, 1956)

Where it appears to the Company Law Board, whether on a reference made to it by the Central Government in connection with any investigation under section 247 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any shares (whether issued or to be issued) and the Company Law Board is of the opinion that such facts cannot be found out unless the restrictions specified in sub-section (2) are imposed, the Company Law Board may, by order, direct that the shares shall be subject to the restrictions. Such restrictions shall be for such period not exceeding three years as may be specified in the order.

Restrictions that may be imposed under sub-section (2) are as follows:

(a) any transfer of those shares shall be void;

(b) where those shares are to be issued, they shall not be issued; and any issue thereof or any transfer of the right to be issued therewith, shall be void;

(c) no voting right shall be exercisable in respect of those shares;

(d) no further shares shall be issued in respect of those shares;

(e) except in a liquidation, no payment shall be made of any sums due from the company on those shares, whether in respects of dividend, capital or otherwise.

As per sub-section (3), where a transfer of shares in a company has taken place and as a result thereof a change in the composition of the Board of directors of the company is likely to take place and the Company Law Board is of the opinion that any such change would be prejudicial to the public interest, it may, by order, direct that-

(a) the voting rights in respect of those shares shall not be exercisable for such period not exceeding three years as may be specified in the order;

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(b) no resolution passed or action taken to effect a change in the composition of the Board of directors before the date of the order shall have effect unless confirmed by the Company Law Board.

The Company Law Board may, by order at any time, vary or rescind any order made by it. Any order made by the Company Law Board in this regard shall be served on the company within fourteen days of making the order.

Any person who exercises or purports to exercise any right to shares issued or to be issued or votes or appoints proxy where he is the holder of shares or transfers any shares, which are subject to Company Law Board's order, he shall be punishable with imprisonment for a term that may extend to six months or with fine up to Rs. Fifty thousand or with both. A failure by any holder of shares which are subject to restrictions as above to give notice to a person who otherwise may act on the rights in those shares without having knowledge of the restrictions is also exposed to the same punishment.

Where shares in any company are issued in contravention of such of the restrictions as may be applicable to the case under sub-section (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees.

A prosecution shall not be instituted under this section except by, or with the consent of, the Central Government.

This section shall apply in relation to debentures as it applies in relation to shares.

4. Voluntary winding up of company, etc., not to stop investigation Proceedings (Section 250A)

An investigation may be initiated under section 235, 237, 239 or 247 notwithstanding that—

(*a*) an application has been made for an order under section 397 or section 398; or

(*b*) the company has passed a special resolution for voluntary winding up,

and no investigation so initiated shall be stopped or suspended by reason only of the fact that an application referred to in clause (*a*) has been made or a special resolution referred to in clause (*b*) has been passed.

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7

Compromises, Arrangements and Amalgamations

7.0 Compromise and Arrangement

Though Companies Act defines "arrangement", it does not define "compromise". These terms have no definite legal connotation. *'Compromise'* means an amicable agreement between parties to a controversy to settle their differences by making mutual concessions, as distinguished from adjudication on the basis of an exact ascertainment of the opposing rights. In a compromise, "the parties agree to try to settle it between themselves by a give-and-take arrangement". For the purpose of a compromise, it has been held that it is but essential that each party thereto should be empowered to make the necessary concessions. *[Dani Chand & Co. vs. Narain Das & Co. (1947) 7 Comp. Case 195 F.B.]*. Thus, compromise envisages the existence of a dispute, e.g. one relating to rights. But the word "arrangement" is of wide import and its meaning should not be limited to something analogous to a compromise.

Section 390(b) provides that the expression *'arrangement'* includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods. An arrangement may also involve debenture holders being given an extension of time for payment, releasing their security in whole or in part or exchanging their debentures for the claims and the balance in shares or debentures of the company; preference shareholders giving up their rights to arrears of dividends, further agreeing to accept a reduced rate of dividend in the future, etc.

7.1 Reconstruction

Reorganisation or arrangement is said to have taken place only when one company is involved. Amalgamation, on the other hand, is of two or more companies. The term "reconstruction" includes reorganisation, arrangement, amalgamation, etc., and thus is a term of wide import.

A *reconstruction* is commonly said to have taken place when a company resolves to wind up its business and it is proposed to form a new company, with only the old shareholders as its members to take over its undertaking, the rights of shareholders in the old company being satisfied by their being allotted shares in the new company. In that case, the old company ceases to exist in point of law, and its assets are transferred to the new company. It would be, nonetheless, a reconstruction even if all the assets might not pass to the company, or all the shareholders of the transferor company might not be shareholders in the transferee company, or all the liabilities of the transferor company might not be taken over by the transferee

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company. A reconstruction, in such a case, would imply that substantially the same persons would carry on the same business substantially. *[Re South African Supply and Cold Storage Co. (1904) 2 Ch. 286].*

7.1.1 Why Reconstruction?

A reconstruction may be necessary for the following purposes:

(1) *To extend the operations of the company:* If the shares are fully paid up and further capital is desired to be raised, the shareholders in the old company may be issued only partly paid shares in the new company so that by calling up the uncalled amount the company would have the funds it would require for carrying on its business.

(2) *As a method for altering the Memorandum of Association:* When such an alteration cannot be undertaken under Section 17 i.e., in a case where the new company desires to have "objects", in its memorandum, over and above those in the old company.

(3) *For purpose of Reorganisation:* The term "reorganisation" is usually applied to an arrangement to alter or modify the rights of shareholders or creditors, or both.

(4) *In order to amalgamate with one or more companies:* Amalgamation is the blending of two or more companies into a single undertaking, the shareholders of each such company becoming substantially the shareholders in the new company which is to carry on the blended undertaking. To achieve this objective, either a new company may be formed to take over the business of the existing companies or the business of one or more existing companies be taken over by one of the existing companies.

(5) *Reconstruction or Arrangement undertaken for bringing the capital structure of companies into line with the requirements of the Act:* The Act requires that the capital of a company must consist only of equity and preference shares. Companies having deferred or other forms of capital, therefore, are obliged to conform to the legal requirement as to their capital structure by a scheme of reconstruction.

7.1.2 How Reconstruction is effected?

Reconstruction may be carried out:

(a) by sale of the company under the powers contained in its Memorandum of Association;

(b) by a scheme of arrangement under section 391;

(c) by acquiring all or a majority of the shares in another company under section 395;

(d) by a compulsory amalgamation of companies in the public interest by an order of the Central Government under section 396;

(e) by a sale under section 494 (members voluntarily winding up); or under section 507 (creditor's voluntarily winding up); in the former case a special resolution and in the latter case the sanction either of the Court or of the Committee of Inspection is necessary.

(f) by a scheme of arrangement with creditors only; under section 517 (voluntary winding up both by members and creditors, a special resolution and consent of three-fourths in value of creditors are necessary.

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Key Points

What is Compromise?	Amicable agreement between parties to a controversy to settle their differences
What Reconstruction includes?	Reorganisation, Arrangements and Amalgamation
Reasons for Reconstruction	(i) To extend the operations of the company (ii) For altering MOA (iii) For the purpose of Reorganisation (iv) In order to amalgamate with one or more companies (v) For bringing Capital structure in accordance with the Act
Methods of Reconstruction	(i) By sale of the company (ii) By a scheme of arrangement u/s 391 (iii) By acquiring all or a majority of shares in another company u/s 395 (iv) By compulsory amalgamation in Public Interest by Central Govt. (v) By sale u/s 494 (vi) By a scheme of arrangement with creditor

Sale powers in the Memorandum: Where a company has power in the objects clause of memorandum, it may dispose of the whole of its undertaking to another company. After the sale, the company will be wound up and the shares in the new company will be distributed among the members in proportion to their holdings in the old company. When a company is not in a position to raise further capital and it cannot otherwise carry on its business or when the carrying on of the company is considered not necessary, the company may resort to such a course.

Reconstruction under section 391: In order to facilitate a reconstruction or amalgamation, it is frequently desirable or necessary for the company first to effect a compromise or arrangement with its creditors or any class of them or/and members or any class of them. section 391 lays down the procedure by which the court's assistance may be invoked in this respect.

According to section 391(1) of the Act, when a compromise or arrangement between parties aforesaid is proposed the following persons may apply to the Court:

(i) the company;

(ii) any creditor;

(iii) any member; or

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(iv) in the case of company which is being wound up, the liquidator.

On such an application, the Court may 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 Court directs.

Further, as per sub-section (2), if at the meeting, a majority in number representing three-fourths in the value of the creditors or members (or any class of them), as the case may be, present and voting either in person or by proxy, where proxies are allowed (under the Rules made under section 643), agree to any compromise or arrangement, it is, *if sanctioned by the Court*, binding on all the creditors or class of creditors or on the members or class of members, as the case may be. The compromise or arrangement is also binding on the company or, if the company is being wound up, on the liquidator and on the contributories.

But, before according the aforesaid sanction, the Court must satisfy itself that the company or any other person which or who has made the application, has disclosed to the Court by an affidavit or otherwise all the material facts relating to the company, e.g., latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, etc. [Proviso to section 391(2)].

You have observed above that if the requisite three-fourths majority is obtained in favour of a scheme of reconstruction, the same shall bind the creditors, members, liquidators and contributories "if sanctioned by the Court". This implies that the Court may not sanction, i.e. its power is *discretionary* and *not obligatory*. Moreover, under proviso to Section 391(2), the Court is under an obligation not to sanction any compromise or arrangement until a full disclosure of all material facts relating to the company have been made. This proviso is designed as a safeguard against any compromise placed by consideration of the shareholders or creditors. Therefore, the claim of minority, on proof that directors had failed to disclose materials facts regarding a company's financial position, would succeed and the Court would not accept the contention if there be any, that the scheme has been duly approved by the majority if it is satisfied that full disclosure of all material facts had not been made at the meeting convened by the Court under sub-section (1) of section 391.

An order of the Court, made as aforesaid shall not be effective until a certified copy of the same has been filed with the Registrar. [section 391(3)]

A copy of the order is also required to be annexed to every copy of the memorandum or instrument which defines the constitution of the company issued after the certified copy of the order has been filed with Registrar; in default thereof the company and any of its officers at fault shall be punished with fine which may extend to one hundred rupees for each copy in respect of which default is made. [section 391(4) & (5)].

The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of. [section 391(6)]

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An appeal shall lie from any order made by a Court exercising original jurisdiction under this section to the Court empowered to hear appeals from the decisions of that Court, or if more than one Court is so empowered, to the Court of inferior jurisdiction. [section 391(7)].

Before giving its sanction, the Court must be satisfied that the statutory provisions have been complied with that the class of creditors or members have been fairly represented by those who attended, and that the statutory majority in approving the scheme is acting bonafide in the interest of the class if professes to represent.

The arrangement must also be such as a man of business would reasonably approve, as fair and reasonable as regards the different classes, if any [Re. *Alabama, New Orleans, Texas and Pacific in Junction Rail Co. 1819 I. Ch. 213 CA; Re. Hindustan General Electric Corporation Ltd. AIR 1959 Cal 679; Nand Prasad vs. Arjun Prasad (1959) Pat (293)*].

The Court cannot sanction any scheme, which involves the doing of an act, which is *ultra vires* the company [*Re. Oceanic Steam Navigation Co. Ltd. (1939), Ch. 4*]. But the memorandum can be changed if members consent. It should be noted that a scheme, not certified by the Reserve Bank, cannot be sanctioned by the Court in respect of banking companies (See Section 45 of the Banking Regulation Act, 1949).

Powers of Courts: Apart from the power of sanctioning a compromise or arrangement the Court has *inter alia* the following powers:

(i) to stay, while application under section 391 is pending the commencement or continuation or any suit or proceeding against the company [section 391(6)];

(ii) to supervise the carrying out of the compromise or arrangement [section 392(1)(a)]. Only the High Court has this power when it makes an order under section 391; a District Court has no such power.

(iii) to modify the compromise or arrangement for the proper working thereof [Section 392(1)]; and

(iv) to order winding up of the company, if it is satisfied that the compromise or arrangement is unworkable [Section 392(2)].

It may be noted that only High Courts have powers (iii) and (iv).

(a) *Circulation of information to creditors or members:* Section 393 provides for the circulation of a statement, which must explain the objects of the proposed compromise or arrangement scheme. The statement should accompany the notice of the meeting to be called to consider the scheme. The statement should accompany the notice of the compromise or arrangement and explain its effect. In particular, the statement must state any material interest of the directors, managing director or manager of the company whether in their capacity as such or as members or creditors and the effect on those interests of the compromise or arrangement, if. and in so far as, the effect is different from the effect thereof on the like interests of other persons.

If the notice calling the meeting is given by an advertisement, a statement must be furnished to such creditor or member free of charge on an application being made in the manner indicated in the notice.

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In the event of a default, the company and the officers responsible thereof would be punishable with fine which may extend to fifty thousand rupees.

It is the duty of every director, managing director, manager and trustee for debentureholders to serve notice on the company of such matters relating to himself as may be necessary for the purpose of the section; a default is punishable with a fine which may extend to five thousand rupees.

(b) *Facilitating reconstruction and amalgamation:* In order to facilitate schemes of reconstruction and amalgamation when application is made to the Court under section 391 for sanction of an arrangement which involves the transfer of the whole or part of the property of one company (called "transferor company") to another company (called "the transferee company"), the Court may make an order under section 394 dealing with the following matters:

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares or debentures, policies, etc. to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against the transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for persons who dissent from the scheme, and

(vi) any other incidental matter.

The first proviso, to section 394(1) restraints the Court from accepting a compromise or arrangement in connection with the scheme of amalgamation, before receiving a report from the Company Law Board or the Registrar that the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or to public interest.

Further, under the second proviso, the order for the dissolution of the transferor company cannot be made until the official liquidator, on the scrutiny of the books and papers, has reported to the Court that the affairs of the company had not been conducted prejudicially to the interest of the members or to public interest.

Note: *A transferor company includes any body corporate whether or not a company under the Companies Act, while a 'transferee company' comprises only a company within the meaning of this Act. This distinction is presumably designed to facilitate transfer of foreign companies to Indian companies by schemes of reconstruction or amalgamation.*

Where, an order is made under section 394, every company in relation to which the order is made must file a certified copy thereof with the Register for registration with 30 days after the order is made.

In the event of the whole or any part of the undertaking of the company being transferred, the directors cannot receive from the transferor company any compensation for loss of

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the office or by way of consideration for retirement. They may, however, receive such compensation from the transferee company or from any other person provided the particulars with respect to the payment proposed, have been disclosed to the members of the company and have been approved by them in general meeting. (section 319)

An order under Section 394 does not transfer automatically a contract of personal services, which are in their nature incapable of being transferred (previously existing between an individual and the transferor company) to the transferee company. *[Noxes vs. Daneaster Amalgamated Collieries Ltd., (1940) 3 All. ER. 549 (HL)]*.

Section 394A makes it obligatory on the part of the Court to serve notice of every application made to it under section 391 or 394 upon the Central Government and to take into consideration the representations, if any, made to it by the Government before passing any order under any of these sections. The objective is to "enable the Government to study the proposal and to raise such objections thereto as it thinks fit in the light of the facts and information available with it and also to place the Court in possession of certain facts which might not have been disclosed by those who appear before it so that the interests of the investing public at large may be fully taken into account by the Court before passing its order."

The Ministry of Corporate Affairs vide General Circular No. 53/2011 dated 26th July, 2011 has issued guidelines for the Regional Director / Registrar of Companies in order to streamline the procedure in the matter of scheme of arrangement / amalgamation under section 391-394 of the Companies Act, 1956. These guidelines supersede all previous guidelines on the matter.

It may be noted that Section 394A, which provides for notice to the Central Government does not apply to proceedings under Section 392 *[Mehtab Chand Golcha vs. Official Liquidator, Golcha Properties (P) Ltd. (1981) Comp. Cas. 103 at p. 104]*.

Key Points

Who may apply to Court	(i) Company (ii) Creditor (iii) Member (iv) The liquidator, if company is being wound up
After filing application	Meeting to be called, held and conducted by the order of the Court
During the meeting	(i) Majority in number representing 3/4 agree to any compromise or arrangement and if sanctioned by the Court shall be binding on others as the case may be (ii) Person making the application has disclosed to the Court by an Affidavit or otherwise all the material facts related to the company

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Order by Court	(i) Certified copy of it shall be filed with Registrar (ii) Copy of order to be annexed to every copy of MOA or any other document as the case may be

Acquisition or Amalgamation by Shares Purchase: Of the various methods of amalgamation, this is the simplest method. A company may acquire business and control of another company not by amalgamation but by acquisition of a majority of shares in that company. The consideration for acquisition may be paid either in cash or shares or both. Section 395 provides a means for the compulsory acquisition of the shares of the dissenting minority to prevent such a minority from extracting unreasonably high price for its shares.

Under the section 395, a scheme of contract involving the transfer of shares or any class of shares in a company has first to be offered for approval of the holders of such shares by the company seeking to acquire the shares. The scheme or contract must then be approved by the holders of not less than 90% in value of the shares concerned within four months from the date of the offer (by the transferee company). Where, however, such shares which are to be transferred are already held by the offeror (i.e. transferee company) or its nominee or its subsidiary to value greater than 10% of the aggregate of values of all the shares of the transferor company, the terms of the offer must be the same for the holders of all other shares and the scheme or contract must not only be approved by 9/10th in value of such holders but they must also be not less than 3/4ths in number.

When these conditions have been satisfied, the transferee company may give notice in the prescribed manner to any dissenting shareholder, expressing its desire to acquire his shares. This notice, if decided to be given, must be served within 2 months after the expiry of the period of 4 months. If such notice is given, the transferee company is entitled and bound to acquire these shares on the terms approved by the majority, unless the dissenting shareholder applies to the Court within one month from the date of the notice, and the Court orders otherwise.

But, if the transferee company has served the aforesaid notice upon the dissenting shareholders and they made no application to the Court or, if the application has been made, but the Court has not ordered to the contrary, the transferee company must within the prescribed period, send a copy of the notice to the transferor together with an instrument of transfer executed by the transferee company and on behalf of the shareholders, by a person appointed by the transferee company. The transferee company must pay or transfer to the transferor company and on behalf of the shareholders, by a person appointed by the transferee company. The transferee company must pay or transfer to the transferor company the amount or other consideration representing the price payable for the shares, which the transferee company is entitled to acquire. The transferor company must thereupon register the transferee company as the holder of those shares, and within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the money or other consideration representing the price payable to them by the transferee company [section 395(3)].

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All sums of money and any other consideration received by the transferor company from the transferee company are to be held in trust for the several persons entitled to the shares in respect of which they have been received and until disbursed, these are to be kept in a separate bank account. These are to be paid to the shareholders against the deposit of relevant share certificates. [section 395(4)]

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, the following provisions are applicable:

(1) Every such offer of every circular containing such offer or every recommendation to the member of the transferor company by its directors to accept offer must be accompanied by such information as may be prescribed.

(2) Every offer must contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that the necessary cash will be available.

(3) Every circular containing or recommending acceptance of such an offer should be first presented to the Registrar for registration and it should not be circularised until it has been registered.

(4) The Registrar may refuse to register any such circular which does not contain the information required to be given under paragraph (1) above or which sets out such information in a manner likely to give a false impression.

(5) Against as order of the Registrar refusing to register any such circular, an appeal lies to the Court.

(6) Whosoever issues a circular mentioned in paragraph (3) above, which has not been registered, shall be punishable with fine extending to ₹ 5000 [section 395(4A)].

Further, to safeguard the interest of dissenting shareholders, sub-section (3) of section 395 imposes an obligation on the transferor company to advise the shareholders, whose shares have been taken over, as to the price payable to them within one month of the date of registration of the shares in favour of the transferee company and of the receipt of the amount or other consideration representing the price.

When all the shares of the company have been agreed to be transferred, the directors, qualification shares will not be transferred till new directors, properly qualified to act as directors, have been appointed *[Briess vs. Wolley (1954) 2 W.L.K. 832; (1954) I. A.I.R. 909]*.

Key Points

Amalgamation by Shares Purchase	By acquiring majority of shares in another company
Scheme of Contract involving transfer of shares	First to be offered to holders of such shares
Scheme of contract must be approved by	Holders of not less than 90% in value of shares concerned within 4 months from the date of offer

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After satisfying the conditions	Transferee Company may give notice to the dissenting shareholder expressing its desire to acquire his shares
When to send notice?	Within 2 months after the expiry of above 4 months
If dissenting shares doesn't apply to Court within 1 month from the date of Notice	Transferee Company is entitled and bound to acquire these shares on the terms approved by the majority
Payment for consideration	Transferee Company must pay the amount of consideration representing price payable for the shares
Registration of shares	The Transferor Company must register the Transferee Company as holders of these shares and inform the dissenting shareholders of the fact of such registration.

Power of the Central Government to provide for amalgamation of companies in the public interest: Section 396(1) provides that where in the "Public" interest it appears to the Central Government that amalgamation of two companies is essential, it may, through notification in the Official Gazette, provide for the amalgamation of the two companies into a single company with such constitution, property, powers, rights, interests, authorities and privileges and with such liabilities, duties and obligations as may be specified in the notification.

Under section 396(2) , the order aforesaid may provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and may also contain such incidental, consequential and supplemental provisions necessary to give affect to the amalgamation.

Every member or creditor (including a debenture holder) of each of the companies before the amalgamation shall have, as nearly as may be, the same interests in or rights against the amalgamated company as he has in the company of which he was originally a member or creditor. If his interests in or rights against the amalgamated company are less than his original interests etc., in the original company, he shall be entitled to receive compensation from the amalgamated company to the extent these have been reduced. [section 396(3)]

The prescribed authority would assess the amount of compensation receivable.

Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Company Law Board and thereupon the assessment of the compensation shall be made by the Company Law Board. [Section 396(3A)].

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Further, as per sub-section (4), the Central Government would not make such an order for amalgamation unless:

(a) the draft copy of the proposed order has been sent to each of the companies concerned.

(b) the time for preferring an appeal under sub-section (3A) has expired, or where any such appeal has been preferred, the appeal has been finally disposed of; and

(c) the Central Government has considered the suggestion, objection or modification to the same made by the said companies or any class of shareholders thereof or any creditor or class of creditors thereof, within a period fixed by the Central Government.

The expression "public interest" has not been defined either by this Act, or by the General Clauses Act. It is a very wide expression and comprehends *inter alia*, (i) economic welfare of the community *[Shri Kishan vs. State of Rajasthan 1955 2 SCR 53];* (ii) welfare of labour *[Basti Sagar Mills vs. Ram Ujagar AIR (1964) S.C. 355]*. The concept of public interest has been discussed in detail at the end of this Study paper.

Without prejudice to the generality of Section 396, the Ministry of Corporate Affairs vide General Circular No. 16/2011 dated 20th April, 2011 has decided that, in appropriate cases, simpler procedures shall be adopted for the amalgamation of Government Companies under section 396 of the Companies Act, 1956 as given below :-

(1) (a) Every Central Government Company which is applying to the Central Government for amalgamation with any other Government Company or Companies under the simplified procedure prescribed in this circular, shall obtain approval of the Cabinet i.e. Union Council of Ministers to the effect that the proposed amalgamation is essential in the 'public interest'.

(b) In the case of State government companies, the approval of the State Council of Ministers would be required.

(c) Where both central and state government companies are involved, approval of both State Cabinet(s) and Central Cabinet shall be necessary.

(2) (a) A Government Company may, by a resolution passed at its general meeting decide to amalgamate with any other Government Company, which agrees to such transfer by a resolution passed at its general meeting;

(b) Any two or more Government Companies may, by a resolution passed at any general meetings of its Members, decide to amalgamate and with a new Government Company.

(3) Every resolution of a Government Company under this section shall be passed at its general meeting by members holding 100% of the voting power and such resolution shall contain all particulars of the assets and liabilities of amalgamating government companies.

(4) Before passing a resolution under this section, the Government Company shall give notice thereof of not less than 30 days in writing together with a copy of the proposed resolution to all the Members and creditors.

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(5) A resolution passed by a Government Company under this section shall not take effect until (i) the assent of all creditors has been obtained, or (ii) the assent of 90% of the creditors by value has been received and the company certifies that there is no objection from any other creditor.

(6) The resolutions passed by the transferor and transferee companies along with written confirmation of the Cabinet decision referred to in para (i) shall then be submitted to the Central Government which shall, if it is satisfied that all the requirements of section 396 and of this circular, have been fulfilled, order by notification in the Gazette that the said amalgamation shall take effect.

(7) The order of the Central Government shall provide:-

(a) for the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company.

(b) that the amalgamation of companies under the foregoing sub-sections shall not in any manner whatsoever affect the pre-existing rights or obligations and any legal proceedings that might have been continued or commenced by or against any erstwhile company before the amalgamation, may be continued or commenced by, or against, the concerned resulting company, or transferee company, as the case may be.

(c) for such incidental, consequential and supplemental matters as are necessary to secure that the amalgamation shall be fully and effectively carried out

(8) The Cabinet decision referred to in para (1) above may precede or follow the passing of the resolution referred to in para (2).

(9) When an order has been passed by the Central Government under this section, it shall be a sufficient conveyance to vest the assets and liabilities in the transferee.

(10) Where one government company is amalgamated with another government company, under these provisions, the registration of the first-mentioned Company i.e. transferor company, shall stand cancelled and that Company shall be deemed to have been dissolved and shall cease to exist forthwith as a corporate body.

(11) Where two or more Government Companies are amalgamated into a new Government Company in accordance with these provisions and the Government Company so formed is duly registered by the Registrar, the registration of each of the amalgamating companies shall stand cancelled forthwith on such registration and each of the Companies shall thereupon cease to exist as a corporate body.

(12) The amalgamation of companies under the foregoing sub-sections shall not in any manner whatsoever affect the pre-existing rights or obligations, and any legal proceedings that might have been continued or commenced by or against any erstwhile company before the amalgamation, may be continued or commenced by, or against, the concerned resulting company, or transferee company, as the case may be.

(13) The Registrar shall strike off the names of every Government Company deemed to have been dissolved under sub-sections (10) to (11).

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Key Points

Amalgamation of two companies is essential in Public Interest	The Central Govt. may through Notification in Official Gazette provide for the amalgamation of two companies into single company.
Interest or rights of members or creditors in amalgamated company are less than his original interest in the original company	Entitled to receive Compensation from the amalgamated company to the extent their rights or interest have been reduced
Amount of Compensation	Assessed by Prescribed Authority
Person aggrieved by assessment of compensation	(i) Prefer an appeal to CLB within 30 days from the date of publication of such assessment in the Official Gazette (ii) Thereupon, the compensation shall be assessed by CLB.

Reconstruction under section 494: The section gives complete power of a special type *for sale of business in winding up*. A company which is proposed to be, or in the course of being wound up, voluntarily, may sell its business to another company and the compensation received, whether in the form of shares, policies or other like interest in the transferee company, may be distributed among the shareholders of the company that is being wound up, or the members of the transferor company may receive any other benefit from transferee company. To give effect to it the following condition must exist:

(i) the transferor company should be in process of being wound up as a members' voluntary winding up.

(ii) there should be a proposal to transfer or sell the whole or part of its business or property to another company (i.e. the transferee company); and

(iii) the transferor company should approve, by a special resolution, the proposal to confer authority, whether general or particular on the liquidator to put the above scheme or arrangement into effect.

The liquidator usually gives notice to the shareholders of the transferor company as regards the number of shares to which they are entitled, the amount payable by them thereon and the time within which they must apply for the shares. The sale or arrangement under this provision is binding on all the members whether they agree to it or not. If any member does not vote in favour of the special resolution, he may address to the liquidator his dissent in writing even 7 days subsequent to the passing of the special resolution and require him:

(a) to abstain from carrying the resolution into effect; or

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(b) to purchase his interest at a price to be determined by agreement or arbitration in the manner provided by section 494.

The liquidator has the right to exercise either of the above options. Should he elect to purchase, he must raise the money in such a manner as determined by the company. It must be paid prior to the company being dissolved.

It is common practice to make a provision in the scheme, enabling the liquidator to sell the shares of those who neither agree nor apply within the prescribed time and to distribute the sale proceeds among them.

The transferor company may pass such a special resolution either before or concurrently with the resolution for voluntary winding up or for the appointment of a liquidator. After an order for winding up of the company by or subject to the supervision of the court has been passed within a year, the special resolution would not be valid unless sanctioned by the Court.

The Arbitration Act, 1940, will govern arbitration, under this Section for determining the purchase price of shares of the dissentient member.

Section 494 makes no provision as regards the rights of creditors who felt that they have been affected by the scheme of transfer. As such the only remedy available to them is to present a petition either for compulsory winding up or for winding up under the supervision of the Court within a year of the making of the order.

The impact of section 494 on the sale of the whole or part of the business or property is that a sale under such scheme can be made even to a foreign company.

Under section 507, it is provided that the procedure under section 494 would apply to a creditors, voluntary winding up as well as to a members' voluntary winding up. The liquidator in the former case will have to exercise the power only with the sanction of the Court or that of the Committee of inspection.

At times an existing company may require further capital to make up the deficiency caused by losses or otherwise but the usual methods of raising capital may not be available to it. In such a case, it may resort to reconstruction under section 494 by constituting a new company to take over the undertaking. The members of the existing company will be allotted partly paid shares in the new company in lieu of assets transferred. Fresh capital after wards will be raised by calling the unpaid amount of the shares. The shareholders of the existing company however will not be bound to take the partly paid shares and they may not assent to the scheme; they may call for the purchase of their interest or for giving up the scheme. The shareholders concurring in the scheme, however, shall have to pay whenever the call is made for raising further capital.

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Key Points

Selling of a business	By a Company (Co.) which is being wound up voluntarily
Compensation in lieu of it	(i) In the form of shares, policies or other like Interest in Transferee Co. (ii) May be distributed among the shareholders of the Transferor Co.
Conditions	(i) Co. being wound up Voluntarily (ii) Proposal to transfer or sell the whole or part of its business (iii) Approval of proposal by Special Resolution (SR) by Transferor Co. to put the above scheme or arrangement into effect
Sale or Arrangement	Shall be binding on all the members of the Transferor co.
If member does not vote in favour of SR	May express his dissent in writing to the Liquidator within 7 days after passing SR and may require: (i) to abstain from carrying the resolution into effect (ii) To purchase his interest
If Liquidator elects to purchase the member's interest	Purchase money shall be paid before the co. is dissolved and be raised by the Liquidator in manner prescribed in SR
If order is made within a year for winding up the Co. by the Court	SR shall not be valid unless it is sanctioned by the Court.

Reconstruction under section 517: It is another form of reconstruction pursuant to an arrangement with the creditors when the company is being voluntarily wound up. Under this Section, any arrangement entered into between a company about to be wound up or in the course of winding-up and its creditors is binding on the company and its creditors provided it has been:

(a) approved by a special resolution of the company; and

(b) agreed to by three fourths in number and value of the creditors.

Any creditor or contributory may, however, within three weeks from the completion of arrangement, appeal to the Court and the court may amend, vary, confirm or set aside the arrangement.

Note: *Students may note that reconstruction under section 517 is not commonly resorted to in as much as it might be difficult to secure the 3/4th the majority referred to in paragraph (b) above.*

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Conditions prohibiting reconstruction or amalgamation of company: According to section 376 of the Act, where any provision in the memorandum or articles of a company, or in any resolution passed in general meeting by, or by the Board of Directors of, the company, or in an agreement between the company and any other person, whether made before or after the commencement of this Act, prohibits the reconstruction of the company or its amalgamation with any body corporate or bodies corporate, either absolutely or except on the condition that the managing director or manager of the company is appointed or reappointed as managing director or manager of the reconstructed company or of the body resulting from amalgamation, as the case may be shall become void with effect from the commencement of this Act, or be void, as the case may be.

- Preservation of books and papers of amalgamated company (Section 396A*):* The books and papers of a company which has been amalgamated with or whose shares have been acquired by another company under Chapter V of Part VI cannot be disposed of without the prior permission of the Central Government which may appoint a person to examine the books and papers in order to ascertain whether they contain any evidence of commission of an offence in connection with promotion or formation or the management of the affairs of the first-mentioned company or its amalgamation or the acquisition of its shares.

  It is a measure introduced to prevent accounts and records of a company being disposed of following amalgamation with a view to destroying incriminating evidence.

7.2 Amalgamation of Two Companies-Steps to be taken by both

*Procedures for amalgamation of the Companies: Proceedings for an amalgamation by the trans*feror and transferee companies should be carried out simultaneously. These are as follows:

In The Transferee Company		In The Transferor Company
1.	To check up whether the memorandum contains the power of amalgamation; if not, then to carry out the proceedings for its alteration and to obtain Company Law Board's Confirmation.	The same as in the case of transferee Company.
2.	To Prepare the draft scheme including exchange ratio and get it approved by the Board's meeting.	–do–
3.	To apply to the Court for directions to convene the general meeting by way of Judge's Summons [Rule 67 of the Companies (Court) Rules, 1959]; such directions would be in respect of matters set out in Rule 69.	–do–
4.	To send notice for general meeting to every member along with a statement setting forth the terms of the compromise or arrangement and explaining its effect and particularly stating any material interests of the directors, managing	–do–

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	director or manager, whether in their capacity as such or as members or creditor, or otherwise and the effect on those interests on the amalgamation and insofar as it is different from the effect on the like interests, of other persons [Section 393(1)(a)]. In case of the said notice being given through advertisement, to either include the aforesaid statement or to notify the place for obtaining the copies of such statement [section (1)(b)]; these can be obtained free of charge on making an application therefore in the manner indicated in the notice [section 393(3)].	
	In case of debenture holders' rights being affected by amalgamation, the said statement to give like information and explanation regarding the trustees under the deed [section 393(2)].	
	[Rules 69 to 76 of the Companies (Court) Rules to be noted in this connection.]	
5.	To hold the general meeting and pass the resolution approving the draft scheme of amalgamation subject to the confirmation of the high Court, resolution to be passed by a majority in number representing 3/4ths in value of the members as required by section 391.	The same as in the case of transferee company.
6.	To move the High Court for approval of the scheme, and for the purpose to supply it with material facts as required by the proviso to section 391(2).	To move the High Court jointly with the transferee company, and also to supply the court with all material facts. Further the court would need a satisfactory report from the Company Law Board or the Registrar that the affairs of the Company have not been conducted in a manner prejudicial to the interests of its members or to public interest, because it is a scheme for the amalgamation of it, with the transferee company which is being wound up. [Proviso to Section 394(1)].

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7.	On receipt of the Court's order, to file the certified copy thereof with the registrar within 30 days after the making of the order [section 394(3)]; otherwise it would not be effective.	The same as in the case of transferee company.
8.	A copy of the Court's order also to be annexed to every copy of the memorandum or instrument, which defines the constitution of the company, issued after the certified copy of the order has been filed with the Registrar. [section 391(4)].	The same as in the case of transferee company.
9.	To proceed to effect the scheme of amalgamation as per the scheme approved and the directions given by the High Court by issuing suitable notices to shareholders and persons concerned and to allot shares and take over the business as per the scheme.	To do the same in the case of the transferee company, except of allotment of shares and taking over business, because no question of these arises in this case.

Note: In this chapter, wherever the word 'Act' is used, it refers to the Companies Act, 1956.

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8

Prevention of Oppression and Mismanagement

8.0 "Majority Rule" as Applied in the Management of a Company

The Companies Act, 1956, together with the protection granted to minority under the Common Law, attempts to maintain a balance between the rights of majority and the minority shareholders by admitting in the rule of the majority but limiting it at the same time by a number of well-defined minority rights, and thus protecting the minority shareholders.

Minority shareholders are protected by:

1. the Common Law; and
2. the provisions of the Companies Act, 1956.

8.1 Protection at Common Law

It is a well-known principle, enunciated in *Foss vs. Harbottle* that the rule of majority shall prevail. But there are certain exceptions to this rule where the majority rule does not prevail. These are as under:

(a) Where the act complained of is illegal or *ultra vires* the company;

(b) Where the act done by the majority constitutes fraud on the minority;

(c) Where a resolution is passed by a simple majority for any act, which requires special resolution for it to be effective;

(d) Where the act infringes the personal rights of an individual member;

(e) Where any act amounts to oppression of minority or mismanagement of the affairs of the company.

In all these cases a minority shareholder is entitled to bring an action for a declaration that the resolution complained of is void, or for an injunction to restrain the company from passing it. All these principles have been followed in a few leading cases in India as well.

Key Points

Majority Rule	• The members with the majority are always in an advantageous position to manage and administer the company according to their command and thus oppressing the minority shareholders regularly. • Thus a balance is maintained between the rights of majority and

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	the minority shareholders by admitting in the rule of the majority but limiting it at the same time by a number of well-defined minority rights. Thus the 'Rule of majority' does not prevail in all the situations. Wherever, the interest of minorities are weak, there they may sue to enforce the obligations owed to the company. • The leading case law '*Foss vs. Harbottle'.*

8.2 Oppression and Mismanagement

The management of companies is based on the principle of majority rule ordinarily; decision of the majority is the rule for the minority. This sound principle has, occasionally, been abused and the whip of the majority has often produced sullen effects, prejudicial to the best interests of the shareholders. Until the commencement of the Companies Act, 1956 the only remedy available (under the Indian Companies Act, 1913) to an oppressed minority was to petition to the Court to wind up the company on the ground that it was "just and equitable" so to do. The winding up remedy is, however, not always advantageous to the petitioning shareholder, or shareholders because the very persons whose conduct is complained of, may be the only persons capable of buying up the shares of the dissentients. Nevertheless, the oppression or mis-management calls for some remedial action. Sections 397 to 409 of the Companies Act, 1956 are the specific provisions which empowers (i) the Company Law Board and (ii) the Central Government to deal with such situations preventing oppression and mis-management in the company.

Meaning of Oppression- As per section 397 of the Act, where the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, may be termed as oppression. There the members complaining may apply to the Company Law Board for appropriate relief subject to section 399.

Meaning of Mis- management- As per section 398 of the Act, where the affairs of the company are being conducted in a manner prejudicial to the public interest or in a manner prejudicial to the interests of the company, or where any material change has taken place in the management or control of the company, by which it is likely that the affairs of the company will be conducted in the manner prejudicial to public interest or prejudicial to the interests of the company. This may be termed as mis-management in the company. The complaining members of a company may apply to the Company Law Board for the relief subject to Section 399. Section 399 provides, however, that a single member is not entitled to make an application under either of the sections, viz., Sections 397 and 398.

8.3 Who May Apply to the Company Law Board when Oppression or Mis-management is complained of?

The application can be made only by:

(a) In the case of a company having a share capital:

(i) not less than one hundred members or not less than one tenth of the total number of members whichever is less; or

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(ii) a member or members holding not less than one-tenth of the issued share capital of company provided that the applicants have paid all calls and other sums due on their respective share [section 399(1)(a)]. It may be noted that joint members are counted as one member.

(b) In the case of a company not having a share capital: not less than one-fifth of the total number of members [section 399(1)(b)].

(c) The Central Government: The Central Government can also apply or authorise a member or members to make an application under section 397 or 398, though the requisite conditions mentioned in the [i] and [ii], given above, are not satisfied [section 399(4)].

An application under section 399(4) must contain the names and addresses of the applicants, the total numbers of applicants, etc., it must be verified by an affidavit. The Central Government may require the applicant to produce documentary evidence in support of the complaint [Section 399(4)]. It may also require the members to give security for costs [section 399(5)].

8.4 Difference between Sections 397 and 398

Under section 397, the existence of conditions justifying the making of winding up order on the ground that it is just and equitable that the company should be wound up, is a condition precedent to the interference by the Company Law Board. On the other hand, under section 398, the C.L.B. would interfere on its being satisfied that by reason of any material changes in the management or control of the company, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interest of the company. The two positions are distinct. Whereas in the first case, the C.L.B. acts to prevent injustice being done to a member or members in his or their individual capacity, in the second case the C.L.B. acts in order to prevent injury being inflicted to the interest of the company as a whole.

The material change in the management or control contemplated in the preceding paragraph will be deemed to have taken place in any of the following circumstances, viz.:

(i) when there has been alteration in the Board of directors;

(ii) when a replacement of its manager has taken place;

(iii) when a change has occurred in the ownership of the shares of the company;

(iv) when there has been a change in the membership of a company having no share capital;

(v) when a change has taken place in any other manner whatsoever.

By reason of any of the aforesaid changes, the affairs of the company are likely to be conducted in manner prejudicial to public interest or to the interest of the company [section 398(1)(b)].

Thus on an application made in the foregoing circumstances, the Company Law Board will interfere only if it is of the opinion:

(1) When it is made under section 397: (a) that the company's affairs are being conducted in a manner oppressive to any member or members [section 397(2)] or in a manner prejudicial to

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public interest; and (b) that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding up order on "just and equitable" ground.

(2) When it is made under section 398:

(a) that affairs of the company are being conducted in a manner prejudicial to the public interests or in the manner prejudicial to the interests of the company [section 398(1)(a)]; or

(b) that a material change has taken place in the management or control of the company and as a consequence the affairs of the company may be conducted in a manner prejudicial to the public interest or in a manner prejudicial to the interests of the company [section 398(1)(b)].

The Company Law Board may make such order it thinks fit with a view to bringing to an end, or preventing the matters complained or apprehended, as the case may be.

(3) Under section 397, the Company Law Board can end the oppression complained of whereas, under section 398, it can *prevent* the matters complained of or apprehended. In other words, only section 398 is preventive; section 397 is not.

A complaint under section 399 can be made only by a member or members and not by officers or directors who might be oppressed in these capacities *[Elder vs. Elder & Weston Ltd. (1952) 102 Law J. 91; (1952) S.C. 49]*.

In the aforementioned case, the interpretation of section 210 of the English Companies Act, 1948, corresponding to section 397 of our Act, was considered. There it was alleged that the majority of the shareholders of a private company had removed two minority shareholders from their directorship and employment but there was no suggestion of mismanagement to the detriment of the share holders. The Court held that these allegations could not support an application under the Section, which required oppressive conduct to members in their character as members. Such conduct towards a member in any other capacity, e.g., as a director or creditor could not *per se* justify an application. The "conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company, is entitled to rely" (*ibid*) (per Lord Cooper).

8.5 Notice to Central Government of applications given under sections 397 & 398

As per section 400 of the Act, C.L.B. is required to give notice of every application made to it under section 397 and 398 to the Central Government before passing any order and to take into consideration the representations, if any, made to it by that Government.

8.6 Right of the Central Government to apply for an order under sections 397 & 398

The Central Government may itself apply to the C.L.B. for an order under sections 397 & 398, or cause an application to be made to the C.L.B. for such an order, by person authorized by him.

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8.7 Powers of the Company Law Board on Application under Sections 397 or 398

Without prejudice to the generality of the powers of making any order as it thinks fit under section 397 or 398 the C.L.B. has, in particular under section 402, the following powers:

(a) to regulate by order the conduct of the company's affairs in the future;

(b) to order the purchase of shares or interest of any member or members of the company by the other members thereof or by the company;

(c) in the case of a purchase of shares by the company as aforesaid, to order the consequent reduction of its share capital;

(d) to terminate, set aside or modify any agreement, howsoever, arrived at, between the company on the one hand and any of the following persons on the other, namely: (i) the managing director; (ii) any other director; (iii) the manager upon such terms and conditions as may, in the opinion of the Company Law Board be just and equitable in all the circumstances of the case;

(e) to terminate, set aside or modify any arrangement between the company and any person not referred to above, after giving due notice to, and obtaining the consent of the party concerned;

(f) to set aside any transfer, delivery of goods, payment, execution of other act, relating to property made or done by or against the company within 3 months before the date of the application under section 397 or 398 which would in the case of an individual be deemed in his insolvency to be fraudulent preference; and

(g) to deal with any other matter for which, in the opinion of the C.L.B., it is just and equitable that provision should be made.

The C.L.B. may make an interim order for regulating the conduct of the company's affairs, pending the passing by it of a final order under section 397 or 398 (section 403).

8.8 Effect of alteration by order under section 397 and 398

Where an order made under section 397 or 398 involves an alteration of the Memorandum or Articles of Association of the company, the company shall not have the right to make any alteration therein, subsequently, in a manner which is inconsistent with the order passed by the C.L.B. without its leave (section 404). Certified copies of the alteration must be filed with the Registrar. Where, an order of the C.L.B. under the foregoing section involves the termination of any of the agreement mentioned herein before, such termination shall not give rise to any claim for damages against the company for loss of office or in any other respect either under the agreement or otherwise. Further, no managing or other directors or manager whose agreement has been terminated or set aside shall, without leave of the C.L.B. be appointed in any of the above capacity in respect of the company for a period of five years from the date of the order. Any contravention of this provision is punishable with imprisonment for a term, which may extend to one year, or with a fine up to ` 50,000 or with both. Before leave is granted, the Central Government must be notified and heard (section 407).

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8.9 Powers of the Central Government

Section 408 has vested some powers in the Central Government to prevent oppression or mismanagement. It can exercise these powers on an order of the Company Law Board which in turn will so order on the application of at least 100 members of the company or of members holding at least one tenth of the total voting power therein. But before exercising such powers, it must make such enquiry as it deems fit and be satisfied that it is necessary to exercise its powers in order to prevent the affairs of the company being conducted either in a manner oppressive to any members of the company or in a manner prejudicial to the interests of the company or to public interest.

(i) Appointment of the persons to safeguard the interest of company/ shareholders/public interest: Central Government may appoint such number of persons as the Company Law Board may, by order in writing, specify as being necessary to effectively safeguard the interest of the company, or its shareholders or the public interest, as directors thereof for such period not exceeding three years at one time as it may think fit [Section 408(1)].

(ii) Persons appointed by the Central Government shall hold office as additional directors: If the Company Law Board has not passed an order in the above manner, it may direct the company to provide for the proportional representation as per section 265 of the Act for the appointment of directors and make fresh appointment of directors with in the specified time [Proviso to section 408(1)], Till new directors are appointed pursuant to the aforesaid order, such number of persons as the Company Law Board may, by order in writing, specify as being necessary to effectively safeguard the interest of the company, or its shareholders or the public interest will hold office as additional directors. The Central Government shall appoint such Additional Directors. [section 408(2)].

(iii) Director/ Directors not liable to retire by rotation: The director or directors appointed under sub-section (1) or (2) of section 408 are not liable to retire by rotation as contemplated by section 255 [section 408(3)].

(iv) Directors so appointed by Central Government not to hold qualification shares nor retirement by rotation: These directors are not required to hold any qualification shares; nor are their tenure of office liable to termination by retirement of directors by rotation. These directors may, however, be replaced by some others by the Central Government [section 408(4)].

(v) No change in Board of directors after appointment unless confirmed by the C.L.B.: No change in the Board of directors, after a person has been appointed or directed to hold office of a director or additional director under section 408 shall so long as such director or additional director holds office, be effective unless confirmed by the Company Law Board [section 408(5)].

On appointing directors or additional directors referred to in the first two sub-sections above, the Central Government may issue such directions to the company as it may consider necessary or appropriate in regard to its affairs. Such directions can be issued notwithstanding anything contained in this Act or in any other law for the time being in force [section 408(6)].

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The Central Government may require these directors or additional directors to report to it from time to time with regard to the affairs of the company [section 408(5)].

On a complaint being lodged by the managing or any other director or the manager, the Company Law Board is empowered under section 409 to prevent any change in the Board of Directors, which is likely to affect the company prejudicially. The power conferred by this Section, however, cannot be exercised in relation to a private company, unless it is a subsidiary of a public company.

Key Points:

Relevent sections	Section 397 to 409 of the Companies Act, 1956 lay down the specific provisions whereby both the Company Law Board and the Central Government is empowered to interfere in the affairs of the company for preventing Oppression and Mis-management in the company.
Meaning Oppression: Mismanagement:	The affairs of company are being conducted in such a manner that it is – (a) oppressive to a member/ some member, or (b) prejudicial to public interest. (a) The affairs of the company are being conducted in such a manner that it is prejudicial to –interest of the company, or public interest, or (b) there is any material change in the management/ control of the company by –(1) alteration in the Board of Directors/ manager, (2) ownership of company's share, (3) change in the membership if it has no share capital- influencing on the conduct of affairs of the company in such a manner that it is prejudicial to public interest or to the interest of the company.
Steps for the prevention of oppression and mis-management:	
Application to C.L.B.-	Oppressed minorities can move an application to C.L.B. whenever the affairs of a company is conducted in a manner being unjust to the member/ members, or injuring the public interest.
Who can apply	(a) Companies with share capital- application can be made by- (1) not less than one hundred members or not less than one tenth of the total number of members whichever is less; or (2) a member/ members holding not less than one-tenth of the issued share capital of company. The joint

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	members are counted as one member. (b) company not having a share capital- application can be made by not less than one-fifth of the total number of members (c) The Central Government itself (d) The Central Government can authorise a member or members to make an application
Power of C.L.B	C.L.B. may dispose of an application by passing following orders- (a) to regulate the conduct of the company's affairs in the future; (b) to purchase shares or interest of any member/ members by the other members thereof/ by the company; (c) reduction of its share capital , where it has ordered to purchase the shares (d) to terminate, set aside or modify any agreement, made between the company and the managing director; any other director, or the manager upon such terms and conditions as may, in the opinion of the Company Law Board be just and equitable. (e) to terminate, set aside or modify any arrangement between the company and any person not referred to above, after giving due notice to, and obtaining the consent of the party concerned; (f) to set aside of any fraudulent preference made within 3 months before the date of application.; and (g) to deal with any other matter which in the opinion of the C.L.B., it is just and equitable.
Power of Central Government	The Central Government is also vested with powers to prevent oppression or mismanagement. It can exercise these powers on an order of the Company Law Board. (i) Central Government may appoint certain persons as directors to hold office as additional directors to safeguard the interest of company/ shareholders/public interest. (ii) Directors so appointed by Central Government are not required to hold any qualification shares nor there is retirement from their office by

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	rotation. These directors may, however, be replaced by some others by the Central Government. (iii) No change in the Board of directors shall be effective unless confirmed by the Company Law Board after the appointment of a person as director or additional director by him. (iv) On appointing directors or additional directors, the Central Government may issue such directions to the company as it may consider necessary or appropriate in regard to its affairs. (v) The Central Government may require these directors or additional directors to report to him from time to time with regard to the affairs of the company.

8.10 Powers of Central Government to Remove Managerial Personnel on the Recommendation of CLB

The powers of the Company Law Board to remove a director of a company are contained in Sections 388B to 388E of Companies Act, 1956.

(1) Reference of cases to the C.L.B.: The Central Government may state a case against any of the managerial personnel of a company and refer the case to the Company Law Board with a request that the Company Law Board may inquire into the case and record a finding whether or not he is fit and proper person to hold the office of director or any other office connected with the conduct and management of the company. The Central Government may exercise this power where in its opinion there are circumstances suggesting:

(i) that any person concerned in the conduct and management of the affairs of a company is or has been in connection there with guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law, or

(ii) that the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices; or

(iii) that a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or

(iv) that the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest [Section 388B(1)].

Every case under sub-section (1) shall be stated in the form of an application which shall be presented to the Company Law Board or such officer thereof as it may appoint in this behalf [Section 338B(2)].

The person against whom a case is referred to the Company Law Board under this section

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shall be joined as a respondent to the application [Section 388B(3)]. The application made to the C.L.B. must contain a concise statement of the circumstances and material as the Central Government may consider necessary for the purpose of the enquiry, and be signed and verified in the manner laid down in the Civil Procedure Code, 1908 for the signature and verification of a plaint in a suit by the Central Government [Section 388B(4)].

(2) Interim order by C.L.B.: The Company Law Board may, on the application of the Central Government, or on its own motion, by an interim order direct that the respondent shall not discharge any of the duties of his office until further orders of the Company Law Board; and appoint a suitable person in place of the respondent [Section 388C(1)]. Such appointee shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code [Section 388C(2)].

(3) Decision of the C.L.B.: At the conclusion of the hearing of the case the Company Law Board must record its findings (Section 388D). If the finding of the Company Law Board is against the respondent the Central Government, by order, shall remove him from office [Section 388E(1)]. The person against whom order of removal from office is made must not hold the office of a director or any other office connected with the conduct and management of affairs of the company for a period of 5 years from the date of the order of removal. The Central Government may, with the previous concurrence of the Company Law Board, remit or relax this period of 5 years [Section 388E(3)]. On the removal of a person from office in the above manner, no compensation in any circumstance whatever is payable to him for the loss or termination of office [Section 388E(4)]. The company may, with the previous approval of the Government, appoint another person to the office in place of the person removed [Section 388E(5)].

8.11 Concept of Public Interest and Its Impingement on Company Law

The expression "public interest" is an elusive abstraction; it means general welfare of the society or "regard for social good" and pervades interest of the general public in matters where regard for the social good is of the first moment.

A thing is said to be in public interest where it is or can be made to appear to be contributive to the general welfare rather than to the special privileges of a class, group or individual. In common parlance, it is assumed to denote the interest to the community or nation as a whole as well as the State Government, which represents it. "The expression is not capable of precise definition and has not a rigid meaning, and is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and state of society and its needs. Thus, what is 'public interest' today may not be so considered a decade later. In any case, the expression cannot be considered in vacuum but must be decided on the facts and circumstance". *[Per Chief Justice Mahajan in State of Bihar vs. Kameshwar, A.I.R. 1952 SC 252].*

Since the concept of public interest is bound to undergo frequent changes with a change in our social, political and economic values, no hard and fast definition can be and actually has been, laid down by the Act. Whatever furthers the general interests of the community as opposed to the particular interest of the individual (a company formed and registered under the Act is a legal person) is to be considered as "public interest", i.e., an interest in which the community is directly and vitally concerned. A survey of the provisions of the Act would reveal

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the truth of the statement that the concept of public interest has been making rapid in-roads into the Indian Company Law, e.g., Sections 396, 397, 398, 408 etc.

A survey of the provisions of the Act would reveal the truth of the statement that concept of "public interest" has been making rapid in roads into the Indian Company Law:

(i) Section 396, as you have seen earlier, empowers the Central Government to provide for compulsory amalgamation of companies (notwithstanding anything contained in sections 394 and 395) into a single company in the public interest. It may be noted that the expression "national interest" was used in 1956. The Amendment Act of 1960 brought the substitution of 'public interest' for 'national interest' into effect. The Indian Companies Act, 1913 contained no provisions similar to those of section 396. Therefore, the Companies Act, 1956, made such provision in the Company Law for the first time.

(ii) There may be a case where a transfer of shares in a company has taken place or is likely to take place and, as a result thereof a change in the composition of the Board of directors is likely to take place; and further such a situation (in the CLB's opinion) may be prejudicial to the public interest. In such a case, the CLB is empowered, under sections 250(3) and (4) to impose restrictions on such transfers e.g. the voting rights in respect of such shares shall not be exercisable for the period specified not exceeding three years or the resolution approving the transfer of such shares should shall not have effect unless confirmed by the CLB. Thus, the Amendment Act of 1960 has extended the provisions of section 250 in public interest also.

(iii) Under section 397, the member of a company has given the right to file an application to the Company Law Board for appropriate relief where the affairs of the company are being conducted, *inter alia*, in a manner prejudicial to public interest provided the requirements of section 399 are fulfilled.

(iv) Under section 398, the shareholder company can file an application to the Company Law Board for relief in cases (a) where the affairs of the company are being conducted in a manner prejudicial to public interest.

(v) Under section 408, the Central Government is empowered to appoint such number of persons as the Company Law Board may, by order in writing specify being necessary to hold office as directors in the company to effectively safeguard public interest (besides the interest of the company or its shareholders). Such an order may be made on a reference made to it by the Central Government or on an application of not less than 100 members of the company or of the members holding 1/10th of the total voting power therein.

(vi) Under section 394(1) of the Companies Act, 1956, the Court has been empowered: (a) to refuse its sanction to any compromise or arrangement in connection with a scheme for the amalgamation of a company which is being wound up, with another company where it receives a report from the Registrar that the affairs of the company have been conducted *inter alia* in a manner prejudicial to public interest; and (b) to refuse the dissolution of any transferor company under clause (iv) of section 394(1) where it receives a report from the Official Liquidator (on security of the books and papers of the company) that the affairs of the company have been conducted, *inter alia* in a manner prejudicial to public interest.

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(vii) The office of public trustee has been set up so as to enable him to take over the voting rights of shares and debentures held in trust from their trustees to be exercised in such manner as he may determine (sections 153A and 153B). The object of this was to ensure that voting powers attaching to funds held in trust for the company or the public were exercised to promote the public interest and not to further those of private individuals who had formed tax-free trusts ostensibly for 'public motives'.

The Central Government is empowered to state a case against managerial personnel to the Company Law Board under section 388B where the circumstances suggest the company is or has been conducted and managed by such person in a manner which is likely to cause or has caused serious injury or damage to the interests of trade, industry or business to which such company pertains {vide} Amendment Act of 1988.

Note: In this chapter, wherever the word 'Act' is used, it refers to the Companies Act, 1956.

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9
Revival and Rehabilitation of Sick Companies

9.0 Definitions

Sick Industrial Company

Sick Industrial Company means an industrial undertaking which has

(i) the accumulated losses in any financial year equal to fifty per cent or more of its average net worth during four years immediately preceding such financial year; or

(ii) failed to repay its debts within any three consecutive quarters on demand made in writing for its repayment by a creditor or creditors of such company.

Industrial undertaking

"Industrial undertaking" means any undertaking, pertaining to any industry carried on in one or more factories or units by any company, as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) but does not include a small-scale industrial undertaking as defined in clause (j) of that section [Section 2 (19AB)].

Net Worth

"Net worth" means the sum total of the paid-up capital and free reserves after deducting the provisions or expenses as may be prescribed.

Explanation.—For the purposes of this clause, "free reserves" means all reserves created out of the profits and share premium account but does not include reserves created out of revaluation of assets, write back of depreciation provisions and amalgamation [Section 2 (29A)].

Operating Agency

"Operating agency" means any group of experts consisting of persons having special knowledge of business or industry in which the sick industrial company is engaged and includes public financial institution, State level institution, scheduled bank or any other person as may be specified as the operating agency by the Tribunal [Section 2 (31AA)]

Industrial Company

"Industrial company" means a company which owns one or more industrial undertakings [Section 2 (19AA)]

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9.1 Procedure for Revival and Rehabilitation

9.1.1 Reference to Tribunal

(a) The Board of directors of a sick industrial company shall make a reference to the Tribunal and prepare a scheme of its revival and rehabilitation.

(b) Such a reference shall be made to the Tribunal along with an application containing such particulars as may be prescribed, for determination of the measures which may be adopted with respect to such company.

(c) The application shall be accompanied by a certificate from an auditor or from a panel of auditors prepared by the Tribunal indicating—

(i) the reasons of the net worth of such company being fifty per cent or less than fifty per cent; or

(ii) the default in repayment of its debt making such company a sick industrial company, as the case may be.

(d) The provisions of Section 424A (i) shall not apply to a Government company.

(e) However a Government company may, with the prior approval of the Central Government or a State Government, as the case may be, make a reference to the Tribunal in accordance with the provisions of this sub-section and thereafter all the provisions of this Act shall apply to such Government company.

(f) In case any reference had been made before the Tribunal and a scheme for revival and rehabilitation submitted before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, such reference shall abate if the secured creditors representing three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) *:*

(g) No reference shall be made to the Tribunal under Section 424A (i) if the secured creditors representing three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).

(h) The Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank without prejudice to the provisions contained in Section 424A (1), may if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Tribunal for determination of the measures which may be adopted with respect to such company:

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(i) A reference shall not be made under Section 424A (1) in respect of any industrial company by—

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to such company, an interest in such company.

(j) A reference under Section 424A (1) or (3) shall be made to the Tribunal within a period of one hundred and eighty days from the date on which the Board of directors of the company or the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution or a scheduled bank, as the case may be, come to know, of the relevant facts giving rise to causes of such reference or within sixty days of final adoption of accounts, whichever is earlier.

(k) The Tribunal may, on receipt of a reference, pass an order as to whether a company in respect of which a reference has been made has become a sick industrial company and such order shall be final.

9.2 Inquiry into Working of Sick Industrial Companies (Section 424B)

(a) The Tribunal may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company—

(i) upon receipt of a reference with respect to such company under section 424A; or

(ii) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.

(b) The Tribunal may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry, require by order any operating agency to enquire into the scheme for revival and make a report with respect to such matters as may be specified in the order.

(c) The operating agency shall complete its inquiry as expeditiously as possible and submit its report to the Tribunal within twenty-one days (extendable to forty days with reasons to be recorded in writing) from the date of such order.

(d) The Tribunal shall conclude its enquiry as expeditiously as possible and pass final orders in the proceedings within sixty days extendable to ninety days with reasons with reasons to be recorded in writing) from the commencement of the inquiry. An inquiry shall be deemed to have commenced upon the receipt by the Tribunal of any reference or information or upon its own knowledge reduced to writing by the Tribunal.

(e) Where the Tribunal deems it fit to make an enquiry or to cause an inquiry to be made into any industrial company, as the case may be, it may appoint one or more persons who possess knowledge, experience and expertise in management and control of the affairs of any other company to be a special director or special directors on the board of such industrial company on such terms and conditions as may be prescribed for safeguarding its financial and other interests or in the public interest.

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(f) The special director or special directors appointed for the purpose shall submit a report to the Tribunal within sixty days from the date of appointment of such director or directors about the state of affairs of the company in respect of which reference has been made and such special director or directors shall have all the powers of a director of a company under this Act, necessary for discharge of his or their duties.

(g) The Tribunal may issue such directions to a special director appointed as it may deem necessary or expedient for proper discharge of his duties.

(h) The appointment of a special director shall be valid and effective notwithstanding anything to the contrary contained in any other provision of this Act or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any special director or directors appointed by the Tribunal.

(i) Any special director appointed, shall—

(a) hold office during the pleasure of the Tribunal and may be removed or substituted by any person by order of the Tribunal;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;

(d) not be liable to be prosecuted under any law for anything done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.

9.3 Powers of Tribunal to Make Suitable Order on Completion of Inquiry (Section 424C)

(a) If after making an inquiry under section 424B, the Tribunal is satisfied that a company has become a sick industrial company, the Tribunal shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by an order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses or make the repayment of its debts referred to in clause (b) of sub-section (2) of section 424A within a reasonable time.

(b) If the Tribunal decides that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses or pay its debt referred to in that sub-section within a reasonable time, the Tribunal shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses or make repayment of the debts.

(c) If the Tribunal decides that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses or make the repayment of its debts within a

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reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 424D in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company.

(d) The Tribunal may, if any of the restrictions or conditions specified in an order made under sub-section (2) are not complied with by the company concerned, or if the company fails to revive in pursuance of the said order, review such order on a reference in that behalf from any agency referred to in sub-section (3) of section 424A or on its own motion and pass a fresh order in respect of such company under sub-section (3) and if the operating agency specified in an order made under sub-section (3) makes a submission in that behalf, review such order and modify the order in such manner as it may deem appropriate.

9.4 Preparation and Sanction of Schemes (Section 424D)

(1) Where an order is made under sub-section (3) of section 424C in relation to any sick industrial company, the operating agency specified in the order shall prepare as expeditiously as possible and ordinarily within a period of sixty days (extendable to ninety days with reasons to be recorded in writing) from the date of such order, having regard to the guidelines framed by the Reserve Bank of India in this behalf, a scheme with respect to such company providing for any one or more of the following measures, namely:—

(a) the financial reconstruction of such industrial company;

(b) the proper management of such industrial company by change in, or take over of, the management of such industrial company;

(c) the amalgamation of—

  (i) such industrial company with any other company; or

  (ii) any other company with such industrial company (hereafter in this section, in the case of sub-clause (i), the other company, and in the case of sub-clause (ii), such industrial company, referred to as “transferee company”);

(d) the sale or lease of a part or whole of any industrial undertaking of such industrial company;

(e) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(f) such other preventive, ameliorative and remedial measures as may be appropriate;

(g) repayment of debt;

(h) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (g):

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(2) The scheme may provide for any one or more of the following, namely:—

(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee company;

(b) the transfer to the transferee company of the business, properties, assets and liabilities of the sick industrial company on such terms and conditions as may be specified in the scheme;

(c) any change in the Board of directors, or the appointment of a new Board of directors, of the sick industrial company and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of directors or of any director, the period for which such appointment shall be made;

(d) the alteration of the memorandum or articles of association of the sick industrial company or, as the case may be, of the transferee company for the purpose of altering the capital structure thereof, or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

(e) the continuation by or against the sick industrial company or, as the case may be, the transferee company of any action or other legal proceeding pending against the sick industrial company immediately before the date of the order made under sub-section (3) of section 424C;

(f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Tribunal considers necessary in the interests of the reconstruction, revival or rehabilitation or repayment of debts of such sick industrial company or for the maintenance of the business of such industrial company;

(g) the allotment to the shareholders of the sick industrial company, of shares in such company or, as the case may be, in the transferee company and where any shareholder claims payment in cash and not allotment of shares or where it is not possible to allot shares to any shareholder, the payment of cash to those shareholders in full satisfaction of their claims—

  (i) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or

  (ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced;

(h) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company;

(i) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified, to any person, including a co-operative society formed by the employees of such undertaking and fixing of reserve price for such sale;

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(j) lease of the industrial undertaking of the sick industrial company to any person, including a co-operative society formed by the employees of such undertaking;

(k) method of sale of assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefor;

(l) issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of such sick industrial company;

(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out.

(3) Scrutiny of the Scheme

(i) The scheme prepared by the operating agency shall be examined by the Tribunal and a copy of the scheme with modification, if any, made by the Tribunal shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Tribunal may publish or cause to be published the draft scheme in brief in such daily newspapers as the Tribunal may consider necessary, for suggestions and objections, if any, within such period as the Tribunal may specify.

(ii) The complete draft scheme shall be kept at the place where registered office of the company is situated or at such places as mentioned in the advertisement.

(iii) The Tribunal may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies: Where the scheme relates to amalgamation, the said scheme shall be laid before the company other than the sick industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the transferee company.

(iv) The sanctioned scheme may thereafter be sanctioned, within sixty days (extendable to ninety days with reasons to be recorded in writing) by the Tribunal and shall come into force on such date as the Tribunal may specify in this behalf: Different dates may be specified for different provisions of the scheme.

(v) The Tribunal may, on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines including the guidelines framed by the Reserve Bank of India in this behalf in

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order to prepare a fresh scheme providing for such measures as the operating agency may consider necessary.

(vi) When a fresh scheme is prepared, the provisions of sub-sections (3) and (4) of Section 424D shall apply in relation thereto as they apply to in relation to a scheme prepared under section 424D(1).

(vii) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in, and the liability shall become the liability of, such other company or person or, as the case may be, the sick industrial company.

(viii) The sanction accorded by the Tribunal shall be conclusive evidence that all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Tribunal to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise), be admitted as evidence.

(ix) A copy of the sanctioned scheme shall be filed with the Registrar within the prescribed time by the company in respect of which such scheme relates.

(x) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies.

(xi) The creditors of a sick industrial company may also prepare a scheme for revival or rehabilitation of such sick industrial company and submit the same to the Tribunal for its sanction: No scheme shall be submitted by the creditors to the Tribunal unless such scheme has been approved by at least three-fourth in value of creditors of the sick industrial company.

(xii) All the provisions relating to the preparation of scheme by the operating agency and sanction of such scheme by the Tribunal shall, as far as may be, apply to the scheme referred to in sub-section (11) of Section 424D.

(xiii) The scheme referred to in sub-section (11) if sanctioned by the Tribunal shall be binding on all the creditors and on other concerned.

(xiv) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Tribunal may, on the recommendation of the operating agency or otherwise, by order, do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty.

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(xv) The Tribunal may, if it deems necessary or expedient so to do, by order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to the sick industrial company as may be specified in the order.

(xvi) Where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Tribunal may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of section 529A and other provisions of this Act.

(xvii) The Tribunal may monitor periodically the implementation of the sanctioned scheme.

9.5 Rehabilitation by Giving Financial Assistance (Section 424E)

(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to the sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Tribunal and if no consent is received within such period or further period, it shall be deemed that consent has been given.

(3) Where in respect of any scheme the consent is given by every person required by the scheme to provide financial assistance, the Tribunal may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(4) On the sanction of the scheme, the financial institutions and the banks required to provide financial assistance, shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.

(5) The financial institution and the bank designated shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.

(6) Where in respect of any scheme consent is not given by any person required by the scheme to provide financial assistance, the Tribunal may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

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9.6 Arrangement for Continuing Operations, etc., during Inquiry (Section 424F)

(1) At any time before completion of the inquiry under section 424B, the sick industrial company or the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution or a scheduled bank or any other institution, bank or authority providing or intending to provide any financial assistance by way of loans or advances or guarantees or reliefs, or concessions to such industrial company may make an application to the Tribunal—

(a) agreeing to an arrangement for continuing the operations of the sick industrial company; or

(b) suggesting a scheme for the financial reconstruction of the sick industrial company.

(2) The Tribunal may, within sixty days of the receipt of the application, pass such orders thereon as it may deem fit.

9.7 Winding Up of Sick Industrial Company (Section 424G)

(1) Where the Tribunal after making inquiry under section 424B and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record its findings and order winding up of the company.

(2) For the purpose of winding up of the sick industrial company, the Tribunal may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of such industrial company and the officer so appointed shall for the purpose of the winding up of such sick industrial company, be deemed to be, and have all the powers of, the official liquidator under this Act.

(3) The Tribunal may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and pass orders for distribution in accordance with the provisions of section 529A, and other provisions of this Act.

(4) Without prejudice to the other provisions contained in the Companies Act, 1956 the winding up of a company shall, as far as may be, concluded within one year from the date of the order.

9.8 Operating Agency to Prepare Complete Inventory, etc. (Section 424H)

For the proper discharge of the functions of the Tribunal under this Part, the circumstances so require, the Tribunal may, through any operating agency, cause to be prepared—

(a) with respect to a company a complete inventory of—

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(i) all assets and liabilities of whatever nature;

(ii) all books of account, registers, maps, plans, records, documents of title or ownership of property and all other documents of whatever nature relating thereto;

(b) a list of shareholders and a list of creditors showing separately in the list of creditors, the secured creditors and unsecured creditors;

(c) a valuation report in respect of the shares and assets in order to arrive at the reserve price for the sale of a part or whole of the industrial undertaking of the company or for fixation of the lease rent or share exchange ratio;

(d) an estimate of reserve price, lease rent or share exchange ratio;

(e) proforma accounts, where no up-to-date audited accounts are available.

9.9 Direction not to Dispose of Assets (Section 424I)

The Tribunal may, if it is of opinion, that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order, direct such company not to dispose of, except with the prior approval of the Tribunal any of its assets during the period of inquiry under section 424B or during the period of preparation or consideration of the scheme under section 424C.

9.10 Power of Tribunal to Call for Periodic Information (Section 424J)

On receipt of reference under section 424A, the Tribunal may call for any periodic information from the company as to the steps taken by the company to make its net worth exceed the accumulated losses or to make repayment of its debts referred to in that section, as the case may be, and the company shall furnish such information.

9.11 Misfeasance Proceedings Section (424K)

(1) If, in the course of scrutiny or implementation of any scheme or proposal, it appears to the Tribunal that any person who has taken part in the promotion, formation or management of the sick industrial company or its undertaking, including any past or present director, manager or officer or employee of the sick industrial company—

(a) has misapplied or retained, or become liable or accountable for, any money or property of the sick industrial company; or

(b) has been guilty of any misfeasance, malfeasance or non-feasance or breach of trust in relation to the sick industrial company,

the Tribunal may, by order, direct him to repay or restore the money or property or any part thereof, with or without interest, as it thinks just, or to contribute such sum to the assets of the sick industrial company or the other person, entitled thereto by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Tribunal thinks just, and also report the matter to the Central Government for any other action which that Government may deem fit.

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(2) If the Tribunal is satisfied on the basis of the information and evidence in its possession with respect to any person who is or was a director or an officer or other employee of the sick industrial company, that such person by himself or along with others had diverted the funds or other property of such company for any purpose other than a bona fide purpose of the company or had managed the affairs of the company in a manner highly detrimental to the interests of the company, the Tribunal shall by order, direct the public financial institutions, scheduled banks and State level institutions not to provide, during a period of ten years from the date of the order, any financial assistance to such person or any firm of which such person is a partner or any company or other body corporate of which such person is a director (by whatever name called).

(3) No order shall be made by the Tribunal against any person unless such person has been given an opportunity for making his submissions.

(4) The provisions of Section 424K shall apply notwithstanding that the matter is one for which the person may be criminally liable.

9.12 Penalty for Certain Offences (Section 424L)

(1) Whoever violates provisions of this Part or any scheme, or any order, of the Tribunal or the Appellate Tribunal or makes a false statement or gives false evidence to the Tribunal or the Appellate Tribunal and attempts to tamper the records of reference or appeal filed under this Act, shall be punishable with simple imprisonment for a term which may extend to three years or shall be liable to fine not exceeding ten lakh rupees.

(2) No court shall take cognizance of any offence except on a complaint in writing of an officer of the Tribunal or the Appellate Tribunal or any officer of the Central Government authorised by it or any officer of an operating agency as may be authorised in this behalf by the Tribunal or the Appellate Tribunal as the case may be.

Note: In this chapter, wherever the word 'Act' is used, it refers to the Companies Act, 1956.

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10
Winding Up

10.0 Introduction

Clarification on Companies (Second Amendment) Act, 2002

[Notification issued by Ministry of Finance and Company Affairs (Department of Company Affairs) vide F. No. 1/1/2003-CL.V dated 9.9.2003].

The Companies (Second Amendment) Act, 2002 (11 of 2003) received the assent of the President of India on 13.1.2003. Government has decided to bring into force the provisions of section 2 and 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) with effect from 1.9.2003. Notification has been published in the Official Gazette dated 31st March, 2003 as S.O.344 (E). This has been notified to enable the Government to initiate necessary steps to establish National Company Law Tribunal and make it operational.

For the sake of clarity it is stated that this Notification bringing into effect section 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) will only set in motion all preliminary steps required for establishment of National Company Law Tribunal. Upon establishment of the same a separate Notification regarding constitution of NCLT will be issued. Till such time, jurisdiction of Company Law Board will continue to remain unchanged."

We bring to the attention of students that though the Companies (Second Amendment) Act, 2002 has been passed by the Parliament, only a few provisions (Section 2 and 6) have been notified so far. In other words, despite, the Sick Industrial (Special Provisions) Act, 1985 [SICA] has been repealed, all the provisions of the said Amendment Act, 2002 have not come into force. The reason being though the Government has constituted the National Company Law Tribunal (NCLT) which shall deal with winding-up and rehabilitation of sick companies it has not yet become operational.

In view of the above situation, the provisions relating to winding-up of companies as contained in the legislation prior to the amendment are still having relevance and in view of the fact that entire provisions of the Companies (Second Amendment) Act, 2002 have not come into force, the provisions of the Amendment Act has not been included in this chapter.

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10.1 Dissolution of Company

10.1.1 How dissolution is brought about: A company, being a body corporate, continues in existence until it is dissolved according to law. Dissolution can be brought about in the following ways.

a. *By removal of the company's name from the register by the Registrar (without winding-up order) (Section 560):* Explanation to this section is covered in Para 10.4 i.e. General Provisions on Winding Up.

b. *By order of the Court or the order of the Central Government under Section 396*: A company whose undertaking is being transferred to another company under a scheme in accordance with Section 394 may be dissolved by an order of the Court [Section 394 (1) (iv)].

   The dissolution of existing two or more companies may take place when the Central Government, by virtue of Section 396, orders the amalgamation of the said existing companies in to a new single company in the public interest.

c. *By winding- up :* This method is by far the most common one and is followed when for any reason other than those mentioned above, the company's existence is not desired or cought to be terminated *e.g.,* because the object for which the company had been formed has been accomplished, or because the company is insolvent.

d. *Effect of dissolution*: "The dissolution puts an end to the existence of the company. Unless and until it has been set aside, it prevents any proceeding being taken against promoters, directors, or officers of the company to recover money or property due or belonging to the company, or to prove a debt due from the company. Where, the company is dissolved, the statutory duty of the liquidator towards the creditors and contributories is gone; but if he has committed a breach of his duty to any creditor by distributing the assets without complying with the requirements of the Act, he is liable to damages to the creditor". (Halsbery's Laws of England, 3rd Edn. Vol. VI, Page, 370); *Kanhaiya Lal Bhargava vs. Official Liquidator (1965) 35 Comp. Cas. 340)*

e. *Revival of company after dissolution:* Where a company has been struck off the register, the company, or any member or creditor who feels aggrieved, may, within 20 years from the gazetting of the notice, apply to the court to have the company restored to the register. If the Court is satisfied that the company was carrying on business or was in operation when struck off or that it is otherwise just that it be restored to the register, it may make an order accordingly. When a certified copy of this order is delivered to the Registrar for registration, the company would be deemed to have continued in existence as if its name had not been struck off.

   A letter or notice referred to above may be addressed to the company at its registered office. If there is no such office, it may be addressed to the company to the care of some director or other officer of the company. If there is no such director or officer whose name and address is known to the Registrar, it may be sent to each of the persons who

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subscribed to the memorandum at the address mentioned in the memorandum [Section 560].

f. Revival of defunct company under Section 560 and dissolved company under Section 559:

Section 559	*Section 560*
(i) Application for revival must be presented by the liquidator or other person who appears to the Court to be interested.	
(ii) Limitation period for application is 2 years of the date of the dissolution.	
(iii) Acts done after dissolution and before revival are not validated by order of revival.	

10.1.2 Distinction between winding-up and dissolution: These two situations differ from each other in following respects:

(i) Winding- up precedes dissolution. In the former case, the company still remains in existence, while the latter implies that the company is not extant any more *(Employer's Liabilities Assurance Corporation vs. Sedwitck..... Co., 1927 A.G.95).*

(ii) Winding-up denotes and involves the liquidator's acts of realising and collecting the assets of the company, satisfying its debts and obligations, distributing its capital and surplus assets among the members of the company. But dissolution comes after the liquidator has done all this in the winding-up; ordinarily it implies that the company's affairs have been completely wound-up and that the company is no longer in existence *[Kanhaiya Lal Bhargava's, Case / (1965) /35 Comp. Cas. 340].*

(iii) The Liquidator, in the case of a winding- up, is the representative of the company on behalf of which he in appointed, but on dissolution he cannot nay more represent a person not in existence. In the first case any creditor can prove a debt due to him from the company, while it is not possible to do so after dissolution *(Kanhaiya Lal's Case Supra).*

10.1.3 Implications of Winding-up Winding- up more popularly known as liquidation of a company, relate to the proceedings by which (a) all its affairs are wound up, (b) its rights and liabilities are discerned, and (c) the claims of its creditors are settled either fully or to such an extent as may be warranted by the assets of the company. Having met all the obligations of the company out of the assets realised, the surplus assets of the company, if there be any, are distributed among its members in proportion to their rights laid down by the articles of association. On this being done and on compliance with certain other statutory requirements, the company is said to have been dissolved.

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The term 'winding-up' should not be construed as synonymous with 'bankruptcy'. In the matter of winding-up, the general rule is that a company may be wound if its members so desire or if it cannot pay its debts or if its extinction is considered desirable on any account. It thus follows that a company may be wound up even if it is otherwise solvent, for instance, winding- up for purposes of reconstruction.

Where a solvent company is being wound up, all debts payable on a contingency and claims against the company, present or future, certain or contingent, ascertained or sounding only in, damages, are admissible to proof against the company, a just estimate being made, as far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value (Section 528). As regards the right of the creditors of the company which is being wound up for its inability to pay its debts, the same rules prevail as in the case of insolvency law in respect of debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors (Section 529).

Secured creditors may rely on the security and ignore the liquidation altogether, or value their security and prove for the balance of their debt, or give up their security and prove for the whole amount, Unsecured creditors are paid in the order prescribed by Section 530. Preferential creditors are paid first; liability for dividends is satisfied only if the claims of outsiders are fully met.

So far as the employees are concerned, a winding- up order by a Court operates as a notice of discharge to the employees and officers of the company except when the business of the company is continued [Section 445 (3)]. A voluntary winding- up which involves a discontinuation of the business also operates as a notice of discharge, and may also raise a claim for damage where there is an agreement for employment for a fixed time *(Reigate vs. Union Manufacturing Co. (1918) 1KB).*

10.1.4 Modes of winding-up: Part VII of the Act deals with the winding-up of a company. Under Section 425, a company may be winding-up either: (i) by a Court (compulsory winding-up) or (ii) voluntarily or (iii) subject to supervision of the Court. Whichever method is adopted, a liquidator or liquidators must be appointed to administer the property of the company, and they first apply the assets of the company towards the payment of debts which have statutory priority in a winding up, next to the payment of creditors in their order of precedence and then distribute the surplus, if any, among the shareholders according to their rights *inter se*.

10.1.5 Contributories: In a winding up, the term ''contributory" means a past or present member. Strictly, it means every person liable to contribute to the assets of a company in the event of its being wound up, and includes holders of shares which are fully paid up and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of the persons who are to be deemed contributories. The term 'contributory' includes any person alleged to be contributory (Section 428).

If a member is once placed on the list of contributories, he is liable to the extent of original shares that remain unpaid, unless he proves that he should not have been placed on the list.

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For instance, some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares which were allotted to them and thereby became shareholders of the company. It was held that it was not open to them to object subsequently to their being shareholders of the company on the ground that the condition had not been fulfilled *(East Bengal Sugar Mills Ltd., In re. (1941) 11 Comp. Cas 169).*

Liability of contributories as present and past members (Section 426): When a company goes into liquidation, every member, whether past or present, has to contribute to the assets of the company. However, a past member will not be required to contribute in the following circumstances:

(a) If he had ceased to be a member for a period of one year or upwards before the commencement of winding up;

(b) If the debt or liability of the company was contracted or incurred after he ceased to be a member;

(c) If the present members are able to satisfy the contributions required to be made by them under the Act.

There is, however, a limitation on the amount the members may be required to contribute. In the case of a company limited by shares, any past or present member is not required to contribute in excess of the amount, if any, unpaid on the shares in respect of which he is liable as such member.

In the case of a company limited by guarantee, a past or present member is not required to contribute an amount which is in excess of the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up. In the case of a company limited by guarantee but having a share capital, every member (present or past) of the company is liable, in addition to the guaranteed amount, to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

When any provisions are contained in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted whereby the funds of the company and alone made payable, the liability of the contributory will be subject to such a provision. Dividends, profits or other sums due to a past or present member, must not be treated as debts due from the company payable to that member for setting off the rights of members as against creditors claiming otherwise than in the character of past or present members. But such sums shall be taken in to account for finally adjusting the rights of the contributories *per se* [Section 426(f) and (g)]. According to Section 426 (g), any debt due to a past member in respect of unclaimed dividends cannot be admitted to rank in competition with the debts due to ordinary creditors *[Re. Consolidated Goldfields of New Zealand Ltd. (1953) Ch. 689.]*

The liability of a member to be included in the list of contributories is not ex contractu but ex lege. This is borne out by Section 426. It provides that the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time

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specified in the calls made on him by liquidator. In other words, the liability of a contributory though commencing at the date when he entered into the contract with the company under which he became a member, is only contingent upon the company being wound up, in as much as it is, until a call is made, nothing more than a mere liability to contribute, if necessary, to the assets of the company for payment of the debts due to its creditors and expenses of the winding up. Thus, the liability of a contributory arises *ex lege* and not *ex contractu*. The effect of this provision is to give to the liquidator a new cause of action which a company itself might not have. For instance, if the claim of a company for the realisation of any call from a member is barred by limitation, such member becomes liable to pay all that has remained unpaid on his shares including the unpaid calls when the company goes into liquidation *[In re East Bengal Sugar Mills Ltd. Supra].* This statutory liability of the contributory is a new liability which arises after the winding-up of a company has started. Therefore, it is no answer to a liquidator's claim against any person whose name appears on the register of members that there was an agreement with the directors to exclude this statutory liability *[Hansraj Gupta vs. Asthana (1932) P.C. 240].*

A director or manager-whether past or present- whose liability under the provisions of the Act is unlimited shall, apart from his liability to contribute as an ordinary member, be liable to make a further contribution as if he were a member of an unlimited company. No further contribution is required of him.

(a) if he has ceased to hold office for a year or more before the commencement of the winding-up;

(b) if the debt was one which the company had contracted after he had ceased to hold office;

(c) subject to the articles, the director or manager shall not be liable to contribute so as to satisfy his debt or liability of the company and the costs, charges and expenses of the winding- up unless the Court deems it necessary (Section 427).

Contributories in case of death or insolvency of member or winding- up of a body corporate which is a member: In the case of death of a member, his legal representative will be liable as contributories whether the death took place before or after his name had been placed on the list of contributories. The assignees of insolvent members are liable as contributories subject to their power of disclaimer. When a body corporate which is a contributory is in the process of a winding-up, it will be represented by its liquidator in regard to its own liability, and the liquidator shall be a contributory subject, however, to his power of disclaimer (Sections 430, 431 and 432).

10.1.6 Official Liquidator

a. Appointment of Official Liquidator: In order that the debts and obligations of a company in liquidation may be satisfied, and the surplus assets distributed amongst the members according to their right to share in such surplus assets, there must be some person to discharge these duties. The person who does all these is called the liquidator.

For the purpose of the Companies Act and in so far as it relates to the winding- up of a company by the Court, there must be attached to each High Court, an Official Liquidator. He is appointed by the Central Government and is a whole time officer, unless the Central

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Government thinks that there will not be sufficient work to justify a full-time appointment in which case a part- time officer may be appointed. The Official Receiver attached to a District Court for insolvency purposes, or if there is no such Official Receiver then such person as the Central Government may, by notification in the Official Gazette, appoint for the purpose shall be the Official Liquidator attached to the District Court [Section 448 (1). Also one or more Deputy or Assistant Official Liquidators may be appointed by the Central Government so as to assist the Official Liquidator in discharging his function [Section 448 (1-A)].

On a winding- up order being made in respect of a company, the Official Liquidator shall by virtue of his office, become the liquidator of the company [Section 449].

The legal position of an Official Liquidator is that he is pubic servant and an officer of the Court. Such a position requires him to be honest and impartial and to act in the interests of all concerned *[Ripon Press vs. Cheti 55 Mad 180].* He has such powers as are prescribed by Section 457. Section 462 requires him to render account to the Court. In the case of government company, the liquidator shall forward a copy to the Central Government if that Government is a member of the Government company; or to any State Government, if that Government is a member of the Government company or to the Central Government and State Government if both are members, of the Government company.

He is not 'trustee', in the sense of the term; although he is sometimes described as such *[ex-parte Watkin 1857. I Dh. E. 130].* He stands in fiduciary relationship with the company he is appointed for *[Black and Co., 1872, 8 Ch. 254].* He is debarred from making any secret profit. If he abuses his power and betrays his position, he shall be liable to make good any secret profits that he may have made as well as be liable to be removed by the Court. Thus, he is a trustee in the sense that he must act in the interest of the company, the creditors and the contributories. He should not act in his own interest *[Silk Stone & Haigh Moor Co. 1900, 1 Ch. 167].*

b. Appointment of Provisional Liquidator: After a winding-up petition has been presented, but before a winding-up order has been issued, the Court may appoint the Official Liquidator as the provisional liquidator. But prior to such an appointment being made, the Court is bound to give notice to the company and also a reasonable opportunity to make its representation. The Court may, however, raise this notice for special reasons which must be recorded in writing. The provisional liquidator will be vested with powers of liquidator, unless they are limited or restricted to any extent by the appointing Court. On winding-up order having been made, the Official Liquidator ceases to be provisional liquidator and becomes the liquidator [Section 450].

Generally, a provisional liquidator will not be appointed unless a strong case is made out by showing the necessity for such an appointment and unless it is proved that the property of the company needs be taken possession of immediately *[In re-Dry Docks Corporation of London, 1888 39 Ch. D. 309; East Punjab Pictures vs. Jhabar Mal 1940 East Punjab 139].* His appointment is temporary and continues till the appointment of the Official Liquidator. The reason for his temporary appointment is that there must be some persons to take proper custody of the company's property so that it debts and obligations are met with equitably and in accordance with the provisions of the Act and fraudulent preference is prevented *(In re-Dry*

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Docks Corporation, supra]. A liquidator may be removed and replaced by another, if the Court is satisfied that it is for the general advantage of those interested in the assets of the company *[Re Adom Eyton Ltd. (1887) 36 Ch. D. 209].*

c. Powers of Liquidator: A liquidator has the following powers which he must exercise with the sanction of the Court;

(i) to institute or defend any suit, prosecution or legal proceeding, civil or criminal, in the name and on behalf of the company

(ii) to carry on the business of the company, so far as may be necessary for its beneficial winding-up,

(iii) to sell movable and immovable property and actionable claims of the company by public auction or private contract in whole or in parcels,

(iv) to raise any money required, on the security of the assets of the company

(v) to do such other things as may be necessary for the winding -up of a company and the distribution of its assets [Section 457 (1)].

The Court may order that the liquidator can exercise the above powers without the sanction or intervention of the Court. However, in such cases, the liquidator, in exercising the aforementioned powers, will be subject to the control of the Court (Section 458).

The following is a list of powers which he can exercise without the consent of the Court:

(i) do all acts and to execute deeds, receipt and other documents for and on behalf of the company and use for this purpose the company's seal;

(ii) to inspect the records and returns of the company on the files of the Registrar without payment of any fee;

(iii) to prove rank and claim of the insolvency of any contributory for any balance against his estate and to receive dividends in his insolvency, in respect of that balance, as a separate debt from the insolvent, and rateably with the other separate creditors;

(iv) to draw, accept, make and endorse bills of exchange, *hundi* or promissory note in the name and on behalf of the company as if these have been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(v) to take out in his official name, letters of administration to any deceased contributory and do any other acts needed for obtaining payment of money due from the contributory or his estate and

(vi) to appoint an agent to do any business which he himself is unable to do [Section 457 (2)].

All the above-mentioned powers, exercisable by the liquidator are subject to the control of the Court. Any contributory or creditor may apply to the Court in regard to the exercise of the powers conferred on the liquidator [Section 457 (2)].

A liquidator in a voluntary winding-up, with the sanction of a special resolution in case of member's winding-up, and, or Court or Committee of Inspection or (if there is no such committee) of a meeting of the creditors in creditor's voluntary winding-up, can exercise

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powers specified under clauses (a) to (d) of Section 457 (1) [i.e., powers (i) to (iv) aforementioned which are exercisable with the sanction of the Court [Section 512 (1) (a)]. The exercise of these powers, however, will be subject to the control of the Court [Section 512 (2)]. The liquidator may

(i) without the sanction referred to in Section 512 (1) (a) exercise any of the other powers given by the Act to the liquidator in a winding-up by the Court;

(ii) exercise the power of the Court, under the Act, of settling a list of contributories which shall be *prima facie* evidence of the liability of the person named therein to be contributories

(iii) exercise the powers of the Court of making calls:

(iv) call general meetings of the company to obtain the sanction of the company by ordinary or special resolution as the case may require, or for any other purpose he may think fit [Section 512 (1) (b) to (c)].

A liquidator may (a) with the sanction of the Court when the Company is being wound up by or subject to the supervision of the Court and (b) with the sanction of a special resolution of the company in the case of the voluntary winding-up;

(i) pay any class of creditors in full;

(ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent; ascertained or sounding only in damages against the company or whereby the company may be rendered liable or

(iii) compromise any call or liability to call, debt and liability capable of resulting in a debt, and all claims, present or future, certain or contingent, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way concerning or affecting the assets or liabilities or the winding-up on such terms and conditions as may be agreed, and take any security for the discharge of any such call, debts, liability or claim and give a complete discharge in respect thereof.

In the case of voluntary winding-up, the powers aforementioned exercisable by the liquidator are subject to the control of the Court. Any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any such power [Section 546 (2) and (3)].

The Supreme Court may make rules under Section 643 as regards the manner in which the liquidator should exercise power under clauses (ii) and (iii) of Section 546 (1) without the sanction of the Court.

d. Duties of Liquidators: The following are the main duties of a liquidator or provisional liquidator, as the case may be, as contemplated by the Act.

(1) To take into custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled (Section 456). For this purpose, the liquidator, or provisional liquidator as the case may be, may in writing request the Chief

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Presidency Magistrate or the District Magistrate within whose jurisdiction such property, effect or actionable claims or any books of account or other documents of the company may be found to take possession thereof. Thereupon, the Chief Presidency Magistrate or the District Magistrate may after having given to any party such notice as he may think fit, take possession of them and deliver the same to the liquidator or the provisional liquidator [Section 456 (1A)].

For securing compliance with the provisions of Section 456 (1A), the Magistrate aforementioned may take or cause to be taken such steps and use or cause to be used such force as he considers necessary [Section 456 (1B)]. All the property and the effects of the company shall be deemed to be in the custody of the Court as from the date of the winding-up [Section 456 (2)].

(2) To submit a preliminary report to the Court giving the particulars mentioned in Section 455.

(3) To keep, in the manner prescribed, proper books in which he shall cause entries or minutes to be made of proceedings at meeting and of such matters as may be prescribed (Section 461).

(4) To summon meeting of the creditors and contributories in the manner hereinafter stated under the head "Committee of Inspection" [Section 464].

(5) To pay the moneys, received by him as liquidator, or any company into the Public Account of India in the Reserve Bank of India (Section 552) and not into his private bank account (Section 554). But the voluntary liquidator is to pay the moneys into a scheduled bank to the credit of "Liquidation Account of X & Co. Ltd./X & Co. Private Ltd/X & Co." (Section 553).

(6) To pay forthwith dividends payable to creditors, which had remained unpaid for 6 months after the date on which they were declared and assets refundable to any contributory, which have remained undistributed for six months after the date on which they become refundable into the Public Account of India Companies Liquidation Account in the Reserve Bank of India in a separate account called "Company's Liquidation Account" [Section 555 (1)].

(7) To summon meetings at such times as the contributories, by resolution, direct, or whenever requested to do so by not less than one-tenth in value of creditors or contributories, as the case may be [Section 460 (3) (b)].

(8) To obey directions given by resolutions of creditors or contributories or by the Committee of Inspection in the administration of the assets of the company and the distribution thereof among its creditors [Section 460 (1)]. Note that any directions given by the creditors or contributories at any general meeting shall in case of conflict, be deemed to override any direction given by the committee of inspection [Section 460 (2)].

(9) To submit the accounts for inspection to Committee of Inspection [Section 465 (2)].

(10) To account for secret profit made by him.

(11) To be impartial between creditors, members, etc.

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(12) To obey the directions of the Court with regard to disposal of books of the company (Section 550).

(13) To file periodical report with the Court (Section 551).

(14) To notify on invoices that the company is in liquidation (Section 547)

(15) To duly observe all the requirements of the Act [Section 463 (1)].

(16) The Ministry of Corporate Affairs have been reported by the Official Liquidators that they are facing problem in e-filing of Income Tax Returns in compliance as they are required to mention PAN No. of the person who files the return, representing the company in liquidation. The Ministry has proposed following steps to be taken by Official Liquidators (OL) vide General Circular No. 41/2011 dated 6th July, 2011:

(i) To check whether the company which has come in liquidation has a PAN and takes possession along with other records.

(ii) If PAN is not available in the records, the PAN No. of the company shall be obtained from concerned ITO.

(iii) There are cases where no certificate of Registration and/or Article of Association/ Memorandum of Association are available. For this following action be taken:

(a) If the company has no assets, it must be got liquidated and there is no need to apply for PAN.

(b) If the company has assets, the concerned ROC be requested to send documents about the company for applying to concerned ITO for obtaining PAN.

(iv) In the verification column of the ITR, OL will mention his personal PAN as this is only for the purpose of Verification Number obtained in official designation.

(v) As Representative Assessee, (OL) official address should be given in Part A-General Information under column No.(b).i.e. address of Official Liquidator's office would be mentioned as the address of the company under Liquidation.

(vi) Since this is a regular activity, following actions be taken:

(a) Staff be trained to prepare and file application for PAN with outsourced agencies of CBDT namely NSDL and UTI;

(b) All IT Returns filing is now on-line. Hence staff be trained to do the same. No CA firms/consultants be employed for above tasks.

(17) To participate in public examination of directors, etc. (Section 481).

(18) To forward dissolution order to Registrar within 30 days from the date thereof [Section 481 (2)].

(19) The Ministry of Corporate Affairs has noticed that certain courts have not allowed fees to be paid to the Chartered Accountants from Common Pool Fund in cases where petitions are filed in respect of companies under liquidation having no assets.

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The Ministry vide General Circular No. 42/2011 dated 7th July, 2011 has decided that in all such cases following steps be taken:

(i) OL will take permission of Court to appoint a Chartered Accountant.

(ii) OL will appoint Chartered Accountants for issuing necessary certificate.

(iii) The terms and conditions of payment of fees to the CAs in such cases will be decided by a Committee consisting of concerned Ol and ROC, chaired by the RD.

(iv) Each OL will maintain a list of local CAs/CA firms and selection should be done from them only.

The payment of fees to CAs in this respect will be made out of the Budget Head "Office Expenses".

(20) Pro-active action in case of winding up petitions- The Ministry of Corporate Affairs has noticed that winding up petitions are filed by creditors, stake holders and management before Hon'ble High courts without providing full information. This leads to waste of valuable time of Hon'ble Court and also delays completion of winding up process as well. In order to speed up the winding up process and to introduce best international practices the winding up process, the Ministry vide General Circular No. 54/2011 dated 26th July, 2011 has decided that following actions will be taken by concerned OL:-

(a) OLs shall post one of the staff members to the Company Court to keep track of all cases where applications have been filed for winding up, but orders for winding up are yet to be issued by the Court.

(b) For all cases pending till date and in future as well, information shall be obtained by OL from "institution register" maintained in High Court and action as below must be taken in all cases.

(c) In each case the OL will file an application praying to the Court to direct the management of the company to submit following information duly verified by a chartered accountant:/ a Company Secretary/ a Cost Accountant in practice-

(i) The current addresses of the Directors, Company Secretary and Statutory Auditor of the company;

(ii) Location and physical details of each immovable asset of the company along with its current valuation;

(iii) The details of all the debtors and creditors with their complete addresses and occupations;

(iv) The details of each movable asset of the company along with value;

(v) The details of workmen/employees and any amount outstanding to them;

(vi) The details of all movable and immovable assets held in the personal names of director by providing its location, value, dates of acquisition and nature of right, title and interest therein;

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(vii) Copies of last three years audited balance sheet of the company; and

(viii)The details of location of the registered office of the company.

(d) RDs will ensure that in all pending cases, the applications are moved by OL before the Court before the next date of hearing and in all new cases, these are filed before the Hon'ble Court before the second hearing of the case.

(e) RDs will ensure that a standard draft is prepared by them after taking legal advice and the same is used in all cases by OLs.

(21) Scrutiny inspection and investigation in all winding up cases- The Ministry of Corporate Affairs has noticed that winding up petitions are being filed by management after having committed major violations under the Companies Act, 1956 as well as misappropriation of funds of the company. Winding up of such companies are also being filed by creditors. In order to curb such malpractices, Ministry vide General Circular No. 55/2011 dated 26th July, 2011 has decided that following procedure may be followed in all such cases:-

(a) The moment winding up petition is filed before the Court, Official Liquidator (OL) will obtain a copy of petition and forward the same to the Registrar of Companies (ROC) concerned.

(b) ROC will have a scrutiny of the details/documents available in respect of the company in MCA21 registry and will submit a preliminary report to the Ministry within a week time for inspection or investigation, if so required, containing following information for the past five years of the date of filing of petition:-

(i) History of the company, viz incorporation, maintenance of registered office, main object and present business activities;

(ii) Management pattern, including details of directors/nominee directors and their directorship in other companies;

(iii) Capital structure and shareholding pattern;

(iv) Financial position and working results;

(v) Comments on filing position and compliances of Schedule VI read with Accounting Standards;

(vi) Nature of complaints registered on MCA-21, their nature and any noticeable findings;

(vii) Whether any complaint was received alleging that the company is involved in fraudulent activities, siphoning of funds etc. If so, the details thereof.

(viii) Whether any scrutiny/inspection was carried out, if so, the details thereof;

(ix) Whether the company is having any holding or subsidiary company, if so, details thereof;

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(x) Whether company has raised funds through IPO, if so, the utilization of amount collected, compliance of provisions of the Act for deviation from the object stated in Prospectus/Offer Document; transactions with related parties;

(xi) In case of public company, whether it has accepted public deposit. If so, whether the payment of matured amount including interest was made as per schedule. In case any amount is still pending, the details of amount and interest thereon.

(xii) The quantum of unsecured loan amount and related party transactions thereto.

(xiii) Secretarial reports and qualifications made by the auditors on accounts of the company;

(xiv) Whether company or its members/creditors have requested for investigation into the affairs of the company, if so, the details thereof.

(c) MCA will take a final view in the matter within a period of 15 days from the date of receipt of preliminary report from ROC. If any inspection under Section 209A and/or investigation under Section 235/237 of the Act are ordered, the same will be completed by the ROC and forwarded to the OL within 30 days.

(d) The OL will place the report before the Hon'ble High Courts for seeking appropriate order/action under Section 539 to 544 and other relevant provisions of the Act. Simultaneously, necessary action as per law will be initiated against the director, ex-director and key management of the company for any violation of law/ Companies Act, 1956.

(e) These cases will be monitored in the monthly staff meeting of Regional Directors.

e. Information as to pending liquidations: Section 551 (1) prescribes that when the winding-up of a company is not concluded within one year after its commencement the liquidator shall, unless exempted from so doing by the Central Government/ Regional Directors, within two months of the expiry of such year and thereafter, until the winding-up is concluded, at intervals of not more than one year or at such shorter interval, if any, as may be prescribed. The statement shall contain necessary particulars and be audited by a Chartered Accountant. These particulars must be with respect to the proceedings in and position of the liquidation. In the case of a winding-up being carried on by or under the supervision of the Court, the aforesaid statement is to be filed in the Court but in the case of a voluntary winding-up, it is to be filed with the Registrar. But an audit is not necessary in case of winding-up by the Court, where provisions of Section 462 apply.

Simultaneously with the filing of a copy of the statements of account in the Court, a copy shall be filed with a Registrar [Section 551 (2)]. In the case of a government company, the copy of the Statement of account shall be filed with the Central Government if that Government is a member, or to the State Government if that Government is a member or to the Central Government and any State Government if both are members of the Government Company [551 (2A)]. Any person stating himself in writing to be a creditor or contributory is entitled all

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reasonable times on payment of the prescribed fee to inspect the foregoing statements of account and to receive a copy thereof or an extract therefrom [Section 551 (3)].

f. Audit of Liquidator's Accounts: As has been stated earlier, Section 462 (1) prescribes that the liquidator shall, during his tenure of office, present to the Court an account of his receipts and payments.

Section 462 (3) prescribes that the Court shall cause the accounts to be audited as it thinks fit. A copy of the accounts must be filed and kept by the Court and the same be open to inspection by any creditor, contributory or any person interested [Section 462 (4)]. In the case of a government company, the liquidator shall forward a copy to the Central Government if that Government is a member of the Government company or to any State Government if that Government is a member or to the Central Government and State Government if both are members of the Government company [462 (4A)]. Section 462 (5) provides that the liquidator shall cause the account when audited, or summary thereof to be printed and shall send a printed copy of the accounts or summary by post to every creditor or to every contributory. But the Court is empowered to dispense with the compliance of this provision.

g. Control exercisable by Central Government over Liquidator: The Central Government, according to the provisions contained in Section 463, is empowered to take cognisance of the conduct of the liquidator of companies which are being wound-up by the Court. If, on the application of any creditor or contributory, it is found that a liquidator is not faithfully performing the duties and fully observing the requirements imposed on him by the Act, rules or otherwise the Central Government must enquire into the matter and take such action as it may think expedient. Also, the Central Government may at any time (a) require any liquidator to answer any enquiry in relation to any winding-up in which he is engaged; or (b) direct a local investigation to be made into the books and vouchers of the liquidator; or (c) apply to the Court to have him examined on oath concerning the winding-up.

10.2 Winding-Up By Court

10.2.1 Circumstances: Section 433 deals with the circumstances in which a company may be wound up by the Court. These are as follows:

(a) If the company has by a *special resolution* resolved that it shall be wound up by the Court;

(b) if the company defaults in delivering the statutory report to the Registrar or in holding the statutory meeting. But instead of ordering such a company to be wound up, the Court may direct the report to be filed or the meeting to be held;

(c) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year. It should be noted that the power of the court to wind up, when the company has not carried on business for a year, is discretionary and it will not be exercised unless there are indications that the company has no intention to start or to continue its business. However, the Court would not grant an order against the wishes of a majority of the contributories if the delay in commencing, or the interruption of, the business is explained

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and if it is satisfied that business would be commenced or resumed. *[Murlidhar vs. Bengal Steam Co. Ltd., (1921) I.L.R. 47 Cal. 654];*

(d) if the number of members is reduced below seven in the case of a public company or below two in the case of a private company, the court would, however, permit the company to wind up itself voluntarily. In this connection, it is necessary to recall that according to the provisions contained in Section 45 of the Act a member is personally liable for the debts of the company if the membership falls below the statutory minimum and the business is carried on for more than six months after the number has been so reduced and such a fact is within the knowledge of the shareholders;

(e) if the company is unable to pay its debts. Under Section 434, a company is deemed unable to pay its debts in any of the following circumstances:

(i) If a creditor of the company, to whom the company by assignment or otherwise owes a sum exceeding Rs.500, has demanded the same in writing, and the company has for 3 weeks thereafter neglected to pay the amount or to secure or compound for it to the reasonable satisfaction of the creditor.

The above-mentioned letter of demand may be delivered by registered post or otherwise at the registered office of the company. The meaning of the word "delivered in respect of a registered letter cannot be limited to cases when the registered letter is accepted by the addressee. A tender of such a letter, even if it is refused by the assessee, is a good delivery. The refusal to take the delivery of the letter precludes the addressee from pleading ignorance of its contents.

Prior to an order for winding-up of a company being made, it is required to be shown that the debt due from the company is presently payable and that the title of the petitioner is complete. A petition cannot be supported on the allegation that some debt is due, unless it was debt for which a statutory demand was made. *[In Re. Jambad Coal Syndicate Ltd. I.L.R. 62 Col 294].*

The demand under clause (i) above is called statutory notice. Notice served at some place other than the registered office of the company will be invalid *[Ankhtiarpur Bihar Light Railway Co. Ltd. vs. Union of India [1954] 93 Cal. L.J. 271].* But if the company has no registered office, then the notice of demand for the payment of the debt may be given at the place where the company carries on business *[British & Foreign Apparatus Co., 1865), 12L.T. 368].* Where the debt is *bona fide* disputed, clause (i) does not apply:

(ii) If execution or other process issued on a decree or order of any Court in favour of the creditor of the company is returned unsatisfied in whole or in part; or

(iii) If it is proved to the satisfaction of the Court that the company is unable to pay its debts.

A company may be wound up even when its assets are valuable, if they are locked up in investments and the company is carried on at a loss. In considering whether a company is able to pay its debts, the company's contingent and prospective liabilities have to be taken into account, and, therefore it may be unable to pay its debts, although it has paid its debts as they become due, if its existing and probable assets will be insufficient to meet its prospective liabilities.

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To justify the application of clause (i) above, the company may be, in the words of Sir William James, V.C. "commercially insolvent". Insolvency may be proved easily by notice under clause (i); under clause (ii), it is more difficult to prove to the satisfaction to the Court. For instance the fact that the liabilities of a company far exceed its assets does not *ipso facto* mean that the company is unable to pay its debts and does not give rise to a ground for compulsory winding up under Section 433. It is rather the "commercial insolvency" (i.e., the circumstances in which the existing assets and liabilities" are such as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet the existing liability") which affords an occasion for compulsory winding-up on the ground of inability to pay off its debts. A particular company may have the capacity to meet the demands of its creditors; in that case, a winding up order would be unjustified [*Krishnaswamy vs. Stressed Concrete Construction (Pvt) Ltd. AIR. 1964 Mad. 191*].

In the *Registrar of Companies, Punjab vs. Ajanta Lucky Scheme and Investment Co. Private Ltd. and Others (1973), 43 Comp Cas. 314*, the Registrar of Companies filed petition for the winding-up of the respondent company under Section 433 (e) read with Section 439 (5) of the Act on the ground that the company was unable to pay debts and that its liabilities exceeded its assets. The two issues that emerged therefrom were as follows, viz. (a) whether the company was unable to pay its debts and meet its liability; and (b) whether it was a proper case for winding-up. *Held:* (a) That for determining the company's ability or otherwise to pay its debts, it was to be considered whether the company was able to meet its liability as and when they accrued due. Section 434 of the Act prescribes the circumstances in which a company was to be treated as unable to pay its debts. Admittedly, none of these circumstances was present in the case in question and no complaint had even been received by the company from its creditors as regards non-fulfilment of any of their claims against the company. In a case where no debt had been due, a demand therefore could not be made. The mere fact that certain liabilities might accrue due in future, which could exceed the existing assets of the company, would not necessarily lead to the conclusion that the company would be unable to meet its liabilities when they accrued due. The mere fact of the company's liabilities being in excess of its assets could not *ipso facto* be a ground for putting the company into liquidation. The test would be that the company should be commercially solvent, *i.e.,* the company ought to be on a position to meet its liabilities as and when they arose: (b) that there was no ground for winding-up, because it was shown that (i) the paid-up capital had augmented, every year the business flourished, there were additions to list profit and the subscribers' claims on maturity had been met; and (ii) any creditor or contributory or even the Reserve Bank had never lodged any complaint against the financial stability of the company.

(f) *"just and equitable" rule:* Where there is a petition of the Court to wind up a company on the ground that it is "just and equitable", the court has power to make a winding-up order in any case where the special circumstances are such that it appears just to make such an order. Such orders have been made by the Court in the following circumstances:

(i) Where the substratum of the company has disappeared, *e.g.,* where the main object of the company was to acquire and work a mine or patent or concession which could not be obtained or where the mine was worthless or the patent was invalid or the concession has lapsed *[Re, German Date Coffee Co. (1882) 20 Ch. D. 169].*

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A company will not be wound up because it has ceased to carry on one of several businesses authorised by its memorandum unless, upon a fair construction of the memorandum, that business is regarded as the main object of the company [*Re. Amalgamated Syndicate (1897) 2 Ch. 600*]. Similarly, a company which has amalgamated with another company cannot be wound up on the ground that it has ceased to carry on business as a separate company.

Thus the substratum of a company is deemed to have disappeared or gone, if the main object for which the company was formed has become impracticable, i.e., permanently impracticable. "Usual tests for determining whether the substratum of the company has disappeared are whether: (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, which means that there is no reasonable hope that the object of trading at a profit can be attained or (d) the existing and probable assets are insufficient to meet the existing liabilities" *[In re Kaithal and General mills Co. Ltd., 1951,31, Comp. Cas. 461].*

Where the substratum has gone, the Court can wind-up the company, even though the majority of shareholders oppose the winding-up order. But before the Court can wind-up on this account, it must be proved that the whole of the business of the company has become impossible of being carried on. The question whether the substratum has gone or not would depend not on the intention of the Board of Directors or of the shareholders, but would depend upon, and should be decided by the Court, on a true and accurate construction of the memorandum of association and the actual facts of the case *[Mohan Lal Mehta vs. Chunilal Mehta (1962) 32 Comp. Cas. 970].* If there are two or more main objects and some are frustrated and some are pursued, the company cannot be wound up. All the main objects must be destroyed in order to justify winding-up *[Kitson & Co. (1946) I.A.E.R. 435 (C.A.)].* It should be noted that even if the substratum is gone, if the members do not ask for winding-up, carrying on of the other objects of the memorandum will not be *ultra vires.*

(ii) Where there is a deadlock or a crisis in the management of a company, *e.g.,* where the two sole shareholders, who were also directors, were not on speaking term owing to disagreement *[Re, Yenidje Tobacco Co. 1916, 2 Ch. 426];* Where there is a *deteriorating state* of management and control of business owing to sharp differences between the members as reflected in their resolutions at their meetings *[Vijayalakshmi Talkies vs. Rao. A.I.R. 966 Andh.Pr.285]*; where the mismanagement is such that there is no practicability of remedying it *[Rajamundry Electric Corporation vs. Rao, A.I.R. 1955 S.C. 213].* However, factions, quarrels; etc., among shareholders are not sufficient grounds *[S.S. Raj Kumar vs. Project Castings Private Ltd. (1968) I Comp. L.J. 41].*

(iii) Where the company has been formed to carry on a fraudulent or an illegal business.

(iv) If the company is a "bubble", i.e., if it never had any business to carry on *[Re London & Country Coal Co. 1867, 3 Eq. 355].*

(v) Where the company is insolvent and is being carried on for the benefit of the debenture holders *[Re. Clandown Colliery Co. (1915), I Ch.369].*

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(vi) Where the petitioner was excluded from all participation in the business.

(vii) Where preponderance of voting power was permanently vested in a Board in which minority shareholders had justifiable no confidence *[Loch vs. John Blackwood Ltd. (1924) A.C. 783].*

Clause (f) of Section 433 should not be construed as *ejusdem generis* [i.e. of the same kind or natural with the other clauses [a] to [c] of that Section. The ground need not at all be similar to any of the other grounds mentioned in Sectioned in Section 433.

10.2.2 Alternative remedy to winding-up in cases of Oppression: Cases have arisen from time to time where minority shareholders have found it difficult to resist oppression by the majority. Section 397 provided that where the affairs of a company are being conducted in a manner oppressive to some members the Company Law Board may, with a view to bringing to an end the matters complained of *make such order as it think fit* to remedy the position, when the winding-up of the company would unfairly prejudice the complaining members. A similar relief can be applied for in the case of mismanagement, where the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or when a material change in the management or control of the company or in its constitution is likely to prejudice the interest of members of the company [Section 398].

10.2.3 Who may petition for winding-up? [Section 439]: The various persons who can make an application for the winding-up a company through Court are:

(1) the company;

(2) any creditor or creditors, including any contingent or prospective creditor or creditors;

(3) any contributory or contributories;

(4) all or any of the above parties, together or separately;

(5) the registrar; and

(6) any person authorised by the Central Government in a case falling under Section 243 of the Act (*i.e.*, when the Central government is satisfied that it is just and equitable that the company should be wound up on the ground that the business of the company is being conducted in a fraudulent or unlawful or oppressive manner or that the company was formed for any fraudulent or unlawful purpose, etc.

A creditor has a right *ex debito justitiae* [i.e., a remedy which the applicant gets as a right] to a winding- up order if he can prove that he claimed an undisputed debt and that the company has failed to discharge it. Under Section 439 (8), a contingent or prospective creditor, however, must obtain leave of the Court, give security for costs and the Court must be satisfied that there is a *prima facie* case for winding- up of the company. The Central Government or any State Government or Municipal or other local authority to whom any tax or other public charge is due is also an entity comprised in the term creditor. It has been held in *[Hari Nagar Sugar Mills Co. Ltd. vs. M.W. Pradhan (1962), 2 Com. LJ. 17 S.C]* that a receiver of creditors, properties is also a creditor and as such he has a right to present a petition. He is creditor by statutory assignment. A secured creditor, the holder of any debentures [including

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debentured stock] whether or not trustees have been appointed in respect of such and other like debentures and also the trustee for the debenture-holders are creditors and hence entitled to present a petition for winding- up [Section 439 (2)].

A contributory can present a petition only when: (i) the number of members falls below 7 or below 2 in the case of a public or private company respectively or (ii) he holds shares which were originally allotted to him or has held shares for six out of the eighteen months prior to the commencement of winding- up or the shares have devolved on him through the death of a former holder [Section 439 (4)]. A holder of fully paid- up shares is also entitled to present a petition. This right of his as a contributory cannot be excluded on the ground that the company has no assets at all or that it may not have any surplus assets left for distribution among the shareholders after the satisfaction of its liabilities [Section 439 (3)].

The Registrar may present a petition for winding -up only on the ground that default has been made in delivering that statutory report to him or in holding the statutory meeting, or that the company has not commenced its business within a year from its incorporation, or that from the financial condition of the company as disclosed in its balance sheet or from the report of an inspectorsappointed under Section 235 or 237, or the report of a special auditor appointed under Section 233A, that the company is unable to pay its debts. But such a partition can be made only with the previous approval of the Regional Directors [Section 439 (5)].

The *Official Liquidator* may also present a petition for winding- up by the Court, where the company is being wound up either voluntarily or subject to the supervision of the Court. And the Court, before making a winding- up order on such petition, must be satisfied that in the circumstances such a winding- up cannot be continued, due regard being had to the interest of the creditors or contributories or both (Section 440).

10.2.4 Powers of Court on hearing petition (Section 443): On hearing a winding up petition, the Court may

(i) dismiss it, with or without costs; or

(ii) adjourn the hearing conditionally or unconditionally; or

(iii) make an interim order that it thinks fit; or

(iv) make an order for winding- up of the company with or without costs, or any other order that it thinks fit.

It must not refuse to make a winding -up order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

If a petition for winding-up is presented on ''just and equitable" ground the Court may refuse to make an order of winding-up if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking winding-up instead of pursuing that other remedy.

Where the petition is presented on the ground of default in delivering the statutory report to the Registrar or in holding the statutory meeting, the Court may direct that the report be

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delivered or that meeting be held instead of making the winding-up order. The person considered responsible for the default may be charged with the costs involved.

10.2.5 Date of commencement of winding-up by Court (Section 441): Where, before the presentation of a petition for the winding-up of a company by the Court, a resolution has been passed by the company for voluntary winding-up, the winding- up of the company shall be deemed to have commenced at the time the resolution was passed. Unless the Court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding- up shall be deemed to have been validly taken. In any other case, the winding- up of the company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

This date is important for several reasons. Some of the immediate effects are that the Official Liquidator becomes the liquidator of the company (Section 449). A statement as to the affairs of the company has to be submitted to him and he has to report thereon to the Court (Section 454 and 455). The winding-up order constitutes a notice of discharge to the officers and employees of the company except when the business of the company is continued [Section 445(3)]. The Court has to communicate winding- up order forthwith to the Official Liquidator and the Registrar (Section 444).

Within 30 days from the date of the making of a winding- up order, a certified copy of the order must be filed with the Registrar by the petitioner and the company [Section 445(1)]. In computing this period of 30 days, the time required for obtaining a certified copy of the order is to be excluded. Then the Registrar shall make a minute thereof of in his book relating to the company and shall notify in the Official Gazette that a winding- up order has been made.

When the winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator no suit or *other legal proceeding* can be commenced or if pending at the date of the order, shall be proceeded with against the company except by *leave of the Court* and subject to terms imposed by it [Section 445 (1)]. The expression: "or other legal proceeding", in Section 446 does not mean a legal proceeding analogous to a suit *(Shaikh Mansoor vs. Government A.I.R. 1952 T.C. 14).* An award under the Industrial Disputes Act is not a legal proceeding *(Price vs. Chandrashekharan A.I.R. 1951 Mad 987).* Leave of Court will be granted where a shareholder applies for rescission or the suit is for specific performance.

A regards the 'Leave of the Court' appearing in Section 446 (1) the Supreme Court decision is that the Court has the jurisdiction to grant leave to proceed with a suit or other proceedings against a company in liquidation, even if such leave was not obtained for the commencement of the suit or proceeding. '' The proceedings may at best be regarded as instituted on the date on which the leave was obtained from the Court" *[Hansidhar Shankarlal vs. Mohammed Ibrahim (1971) Comp. Cas. 21].* But the Court does not grant this leave as a matter of course. The facts and circumstances of each case have to be probed into by the Court. The discretion of the Court must be exercised judicially but not capriciously or arbitrarily. Usually, leave is granted where outsiders get linked up with some dispute with the company and the Court thinks it fit that the dispute should be settled in an action by the ordinary Civil Court. It has been held that against an order refusing leave to institute a suit, an appeal lies under Section 483 *(Balakrishan vs. Indian Association Chemical Industries Ltd. A.I.R. (1959) Bom. 41*

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Suppose, RC, a labourer of GD & Co. Ltd. which is in liquidation, prays for permission of the Court to implead the Official Liquidators as the party respondent in a claim petition made before the Labour Court subsequent to the winding- up order. Should the leave be granted in this case? It has been held *[R. Chidambaranathan vs. Gannon Dunkerly& Co. (Madras) Ltd. (1973) 43, Comp. Cas. 500]* that the prayer for leave under Section 446 (1) was misconceived. In the event of such leave being granted, a flood gate of litigation would be opened before the Labour Court and every labourer would be filing petitions and drawing the Official Liquidator to the Labour Courts for defending the case of the company. The purpose and the intention of the Act was that all such claims against the company which has been wound up would have to be filed before the Official Liquidator who was empowered to decide such claims. The petition was, therefore, dismissed. It has, however, been held that RC could withdraw the proceedings before the labour Court and file the same before the Official Liquidator for appropriate reliefs.

It has been held that the following proceedings are not affected by [Section 446]: (a) a private sale outside the Court by public auction by a mortgagees *[Ranganathan vs. Govt. or Madras 1955, S.C. 604 ;].* (b) a defendants plea of set- off or counted claim in defence *[Andhra paper Mills Co. Ltd. vs. Anand Bros. (1951) I.M.L.T. 340]:* (c) proceeding by persons out of jurisdiction on a foreign country *[Re. Voclain (Foreign) Ltd. (1932) 2, Ch. 196]*; (d) a claim petition by a third party where a company in winding-up has attached the property of a judgement debtor *[Seiva Lyer vs. Mathura Mercantile bank (1962) 32, Comp Cas. 47].*

It may be noted that the proceedings for assessing a company to income tax under the Income tax Act are not legal proceedings and hence are not affected by Section 446. Until the I.T.O. makes an assessment order, he is not a creditor, and as such can not prove his claim in the winding-up *[Tilk Ram and Sons (Private) Ltd. vs. Commissioner of Income- tax (1964) 4 Comp. Cas. 151].* However, it has been held in *[Rele vs. Deshpande, (1967) Comp, L.J. 210]* that the re-assessment proceedings by the Income-tax authorities cannot be commenced or continued without the leave of the Court.

It may further be noted that if a secured creditor realises his security without intervention of the Court, he will be outside the jurisdiction of the Court in the winding up. But where the secured creditor invokes the aid of the Court and takes any legal proceeding against the company within the meaning of Section 446, it will be necessary for him to seek leave of the Court *[Ranganathan vs. Government of Madras, Supra].*

In the winding-up, the Court which is winding up the company shall have the jurisdiction to entertain or dispose of; (i) any suit or proceeding by or against the company; (ii) any claim made by or against the company including claims by or against any of its branches in India; (iii) any application made under Sections 391 by or in respect of the company; (iv) any question of priorities or any other question of law or fact which may relate to or arise in the course of the winding-up of the company [Section 446 (2)]. Any such suit or proceeding pending in any other Court may be transferred to or disposed of by the Court in which the winding-up proceedings are taken [Section 446 (3)]. The provisions contained in sub-section (1) or (3) as aforementioned, shall not be applicable to any proceeding in appeal either before the Supreme Court or a High Court [Section 446 (4)].

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Section 446 is designed to safeguard the assets of the company in winding-up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding-up Court itself "An even- handed justice requires that the Court should have power to intervene at an early stage for the protection of the assets, and this power is given by Section 446."

The winding- up order operates in favour of all the creditors and contributories of the company as if it had been made on the joint petition of a creditor and of a contributory [Section 477].

10.2.6 Statement of Affairs: Where winding- up order has been made or the Official Liquidator has been appointed as provisional liquidator by the Court, a statement as regards the affairs of the company in the prescribed form shall be delivered to the Official Liquidator. Such a statement shall have to be verified by an affidavit and shall contain particulars of

(i) the assets of the company stating separately the cash balance in hand and at the bank, negotiable securities;

(ii) its debts and liabilities;

(iii) the names, residence and occupations of the creditors (secured debts being segregated from those considered unsecured) and in the case of secured debts the particulars of the securities given whether by the company or an officer there of, their value and the dates on which they were given;

(iv) the debts due to the company and the names, and residences, and occupations of the persons from whom they are due and the amount likely to be realized on account thereofand

(v) such further or other information as may be prescribed or as the Official Liquidator may required [Section 454 (1)].

The aforementioned statement is required to be made and verified by one or more of the directors and by the person who, at the date of winding-up order or the appointment of the provisional liquidator, as the case may be, the manager, secretary or other chief officer of the company. Also, it may be made by the following persons if the Official Liquidator so requires, subject to the directions of the Court;

(i) who are or have been officers of the company;

(ii) who have participated in the formation of the company at any time within one year before the relevant date;

(iii) who are in the employment of the company or have been so within the said year and are in the opinion of the Official Liquidator, capable of giving the information required;

(iv) who are or have been within the said year, officers of, or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates [Section 454(2)].

The above mentioned statement is required to be submitted within 21 days of the winding- up order of the appointment of the provisional liquidator, as the case may be, or within such extended time, not exceeding three months, as may be fixed by the Official Liquidator or the Court for special reasons. The persons, preparing the statement and affidavit shall be allowed

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such costs and expenses incurred in connection therewith as the Official Liquidator may deem reasonable, subject to an appeal to the Court [Section 454 (3) and (4)].

Non-compliance with any of the requirements of Section 454, without a reasonable excuse, shall render the defaulter liable to be punished with imprisonment to the extent of two years or with a fine extending upto ₹ 1000 per day during which the default continues or with both [Section 454 (5)].

The Court concerned may take cognizance of an offence, mentioned above, upon receiving a complaint of facts constituting such an offence and try the offence itself in accordance with the procedure laid down in the Criminal Procedure Code, 1898 for the trial of summons cases by Magistrates [Section 454 (5A)].

The Statement of affairs must be open to inspection by any one stating himself in writing to be a creditor or contributory. Also he is entitled to a copy thereof or as extract there from. For both inspection and copy or extract, the prescribed fee is to be paid [Section 454 (6)].

(Note: The expression 'the relevant date' in a case where a provisional liquidator is appointed, is the date of his appointment and in a case where no such appointment is made, the date of the winding-up)

Section 511A extends the provisions of Section 454 to every voluntary winding-up in the same way as they are applicable to a winding-up by the Court. For construing these provisions, references in the Section to (a) the Court shall be omitted; (b) the Official Liquidator or the provisional liquidator shall be construed as references to the liquidator; (c) the 'relevant date' shall be construed as references to the date of commencement of the winding-up.

The afore-mentioned provisions of Section 454 are intended to enable the liquidator to have information as regards the affairs of a company, so that the liquidator may know something about the property and the assets of the company, the names, addresses and occupations of the creditors, the debts due to the company and the persons from whom they are due. The statement of affairs of the company is intended to afford facility to the liquidator in his management of the company's affairs in discharging the company's obligations, realising its assets, and distributing surplus assets (if any) among its members.

The Ministry of Corporate Affairs has observed that companies are not filing Statement of Affairs (SOA) in time in terms of section 454 of the Companies Act, 1956. This delays the process of liquidation considerably. It has, therefore, been decided vide General Circular No. 56/2011 dated 28th July, 2011 to give the companies and the directors of such companies where winding up orders have been passed by the Hon'ble Court, one months notice to file SOA before action for blocking their DIN is initiated by the Ministry.

Official Liquidators shall furnish list of all such directors who have failed to furnish SOA (giving their details) to the Ministry on 3rd working day of every month starting from 5th September, 2011 by e-mail to respective RD, ROC, e- Governance Cell and Insolvency Section of this Ministry.

MCA 21 cell in the Ministry would block DIN of all such directors on getting information after approval of the competent authority concerned and intimate the same to all.

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10.2.7 Official Liquidators report (Section 455): The Official Liquidator must, as soon as practicable after the receipt of the statement of affairs under Section 454 but, not later than six months from the date of the winding- up order or such extended period as may be allowed by the Court, or where the Court orders that no statement of affairs need be submitted as soon as practicable, after the date of the order, submit a preliminary report to the Court:

(a) as to the amount of capital issued, subscribed, and paid-up and the estimated amount of assets and liabilities, giving separately under the heading of assets, particulars of, (i) cash and negotiable securities; (ii) debts due from contributories (iii) debts due to the company and securities (if any) available in respect thereof; (iv) movable and immovable properties belonging to the company; and (v) unpaid calls;

(b) if the company has failed, as to the causes of the failure; and

(c) whether a further inquiry is desirable as to the company's failure, promotions or formation or the conduct of the business thereof.

If the Official Liquidator thinks fit, he may make a *further* report or report, stating the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its formation or promotion or by any officer of the company in relation to the company since the formation and any other matters which, in his opinion, it is desirable to bring to the notice of the Court. Such further report may lead to the public examination of a person or officer in accordance with Section 478 (Section 455).

A person ordered by the Court to be examined will be entitled to obtain a copy of the report of the Official Liquidator at his cost and to employ an advocate to enable him to explain or qualify any answer given by him. The person so charged may apply to the Court to be exculpated from any charges made or suggested against him and, if he does so, it shall be the duty of the Official Liquidator to appear on the hearing of the application and call the attention of the Court to any matters which appears to the Official Liquidator to be relevant [Section 478 (6) & (7)].

10.2.8 Final Winding- up: When the affairs of a company have been completely wound up or when the Court is of the opinion that the liquidator cannot proceed with the winding-up of the company for want of funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution should be made, then the Court shall make an order that the company be dissolved from the date of the order and the company shall be dissolved accordingly [Section 481 (1)]. A copy of the order must be forwarded within 30 days from the date of the order by the liquidator to the Registrar who shall enter in his books a minute of the dissolution of the company [Section 481 (2)].

If the liquidator makes default in forwarding a copy as aforesaid, he shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues. [Section 481(3)]

10.2.9 Committee of Inspection : Either at the time of making an order of the winding- up of a company or at any time thereafter, the Court may direct that a Committee of Inspection shall be appointed in order to act with the liquidator. In the event of such a direction being given, the liquidator is bound to convene a meeting within 2 months from the date of such

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direction, of the creditor (as ascertained from the company's books and documents) with a view to determine who are to be members of the committee [Section 464 (1)]. Within 14 days from the date of the creditor's meeting or such further time as extended by the Court, the liquidator shall convene a meeting of the contributories so as to consider the decision taken at the creditor's meeting in regard to the membership of the committee. This decision may either be altogether rejected with or without any modifications [Sub- Section (2)]. If the decision taken at the first meeting is either rejected or accepted with modification, the liquidator shall be duly bound to seek the Court's, direction as regards the composition [sub-section (3)].

A committee of inspection shall consist of not more than 12 members, being the creditors and contributories or their attorneys. The proportions of the members of the committee; if not decided upon by the creditors and contributories themselves, shall be determined by the Court. Its function is to assist the liquidator and to inspect his accounts. The committee must meet at such times as and may from time to time appoint; the liquidator or any member may also summon a meeting as an when he thinks necessary. The quorum is 1/3rd of total numbers of member or two, whichever is higher. The committee acts only if there is a quorum and by a majority of members present. A member of the committee ceases to act; (i) when he resigns by notice in writing signed by him and delivered to the liquidator; (ii) when he is adjudged an insolvent or compounds or arranges with his creditors; (iii) when he is absent from five consecutive meetings of the committee without leave of those members who together with himself, represent the creditors or contributories; (iv) when he is removed by ordinary resolution of which 7 day's notice has been given by the creditors, if he represents the creditors, or by the contributories, if he represents the contributories.

If any vacancy occurs in the committee, the liquidator must immediately summon a meeting of the creditors or contributories, as the case may be, to fill the vacancy unless he thinks it unnecessary to fill in the vacancy and obtains the leave of the Court in regard thereto (Section 465). A member of the committee of inspecting is in fiduciary position and cannot buy any of the company's property from the liquidator *(In re Blumer (1937)* Ch. 489). Similarly, where a member of the committee purchases the property of a company, such as purchase was held to be bad, in as much as he occupied a fiduciary position in relation to the company *(Durga Prasad vs. Official Liquidator, Benaras Bank Ltd. A.I.R. 1959 All. 196).*

10.3 Voluntary Winding Up

10.3.0 Introduction: The object of a voluntary winding-up is to enable the members and creditors to settle their affairs among themselves without seeking assistance of the Court but they may apply to the Court for any directions or orders if and when necessary (Section 518). A voluntary winding-up does not necessarily, imply that the company's business has ceased since such a winding-up may also be necessary in the case of reconstruction or an amalgamation of a company.

10.3.1 Procedure for voluntary winding-up: A company may be wound-up voluntarily under Section 484, according to the following procedures

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(a) *By passing an ordinary resolution at a general meeting in any of the following circumstances:* (i) When the period (if any) fixed for the duration of the company by its Articles has expired. (ii) When the Articles provide for the dissolution of the company on occurrence of an event and the event has occurred e.g. if a company is formed to construct a particular bridge and tile same has been built.

(b) *By a special resolution:* When the company for any reason which need not be disclosed, decides that it should be wound-up voluntarily. A company may be prosperous, yet it may desire to wind-up its affairs as a matter of convenience. It can do so if it passes a special resolution to that effect.

The members of a company can not be divested of their right to pass a resolution calling for a voluntary winding-up by including in the Articles, a special provision in this regard because such a provision would be repugnant to the express provisions of this Act. Notices of the meeting where it is intended to propose an ordinary or a special resolution as the case may be, must be given, and the meeting should be held in the manner laid down by the Act and the articles of the company. Upon the passing of a resolution for voluntary winding-up, the company must within 14 days thereof, give notice of the resolution by an advertisement in the Official Gazette and also in some newspapers circulating in the district where the Registered Office of the company is situated (Section 485). A printed or typewritten copy of every winding-up resolution passed in pursuance of Section 484 (duly certified under the signature of an officer of the company must within thirty days after the passing thereof be filed with the Registrar who shall record the same (Section 192).

10.3.2 Commencement of voluntary winding-up: Voluntary winding-up is deemed to have commenced at the time when the resolution for the voluntary winding-up is passed (Section 486). Even if the company is subsequently wound-up by the Court, the commencement of the winding-up would be taken to be as from the date of the passing of the resolution (Section 441).

10.3.3 Effects of voluntary winding-up: With the commencement of voluntary winding-up, the following situations arise

(1) The company ceases to carry on its business except for the purposes of beneficial winding-up of such business (Section 487). It still maintains its corporate personality and its corporate power, until it is dissolved (Section 487). This is so even if the Articles provide to the contrary *[Hari Prasad Jayantilal & Co. vs. I.T.O. Ahmedabad.9.LR. (1966) S.C 148.11.* The liquidator represent the company in liquidation and the functions as its agent for purposes of winding-up *[Official Liquidator vs. Commissioner of Income Tax (1971) 41 Comp. Cas. 226].*

(2) Any transfer of shares made without the sanction of the liquidator is invalid and alteration in the status of the members made after the commencement of the winding-up is void (Section 536).

(3) On the appointment of a liquidator under Section 490 or 502, as the case may be, the powers of the directors, or managing or whole time director, or manager cease except in so far as the company in general meeting or liquidator, may sanction that the same be

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continued or for the purpose of giving notice of liquidator's appointment to the Registrar under Section 493. In the event of a creditors' winding-up, the powers of directors cease except in so far as the Committee of Inspection, or if there is no such Committee, the creditors in general meeting may sanction that the same may be continued (Sections 491 & *505).*

(4) Every invoice, order for goods, or business letter issued by or on behalf of the company or a liquidator or a receiver or manager, in which the company's name appears must contain a Statement that the company is being wound-up (Section 547).

(5) As to whether a voluntary winding-up discharges the servants of the company, it would depend upon whether the business of the company has ceased or is being continued. Thus, it would depend on the facts of each case. A voluntary winding-up coupled with immediate cessation of the company's business has been held to operate as a dismissal of the company's servants *[Reigate vs. Union Mfg. Co. (1981) I.K.B., 592 (Ch.)].*

(6) Suits and other legal proceedings against the company are not automatically stayed but an application may be made by the liquidator or any creditor or contributory to the Court to determine any question arising in the winding-up, e.g. enforcing of calls, staying of proceeding or any other matter. Generally, such an application can be made for exercising all or any of the powers which the Court might exercise, if the company was being wound-up by the Court (Section 518).

(7) A voluntary winding-up shall not be a bar, *enter alia,* to the right of any creditor or contributory to have the company wound-up by the Court; but in the case of such an application the Court shall have to be satisfied that the rights of the creditors or contributories or both would be prejudiced by a voluntary winding-up (Section 440).

10.3.4 Position of various parties

10.3.4.1 Shareholders and contributories: A shareholder of a company is liable to pay the full amount on the shares held by him but nothing more. This liability continues even after winding-up, but for the purposes of winding-up, he is described by the Act as a contributory. Prior of a shareholder to the assets of the company is measured by the from membership. However, winding-up creates a new cause of action for the liquidator and the liquidator can demand of him the payment of the unpaid calls even if they had become time-barred before liquidation *[Re. East Bengal Sugar Mills Ltd. (1982) 1 Cal. 1321].* The liability arises from the fact that his name appears on the register of members *[K.L. Goenka vs. S.R. Majumdar (1958) 28 Comp.. Cas. 536].* According to Section 429, the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time specified in the calls made on him for enforcing that liability (by the liquidator). Thus, the liability of a contributory, though commencing at the date of the winding-up, is only contingent during the winding-up, since until a call is made, it is nothing more then a mere liability to contribute, if necessary, to the company for payment of the debts due to its creditors and expenses of the winding-up. Such liability, however, creates a debt under Section 429 and it does not become payable until a call is made. It may be noted that the liability under this Section stands in striking contrast with the liability of a shareholder under Section 36(2)

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according to which all moneys payable by any member, to the company under the Memorandum or Articles shall be a debt due from him to the company. The debt under Section 36(2) arises *ex-contractu,* whereas the debt under Section 429 arises *e-x-lege* i.e. as a result of the statute on the company going into liquidation. Thus, Section 429 gives the liquidator a new cause of action which a company itself might not have.

The estate of the deceased shareholder is liable to the same extent as, it would have been if he had been alive (Section 430). Section 431 lays down that if a contributory becomes insolvent after the commencement of the winding-up, he becomes a stranger to the company; although his name remains on the list of contributories, his assignee in insolvency represents him for all purposes and is to be deemed a contributory. Under Section 432, where a body corporate which is a contributory in itself is ordered to be wound-up, either before or after it has been placed on the list of contributories, the liquidator of body corporate shall represent it for all the purposes of winding-up of the company and shall be deemed a contributory.

A shareholder on the A list of contributories is liable to the extent to which his shares are not fully paid up. But the liability of a member on the B list arises only in certain specific circumstances, mentioned in Section 426. The A list comprises the present members and the B list the past members, who ceased to be members within one year prior to the winding-up. A past member is liable to contribute only when the present members have been unable to satisfy the contribution required from them in respect of their shares.

A person who is both a contributory and a creditor of the company (in respect of dividends, profits or otherwise), cannot set off the debt due and owing from the company against his liability for call even if there is an express agreement to do so. In other words, the contributory has to make his contribution to the assets of the company without any right to claim a set-off in regard to the amount due to him from the company *[Pure Milk Supply Co. Ltd. vs. Hari Singh A.I.R. (1963) Punj 22].*

In addition to the aforesaid liabilities, Section 536 imposes a sort of restriction on the members; namely that in the case of voluntary winding-up, no transfer of share except transfers made to or with the sanction of the liquidator shall be made and that every alteration in the status of the members after the commencement of such winding-up shall be void. In the case of winding-up by or subject to the supervision of the Court, every disposition of the property including actionable claims of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding-up shall be void unless the Court otherwise directs.

10.3.4.2 Creditors: A company can never be declared insolvent, although it may have become insolvent in the sense that it is unable to pay its debts. Where a solvent company is being wound-up all the debts payable on a contingency and claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company. A just estimate should be made of the possible value of such debts or claims as may be subject to any contingency or may sound only in damages or for some other reason may not bear a certain value (Section 528). As regards the rights of the creditors, company which is being wound-up for its inability to pay its debt, the same rules prevail as in the case of insolvency law in respect of debts provable, the valuation

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of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors (Section 529).

The secured creditor may rely on the security and ignore the liquidation altogether, or value his security and prove for the balance of his debt, or give-up his security and prove the whole amount. Unsecured creditors are paid in the order prescribed by Section 530. Preferential creditors are paid first; liability for dividends is satisfied only if claims of outsiders are fully met.

10.3.4.3 Employees: A winding-up order by a Court operates as a notice of discharge to employees and officers of the company, except when the business of the company is continued [Section 445(3)]. A voluntary winding-up which involves a discontinuation of the business also operates as a discharge, and may also give rise to a claim for damage where there is an agreement for employment for a fixed time *[Reigate vs. Union of Manufacturing Company (1918) I.K.B. 592].*

10.3.5 Types of voluntary winding-up: There are two types of voluntary winding-up, viz. Members' voluntary winding-up and Creditors' voluntary winding-up. Where the directors are in a position to make the statutory declaration of solvency required under Section 488 of the Act, the winding-up would be conducted as a *Members' voluntary winding-up* and would be controlled by the members themselves, the creditors would have no voice in the proceedings. If the directors do not make such a declaration, the winding-up would be conducted as a *creditors voluntary winding-up and* the creditors shall have a controlling voice in the procedure. In both the cases, the process of liquidation would be normally conducted without reference to the Court; although the Court shall have the power to determine any matter the liquidator or any creditor or contributory might refer to it.

10.3.5.1 Members' voluntary winding-up–declaration of solvency: In respect of a members' voluntary winding-up, two directors, where there are only two directors, and a majority of directors, where there are more than two, should make a declaration, called 'declaration of solvency'. In the declaration, the following matters are required to be stated, namely, (i) that they have made a full enquiry into the affairs of the company, and (ii) that having made such enquiry, they have formed the opinion that the company has no debts or that it will be able to pay its debts in full within a period not exceeding three years from the commencement of the winding-up. To be effective:

(a) it must have been *made and filed* with the Registrar within the five weeks immediately preceding the date of passing of the winding-up resolution; and

(b) it must be accompanied by a copy of the auditor's report on the profit and loss account of the company for the period commencing from the date of the company for the last account to the latest practicable date immediately before the making of the declaration and the balance sheet of the company made out as on the last-mentioned date and, also, embodies a statement of the company's assets and liabilities as at that date. The report of the auditor must be prepared, as far as circumstances permit, in the manner laid down by the Act (Section 488). This accompaniment is intended to be an additional safeguard.

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Unless the above mentioned conditions are complied with, the resolution passed for voluntary winding-up would be invalid and the members' voluntary winding-up cannot be effected *[S.P. Bhargava vs. Rameswar A.I.R. (1952) M.P. 3]*

Where the declaration of solvency is made by the directors without any reasonable grounds that the company will be able to pay its debts in full within the period specified in the declaration, it would render them liable to imprisonment which may extend to 6 months and or to pay a fine exceeding ₹ 50,000. If the company is wound-up in pursuance of such a resolution within a period of 5 weeks after the declaration was made, but its debts are neither paid off nor provided for in full within the period specified in the declaration, it would be presumed, till the contrary is shown, that the directors did not have reasonable ground to form the opinion as to company's solvency [Section 488(3) & (4)].

10.3.5.2 Creditors' voluntary winding-up: Where the declaration of solvency, referred to under *members' voluntary winding-up* has not been made by the directors and filed with the Registrar, the winding-up is known as a *Creditor's voluntary winding-up* [Section 488(5)].

10.3.6 Procedure of winding-up: The procedure applicable to the two types of voluntary winding-up is somewhat different. The provisions under Sections 490 to 498 are applicable to a members' voluntary winding-up, whereas Sections 511 to 521 apply to both types of voluntary winding-up.

10.3.6.1 Procedure of members' voluntary winding-up: The procedure for a member's voluntary winding-up of a company is narrated below:

(i) At the Board's meeting, the directors have to make a declaration of solvency under Section 488 of the Companies Act, 1956. If there are more than 2 directors then the said declaration must be made by a majority of them. This declaration has to be filed with the Registrar of Companies together with the auditor's report on the balance sheet and profit and loss account or income and expenditure account of the company made upto the date of the Board's meeting, the time limit for such filing being 5 weeks before the passing of the resolution for the winding-up.

(ii) Next, the company has to pass at its general meeting a special resolution called "resolution for voluntary winding-up" (Section 454). At this very meeting or at any meeting subsequent thereto, one or more liquidators are to be appointed by the company; also his or their remuneration, if it is to be given, should be fixed at the said meeting (Section 490).

(iii) Under Section 485, the aforesaid resolution to wind-up the company voluntarily has to be published in Official Gazette as also in a newspaper circulating in the district where the Registered Office of the company is situated. This is required to be made within 14 days of the passage of the resolution.

(iv) Under Section 493, the company has to give notice of appointment of the liquidator to the Registrar. The notice is to be given in form No. 36(b) of the Companies (Central Government's) General Rules and Forms. The liquidator has also to separately notify the Registrar, under Section 516, about his appointment.

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(v) The liquidator is then required to do the following things, namely, speedy realisation of assets, preparation of list of creditors, admission of proof, settlement of lists of contributories, making of such calls as are necessary, payment to secured creditors of costs including the liquidator's own remuneration, payment of preferential claims and distribution of the surplus *pro rata* amongst the contributories after meeting all the claims of creditors and after adjusting all rights and claims. For resolving any doubts and difficulties, application may be made to the Court.

(vi) *Duty of liquidator to call general meeting:* In the event of a voluntary winding-up being continued for more than a year, the liquidator shall call a general meeting of the company at the end of the first year from the commencement of the winding-up and at the end of each succeeding year within three months from the end of each or such longer period as the Central Government may allow. Also, he shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year together with a statement in the prescribed form containing stipulated particulars in respect of winding-up proceedings and the position of the liquidation. Any failure on the part of the liquidator in complying with these provisions shall render him liable to a fine to the extent of ₹ 1000 in respect of each failure (Section 496). The liquidator has to keep all moneys in a scheduled bank; he must strictly adhere to the provisions of Section 553. Where the winding-up of a company is not concluded within one year after its commencement, Section 551 requires that a statement in the prescribed form by the liquidator should be filed with the Registrar within 2 months of the close of such year (if he is not exempted from so doing by the Central Government) and thereafter until the winding-up is concluded, at intervals of not more than one year or such shorter interval as may be prescribed. The statement should be audited by a chartered accountant.

(vii) *Final meeting and dissolution:* When the winding-up is complete, the liquidator shall, subject to the provisions contained in Section 498, make-up an account of the winding-up which must show as to how the winding-up has been conducted and the property of the company has been disposed of, also he shall call a general meeting of the company to place before it the account. Such a meeting is required to be called by *advertisement* which must specify the time, place and object of the meeting and published, not less than one month before the meeting, in the Official Gazette as well as some newspapers circulating in the district where the registered office of the company is situated. Besides, he shall, within one week of the meeting, send to the Registrar and the Official Liquidator a copy of the account and also a return to each of them as regards the holding of the meeting and of the date thereof [Section 497(2) & (3)]. Where the meeting is not held for want of quorum, the liquidator shall, instead of the said return, make a return, to the effect that the meeting was duly called but no quorum was present thereat [Section 497(4)]. Upon receiving the account and either of the returns under Sub-section (3) or (4), the Registrar must immediately register them, with a view to ensuring that the winding-up process of the companies which have been voluntarily wound-up should not be conducted in a manner prejudicial to the interest of the shareholders or of the public.

On receipt of the final statement of accounts and the returns from the liquidator, the Official Liquidator shall make a scrutiny of the books and papers of the company. For the purpose, he

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shall be provided with all reasonable facilities by the liquidator and all officers (past and present) of the company.

Where the Official Liquidator, after scrutiny of the returns and accounts, reports to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members to public interest, the company is deemed to have been dissolved from the date of the submission of the report.

If the official Liquidator, on such a scrutiny, reports to the Court that the affairs of the company *have been conducted* in a manner prejudicial to the interest of its members or the public, the Court shall direct the Official Liquidator to make a further investigation into the affairs of the company, and for that purpose, he shall be invested with all such powers as the Court may deem fit [Section 497(6A)I. On receipt of the report as regards further investigation, the Court may either make an order that the company shall stand dissolved with effect from the date which it shall specify or shall make such other order as the circumstances of the case might justify [Section 497(6B)].

10.3.6.2 Procedure of creditors' voluntary winding-up: (1) The creditors of a company would be mainly concerned if the company arrives at the decision that it should wind-up itself because of its inability to meet its liabilities. The company in that case must call a meeting of the creditors to be held on the day or the day next following the next date on which there is to be held a general meeting of the company at which the resolution for voluntary winding-up is to be proposed [Section 500 (l)].

(2) Notice of the meeting is to be sent to the creditors and it must also be advertised once at least in the Official Gazette and in two newspapers circulating in the district where the registered office of the company is situated [Section 500(2)].

At the meeting of the creditors, the Board of Directors must cause a full statement of the company's affairs, and a list of the company's creditors and the estimated amount of their claims, to be laid before the meeting of the creditors. The Board of directors also must appoint one of their members to preside over the said meeting [Section 500(3)].

If the meeting of the company for passing the winding-up resolution, is adjourned and at the adjourned meeting the resolution is passed, then any resolution passed at the creditors meeting, though prior in date to that for winding-up would nevertheless be valid and effective as if it had been passed after the passing of the winding-up resolution [Section 500(5)]

The resolution passed at the creditors' meeting shall be notified by the company to the Registrar within *ten* days of the passing thereof (Section 501).

In a creditors voluntary winding-up, the creditors and the members appoint a liquidator in their respective meetings. If different persons are nominated, the creditors' nominee shall become the liquidator. However, any director, member or creditor may, within seven days after the nomination has been made by the creditors, apply to the Court for an order that the company's nominee shall be the liquidator instead of, or jointly with, the creditor's nominee.

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(3) If a vacancy occurs by death, resignation or otherwise in the office of a liquidator (other than the one appointed by or by the direction of the Court) the creditors in general meeting may fill in the vacancy (Section 506).

(4) The creditors at the first meeting under Section 500, or at a subsequent meeting may appoint a Committee of Inspection consisting of not more than five persons [Section 503]. The members of the Committee are to be nominated by the company at a general meeting. If any of the nominees is not acceptable to the creditors, they may by resolution choose any person in his place. However, the Court is empowered to direct otherwise.

(5) The Committee of Inspection and, if there is no such Committee, the creditors, may fix the remuneration of the liquidator. If they do not fix the remuneration, the Court would do so (Section 504). Section 465(2) to (10) applicable to Committee of Inspection appointed in a compulsory winding-up will also apply to the Committee of inspection under Section 503, subject to such rules as may be made by the Central Government [Section 503(5)].

(6) Where the voluntary winding-up continues for more than a year, the liquidator must call a general meeting of the company, as in the case of members' winding-up as well as meeting of the creditors at the end of the first year of the commencement of winding-up within three months from the end of each year or such longer period as the Central Government may allow, Such a meeting also must be called at the end of each succeeding year in the same manner. The liquidator must lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year and also a statement in the prescribed form (Section 508).

(7) As soon as the affairs of the company have been wound-up, the liquidator shall: (a) make-up an account of the winding-up showing how the winding-up has been conducted and the property of the company has been disposed of, and (b) call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meeting and giving any explanation thereof.

10.3.7 Duties and responsibilities of liquidator in creditors' voluntary winding-up: The liquidator in a creditors' voluntary winding-up administers the company is very much the same way in which the directors administer it before the commencement of winding-up. To that extent a liquidator can rightly be described as the agent of the company.

The liquidator owes certain duties towards the creditors and contributories under the statute, including that of administration of the assets of the company. These he holds in trust for them. To this extent he is *trustee* and he must discharge his fiduciary duties honestly. If he neglects these duties, he may be held personally liable by the party prejudiced or for misfeasance proceedings, under Section 543. Thus the liquidator in a creditor's voluntary winding-up has a *dual status both as agent and trustee.*

Like any other liquidator, it is also his duty to take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. To discharge this responsibility, it is his duty to take the aid, if need be, if the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction the aforesaid property, etc. are found (Section 456).

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As regards the distribution, on realisation, of the assets of the company, the liquidator is under an obligation to apply such assets subject to the provisions of the Act as to preferential payment, in satisfaction of its liabilities *pari passu.* He must thereafter distribute the residue among the members according to their rights and interest in the company (Section 511). For the purpose, the liquidator has to ascertain the assets and liabilities of the company and draw-up a scheme of distribution.

It is the liquidator's duty to compel the directors or the officers of the company in liquidation to supply him with a statement as to the affairs of the company verified by an affidavit containing the particulars relating, *inter alia, to:*

(i) the assets of the company, stating separately the cash balance in hand and at banks and the negotiable securities held by the company;

(ii) its debts and liabilities;

(iii) names, residence and occupations of all creditors and amounts standing to their credit together with dates and amounts of securities given therefor; and

(iv) debts due to the company and the amount likely to be realised on their account (Section 511A read with Section 454).

Within 30 days of his appointment, the liquidator is duty-bound to publish his appointment in the Official Gazette and notify the same in the prescribed form to the Registrar (Section 516).

On the detection of a fraud having been committed by promoters, directors, etc., it is the liquidator's responsibility to invoke the aid of Section 519 and apply to the Court for the public examination of them.

For the determination of any question arising in the winding-up or for getting the rights and powers of the Court regarding enforcement of calls, staying of proceedings or other matters exercised by it, it is the responsibility of the liquidator to apply to the Court (Section 518).

Where the voluntary winding-up continues for more than a year, the liquidator must call a general meeting of the company and a meeting of the creditors at the end of the first year of the commencement of winding-up and at the end of each succeeding year, or as soon thereafter as may be convenient within 3 months from end of year or such longer period as the Central Government may allow. The liquidator must lay before the meetings an account of his acts and dealings and of the conduct of the winding-up during the preceding year and also a statement in the prescribed form. (Section 508).]

As soon as the affairs of the company have been wound-up, the liquidator shall:

(a) make-up an account of the winding-up showing how the winding-up was been conducted and the property of the company has been disposed of, in the prescribed Form; and

(b) call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meeting and giving any explanation thereof. Besides, the liquidator, within one week from the date the meeting is held, must send to the Registrar and the Official Liquidator a copy of each of the account and also a return to each of them regarding the holding of the meeting and of the date thereof. Where the meeting is

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not held for want of quorum, the liquidator shall, instead of the said return, make a return to the effect that the meeting was duly called but no quorum was present thereat.

Under Section 512(3), it is the liquidator's duty to pay the debts of the company and to adjust the rights of the contributories themselves.

10.3.8 Position of a 'voluntary' liquidator: It has been held that a voluntary liquidator is not an officer of the Court, *[Re. Hills Waterfall etc. Co. (196) Ch. 946, 954].-* also that he can more rightly be described as the agent of the company *[Knowles Scott (181), I Ch. 717].*

The status of a liquidator as an agent of the company can be appreciated if one considers that in a voluntary winding-up the liquidator is appointed by the shareholders, at a general meeting, both in the case of members' and the creditors' winding-up, the only difference between the two is that where the person nominated by the creditors at their separate meeting is different from the one proposed by the members, the nominee of the creditors takes the office of the liquidator. Further, under Section 512 of the Companies Act, a liquidator can exercise certain powers, with the sanction of a special resolution of the company, in the case of a members winding-up *and* in the case of creditors' winding-up with the sanction of the court or the Committee of Inspection or (if there is no such committee) of the meeting of the creditors' be also has the right to exercise a number of powers on his own as the agent of the company' A company in voluntary winding-up thus is administered by the liquidator in very-much the same way as it is done by the directors, before the commencement of winding-up.

It must, how ever, be remembered that the liquidator owes certain duties towards the creditors and contributories under the statute including that of administration of the assets of the company. These he holds in trust for them. In so far as this, he is a trustee. If he neglects these duties, he may be held personally liable by the party prejudiced, or misfeasance proceedings under Section 543 can be taken against him. Thus the liquidator has a dual status both of agent and trustee.

10.3.9 Steps to be taken in a case where the company is solvent but the business for which it was formed has been completed

(a) Prepare a statement of its assets and-liabilities [Section 488(2)].

(b) Prepare and file with the Registrar of Companies a statutory declaration by directors that the company will be able to pay its debts in full within such period not exceeding three years from the commencement of the winding-up as may be specified in the declaration.

This must be done within five weeks before that date of the passing of the winding-up resolution, and must be delivered to the Registrar before that date. It may be accompanied by a copy of the report of the auditors of the company on the profit and loss account of the company (for the period commencing from the date up to which last such account was prepared and ending with the latest practicable date immediately before the making of the declaration) and the balance sheet of the company (made out as on the last-mentioned date). It must also embody a statement of the company's assets and liabilities, as at that date [Section 488(3)].

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(c) Call a general meeting of the company to pass a resolution for the winding-up of the company (Section 484). As to resolution, it should be in accordance with the provisions of Section 189(1).

(d) Hold meeting of shareholders in accordance with notice so as to pass the resolution referred to in (c) above.

(e) Appoint liquidator for the purpose of winding-up the affairs and distributing the assets of the company (Section 490).

(f) The company must give notice of appointment of liquidator to the Registrar of Companies (Section 493).

10.3.10 Provisions applicable to every voluntary winding-up: These provisions are contained in Sections 510 to 521. These are summarised below:

(a) As regards the distribution, on realisation of the assets of the company in liquidation, such assets should be applied subject to the provisions of the Act, as to preferential payment in satisfaction of its liabilities *pari passu* and the residue will be distributed among the members according to their rights and interests in the company (Section 511). For the purpose the liquidator has to ascertain the assets and liabilities of the company and draw-up a scheme of distribution.

(b) The liquidator in all cases is entitled to be supplied with a statement as to the affairs of the company verified by an affidavit containing the particulars relating, *inter alia, to:*

(i) the assets of the company stating separately the balance in hand and at banks, and the negotiable securities held by the company.

(ii) its debts and liabilities;

(iii) names, residence and occupations of all creditors and amounts standing to their credit together with dates and amounts of securities given therefor; and

(iv) debts due to the company and the amount likely to be realized on their accounts.

The liquidator can compel one or more directors or other officer of the company to submit such a statement within 21 days from the date of the commencement of the winding-up. He may also extend the time up to a maximum period of 3 months from that date (Section 511A read with Section 454).

(c) A body corporate cannot be appointed as a liquidator (Section 513).

(d) If for any reason whatever there is no liquidator to act, the Court may appoint the Official Liquidator or any other person as a liquidator and appoint in his stead the official Liquidator. The Registrar is also empowered to apply to the Court for such appointment or removal so that the liquidation proceedings be accelerated and the proper conduct of the liquidation by a competent liquidator be ensured (Section 515).

(e) Within 30 days of his appointment, the liquidator is required to publish his appointment, in the Official Gazette and notify the same in the prescribed form to the Registrar (Secton-516).

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(f) Section 518 empowers the liquidator or any contributory or creditor to apply to the Court to have questions determined or to exercise the powers as specified in the Section.

(g) Section 519 empowers the liquidator to apply to the Court for public examination of promoters, directors, etc. on the detection of a fraud having been committed by them.

(h) All costs charges and expenses properly incurred in the winding-up are required to be paid, subject to the rights of secured creditors, out of the assets of company in priority to all other claims (Section 520).

10.3.11 Summary procedures for winding-up

10.3.11.1 Members' voluntary winding-up:

(i) Directors (both where 2 directors majority where more than 2 directors) have to make a declaration of solvency under Section 488 at the Board Meeting. This declaration together with the auditors report on the balance sheet and profit and loss account (or income and expenditure account) of the company made-up to the date of the Board Meeting shall be filed with the Registrar, the time-limit for such filing being 5 weeks before the passing of the resolution for winding-up;

(ii) Company has to pass at its meeting a special resolution (Section 484) and appoint one or more Liquidators, at this or at subsequent meeting and fix remuneration if to be paid (Section 490);

(iii) Company has to publish the said resolution in the Official Gazette as also in newspaper circulating in the district where its Registered Office is situated, within 14 days of the passage of the resolution (Section 485);

(iv) Company is required to give notice of the appointment of Liquidator to the Registrar (Section 493) and the Liquidator to separately communicate his appointment to the Registrar under Section 516;

(v) Then the Liquidator has to do the following things e.g., speedy realisation of assets, preparation of list of creditors, admission of proof, settlement of List of contributories, making of necessary calls, payment to secured creditors, payment of costs, payment of preferential claim, etc.;

(vi) Liquidator has to call general meeting at the end of each year under Section 496;

(vii) Liquidator has to file with the Registrar a Statement as required by Section 551, where the winding-up is not concluded within one year after its commencement;

(viii) Liquidator has to call final meeting for the purpose of dissolution of the company, and for that matter to proceed according to the provisions contained in Sections 497 and 498.

10.3.11.2 Creditors' voluntary winding-up: The creditors would be mainly concerned if the company arrives at the decision that it should wind-up itself because of the inability to meet its liabilities. Therefore:

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(i) the company has to call creditors' meeting to be held on the day or the day next following the date on which there is to be held a general meeting of the company at which the resolution for voluntary winding-up is to be proposed [Section 500(1)];

(ii) the company has to send notice of the meeting to creditors and also advertise the notice in two newspapers circulating in the district of its registered office [Section 500(2)];

(iii) the Board of Directors, in the creditors' meeting, has to cause a full statement of the position of the company's affairs and a list of company's creditors and the estimated amount of their claims to the laid [Section 500(3)];

(iv) the company has to notify the resolution passed thereat to Registrar within 10 days of the passing thereof [Section 501(1)];

(v) creditors' nominee as Liquidator to call meeting of the company and of creditors at the end of each year in compliance with the requirements of Section 508;

(vi) the liquidator has to call the final, meeting in compliance with the provisions of Section 509.

10.4 General Provisions on Winding-Up

Sections 528 to 560 contain provisions applicable to every mode of winding-up. Some of the important provisions are stated below:

(1) Section 551 prescribes that information as to the pending liquidation, unless exempted by the Central Government, shall be given by the liquidator within 2 months of the expiry of the first year and thereafter at intervals of not more than one year, by filing a statement in the prescribed form; also that the statement shall be audited by a Chartered Accountant. The statement shall have to be filed (a) in the case of a winding-up by or subject to the supervision of the Court, in the Court; and (b) in case of a voluntary winding-up, with the Registrar.

N.B. *Students should note that this requirement is over and above the requirements under Sections 497 (in the case of members voluntary winding-up) or 508 and 509 (in the case of creditors voluntary winding-up).*

(2) Debts that are payable: Debts of all descriptions in a winding-up are payable only when these have been proved. All debts payable on a contingency and claims against the company, whether present or future, certain or contingent, ascertained or unascertained, can be proved against a company; when the amount of a debt cannot be ascertained, a fair estimate thereof may be made for purposes of proof (Section 528). This Section applies to proof of debts when the company is in a solvent state i.e. when its assets are sufficient to pay all its debts and liabilities and the costs of the winding-up. Where the company is insolvent, Section 528 would be applicable. In the winding-up of an insolvent company, the same rules are applicable as regards: (i) debts provable; (ii) the valuation of annuities and future and contingent liabilities and (iii) the respective rights of secured and unsecured creditors, as those in the case of an estate of person adjudged insolvent under the Insolvent Law. [Section 529(1)]. However, the security of every secured

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creditor shall be deemed to be subject to a *pari passu* change in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor instead of relinquishing his security and proving his debt, opts to realise his security, then (a) the liquidator shall be entitled to represent the workmen and enforce such charge; (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues, and (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less shall rank *pari passu* with the workmen's dues for the purposes of Section 529A *[Proviso added to Sub-section (1) of Section 529 by the Companies (Amendment) Act, 1985]*.

All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to make by virtue of this Section [Sub-section (2)]. If, however, a secured creditor, instead of relinquishing his security and proving for his debts, proceeds to realise his security, then he shall be liable *to pay his portion of the expenses* incurred by the liquidator (including a provisional liquidator) for the preservation of the of a security before it is realised by the secured creditor for the purpose of sub-section (2), the portion of expenses which the secured creditor shall be liable to pay shall be the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security.

For the purposes of Section 529, Section 529A and Section 530:

(a) ["workmen" in relation to a company, means the employees of the company being workmen within the meaning of the Industrial Disputes Act, 1947 i.e., any person (including an apprentice) employed in any industry to do any skilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, but does not include any such person:

    (i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

    (ii) who is employed in the police service or as an officer or other employee of a prison; or

    (iii) who is employed mainly in a management or administrative capacity, or

    (iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand rupees per-mensum or exercise, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.];

(b) "workmen's dues" means the aggregate of the following sums due from the company to its workmen, namely:

    (i) all wages, salaries including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workmen, in respect of

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services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947;

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, o the termination of, the winding-up other or resolutions;

(iii) unless the company is being wound-up voluntarily merely for the purposes of reconstruction or of amalgamation with another company or unless the company has, at the commencement of the winding-up, under such a contract with insurers as mentioned in Section 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company. In other words, in the absence of alternative circumstances mentioned in the beginning of this clause the provision of this clause will fall within the provision of the phrase "workmen's dues";

(iv) all sums due to any workman from a provident fund, a gratuity fund or any other fund for the welfare of the workman maintained by the company.

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the company which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of (i) the amount of workmen's dues, and (ii) the amounts of the debts due to the secured creditors. It has been exemplified by the following statutory illustration.

Illustration

The value of the security of a secured creditor of a company is ₹ 1,00,000. The total amount of the workmen's dues is ₹ 1,00,000. The amount of the debts due from the company to its secured creditors is ₹ 3,00,000. The aggregate of the amount of workmen's dues and of the amounts of debts due to secured creditors is ₹ 4,00,000. The workmen's portion of the security is therefore 1/4th of the value of the security, i.e. 25,000, [Sub-section (3) added to Section 529 by the Companies (Amendment) Act, 1985].

Now let us illustrate the significance of the Explanation aforementioned by reference to the statutory illustration stated above.

The facts given in the above illustration remain the same. The liquidators incur ₹ 10,000 for the preservation of the security before it is realised by the secured creditor. Now what is the portion of ₹ 10,000 that should be borne by the secured creditors? It is equal to the following equation:

$$\text{Whole of expenses} - \text{Whole of expenses} \times \frac{\text{Workmen 's portion}}{\text{Value of the security}}$$

$$= ₹\,10,000 - \frac{10,000 \times 25,000}{1,00,000} = ₹\,10,000 - 2,500$$

= ₹ 7,500. This is the amount to be borne by the secured creditors.

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- Overriding preferential payment: Under Section 529A (incorporated by the 1985 Amendment Act), notwithstanding anything contained in other provisions of this Act or any other law for the time being in force in the winding-up of a company – (i) workmen's dues and (ii) debts due to secured creditors to the extent such debts rank, under clause (c) of the proviso to Sub-section (1) of Section 529, *pari passu* with such dues, shall be paid in priority to all other debts. These debts payable under (i) and (ii) above shall be paid in full, unless the assets are insufficient to meet them, in which the case they shall be paid in equal proportions.

  Note: The aforesaid rules of insolvency as contained in Section 529 will be applicable only in respect of the three matters specified under paragraph (i), (ii) and (iii) but no further; and they apply except in so far as special provisions are contained in the Companies Act *Italia* vs. *Free Press Journal* (1956) M.L.J. 463. Further Section 529 shall cease to be applicable as soon as it is found that the company in the course of winding-up is not insolvent *[Re. Fine Industrial Commodities Ltd. (1953) 3 A.E.R. 707].*

(3) Preferential payments: Subject to the provisions of Section 529A (discussed earlier), the following debts must, according to provisions contained in Section 530, as amended by the 1996 Amendment Act, be paid in priority to the claims of unsecured creditors:

(a) All revenues, taxes, cesses and rates due to the Central or State Government or a local authority, having become due and payable within the twelve months before the relevant date;

(b) All wages and salaries of an employee for service rendered for a period not exceeding four months within the preceding 12 months next before the relevant date, but not exceeding ₹ 20,000 in any one case;

(c) All accrued holiday remuneration;

In case of (b) and (c) where amount is paid out of money advanced by another person for that purpose, that person, is subrogated to rights of employee who has been paid [Section 530(4)];

(d) Unless the winding-up is merely for purposes of amalgamation or of reconstruction employer's contribution to the State Insurance Scheme under the Employees' State Insurance Act, 1948 payable during 12 months before the relevant date and all amounts due in respect of any compensation or liability for compensation in respect of death or disablement compensation under the Workmen's Compensation Act, 1923;

(e) All sums due to any employee from any fund including a provident, pension or a gratuity for the welfare of the employees, maintained by the company; and

Expenses payable by any company in respect of an investigation held under Section 235 or 237 of the Act.

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For the purposes of Section 530:

(i) Any remuneration in respect of a period of holiday or of absence from work through sickness or other good causes shall be deemed to be wages in respect of services rendered to the company during that period;

(ii) The expression "accrued holiday remuneration" includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(iii) The expression "employee" does not include a workman (added by the Companies (Amendment) Act, 1985 (w.e.f. 29.5.85); and

(iv) The 'relevant date' means in the case of winding-up by the Court:

(a) the date of the appointment of first appointment of a provisional liquidator; or

(b) if no such appointment was made, the date of the winding-up order, *Unless, in either case the company had commenced to be wound-up voluntarily before that date*.

In all other cases, it means the date of voluntary winding-up resolution.

If the assets are insufficient to pay the foregoing preferential debts in full they abate in equal proportions. If necessary, these debts may be paid out of the proceeds of any assets subject to a floating charge.

The order of priority in paying off debts in a winding-up may be roughly worked out as follows: (i) Secured creditors (mortgagees); (ii) costs and charges of winding-up [In a voluntary winding-up automatically this has priority. In a compulsory winding-up, Court has to give it priority by order] (See Section 576 and 520); (iii) preferential debts (Section 530); (iv) floating charges [See Section 530(5)(b)]; and (v) unsecured creditors.

The above does not affect debts that are secured by a fixed charge which have to be paid up to the value of the property concerned.

If there is any surplus, capital is returned to preference shareholders first and then to equity shareholders. If there is still any surplus left, it depends on the articles whether preference shareholders are entitled to share that surplus.

Section 530(1) requires that the revenues, taxes, etc. should have become *due and payable* within the period of 12 months *immediately preceding* the relevant date. The arrears of sales tax not to be paid preferentially under Section 530 although the same become 'recoverable' as arrears of land revenue under the Sales-tax Act. The words 'recoverable' arid 'payable' have got completely different connotations. The word 'revenues' used in Section 530(1)(a) of the Companies Act means revenues which have

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become due and payable as revenues within the next 12 months before the relevant date, and not revenues which are recoverable as arrears of land revenue. Sales tax, assessed after winding-up, is not revenue, which has become due and payable within 12 months next before the relevant date. Therefore, it cannot be paid preferentially under Section 530. *[Sales-tax Officer, Kanpur vs. Official Liquidator (1968) 38 Comp. Case 430]*.

Advance income tax demanded and due under the Income-tax Act, 1961 is to be paid preferentially under Section 530(1)(a) of the Companies Act,1956 provided it becomes due and payable within the twelve months next before the relevant date. *[Joint Official Liquidator vs. Comm. Of Income-tax (1954) I.M.L.J. 282 – AIR 1954 Mad. 858]*. But the Calcutta Court has held a contrary view *[Suburban Bank Ltd. AIR (1953) Cal. 487]*.

Ex-gratia payments to employees of the company are not within the ambit of Section 530(1)(b) [*Vijay Card Board Co. Ltd. vs. Collector, District Hyderabad AI (1957) Andhra Pradesh 725].*

Under Section 530(4), the bank which provided an overdraft for making money available for payment of wages, is entitled to preferential payment for the money so advanced and paid *[Re. Rampgill Mill Ltd. (1967) Comp. L.J. 262]*.

'Bonus' payable to staff appears to be covered by the expression 'all wages' occurring in Section 530(1)(b) and therefore, is to be paid preferentially to the extent laid down in Section 530(1)(b) especially if it is due under the Payment of Bonus Act. The company's contribution payable to the Employees State Insurance Corporation is, for the purposes of Section 530, a preferential payment *[Re. Bihar Bolts Engineering Works Ltd. Air 1959 Pat. 417]*.

In the winding-up of a company, an advocate is entitled to preferential payment of his fees and expenses out of the funds of a litigation which he had successfully conducted for the company which are in the hands of the liquidator *[Kutti Krishna Menon vs. Cochin Mercantile Ltd. (1969) 32 Comp. Case 578]*.

(4) Effect of winding-up on antecedent and other transactions: With a view to affording better protection to the creditors of a company, the principle of fraudulent preference as existent in the insolvency laws, has been extended to companies so as to render void certain categories of transactions entered into within a limited period before the commencement of winding-up. The detailed provisions in this regard are contained in Sections 531 to 537 of the Act, which are summarised below:

(i) Fraudulent Preference: All transfers of property, movable or immovable, made by delivery of goods or payment of money etc., if made by an insolvent person within 3 months before the presentation of insolvency petition, would be held to be a fraudulent preference of its creditors and would be invalid. Similarly, in the case of a company all such transfers, if made within 6 months before the commencement of its winding-up, would be deemed to be a fraudulent preference of its creditors, and would be invalid (Section 531). For the purpose of proving a fraudulent preference, two things need be shown, viz.:

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(a) that in the case of a winding-up by or subject to the supervision of the Court, the transaction took place within 6 months before *the presentation of the petition* and in the case of voluntary winding-up, the transaction took place within 6 months of *passing of resolution* for winding-up [Section 531(2)]; and

(b) that the main motive in the mind of the company, acting through its directors, was to prefer one creditor to the other *[In Re. Jackson & Bassford (1906) 2 Ch. 467].*

On the basis of the above-mentioned provisions of Section 531, let us examine the following situation: A company has been running into losses. To one of its creditors it gives a mortgage on its immovable property on 1st May, 1985. On October 15, 1985, a winding-up petition is presented to the Court, which passes an order of winding-up on 30th November, 1985. It is clear from this situation that the transaction of mortgage on the company's immovable property took place within 6 months before the presentation of the petition for winding-up. Now, if it can further be proved that the dominant motive of the company was to prefer one creditor to other creditors, then the transaction would be deemed to be fraudulent preference and hence invalid. The real test is whether the debtor (the company in the said illustration) in making the transfer is doing what he himself felt bound or compelled to do. If so, the case does not fall within the purview of fraudulent preference *[Nobin Kishori vs. Jugneshwar AIR (1983) Cal. 809; In re. MIC Trust Ltd. (1933) Ch. 542]*.

(ii) Avoidance of voluntary transfer: Any transfer of movable or immovable property or any delivery of goods by a company, save and except a transfer or delivery in the course of the company's business in favour of a purchaser or encumbrancer in goods faith and for valuable consideration, shall be void against the liquidator, if such transfer or delivery is made within one year before the presentation of the winding-up petition by or subject to the supervision of the Court or the passing of a resolution for the voluntary winding-up (Section 531A).

(iii) Void transfer: Any transfer or assignments by a company of all the property to trustees for the benefit of its creditors are void (Section 532).

(iv) Liabilities of fraudulently preferred persons: If an act done by a company is invalid under Section 531 as a fraudulent preference of a person interested in property mortgaged or charged in his favour to secure the company's debt, the person so preferred would be liable, as a surety for the debt to the extent of the mortgage (or the charge) on the property or the value of his interest, whichever is less. The value of the said person's interest shall be determined at the date of the transaction constituting the fraudulent preference and shall be determined as if the interest were free of all encumbrances other than those to which the mortgage or charge the company's debt was then subject (Section 533).

(v) Limitation on rights under a floating charge: There are two major statutory limitations to rights arising out of a floating charge. First, a floating charge created within 12 months of the commencement of winding-up unless it is proved that the company immediately after the creation of the charge was solvent, is invalid except up to the amount of any cash paid to the company at the time or subsequent to the creation of, and in consideration

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for, the charge together with interest on the amount at 5% per annum or other prescribed rate (Section 534). Secondly, preferential debts have also priority over debts secured by a floating charge (Section 123 and 530) and they must be paid out of the assets covered by a floating charge to the extent that they cannot be met out of assets available for payments of unsecured creditors.

(vi) Disclaimer of onerous property: The liquidator may, with the leave of the Court, 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 are fit. The Court 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 Court 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).

(vii) Avoidance of transfers etc.: In the case of a voluntary winding-up, any transfer of shares in the company which has not been sanctioned by the liquidator, and any alteration in the status of the members of the company made after the commencement of the winding-up, is void.

In the case of a winding-up by or subject to the supervision of the Court, all disposition of properties (including actionable claims) belonging to the company as well as transfer of shares in the company or alteration in the status of its members which are made after the commencement of the winding-up are void unless otherwise ordered by the Court (Section 536).

(viii) Avoidance of certain attachment, etc.: In the case of any company which is being wound by or subject to the supervision of the Court, (a) any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company, after the commencement of the winding-up or (b) any sale held, without leave of the Court, of any of the properties or effects of the company after such commencement shall be void. These provisions, however, will not apply to any proceeding for the recovery of any tax or impost or any dues payable to the Government (Section 537).

In Rajratna Narabhai Mills Co. Ltd. (In liquidation) by its Official Liquidator vs. New Quality Bobbin Works (1973) 43 Comp. Case 131. Three issues emerged for decision. These are as follows:

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First, where an attachment of the company's property under Court's order takes place prior to the filing of the winding-up petition and the sale of the attachment property takes place before the issue of the winding-up order, can the liquidator claim the sale proceeds? It was held that on account of the sale of the property having taken place after the commencement of the winding-up proceedings, Section 537 of the Act would operate and the sale of the shares would be void. Where the respondent had derived benefit under a void contract, he would be under an obligation to return it to the Official Liquidator of the company in liquidation who would be the only claimant of the benefit. Secondly, if the sale proceeds were claimable, would the liquidator being required to file a separate suit? It has been held that the summons for getting the relief under Section 537 by the official liquidator was maintainable and there was necessity for the liquidator to file a separate suit. When the official liquidator, if empowered by Section 457(1) of the Act to institute or defend legal proceedings and in performance of his duty, finds a transaction to be void against him the transaction becoming void because of the winding-up proceedings – it would be a question of fact arising in the course of winding-up and the Court would have the jurisdiction to decide the question. This is the scope and ambit of jurisdiction conferred upon the Court under Section 446(2) of the Act. Therefore, the liquidator would not have to file the suit in the Court. Thirdly, whether the application by the liquidator to the Court for the recovery of the sale proceeds was barred by limitation? Article 137 of the Limitation Act, 1963 would apply only to application not made under the Code of Procedure. The liquidator made this application not under the Code of Procedure but under the Companies Act to the Court on whom jurisdiction is conferred by Section 10 of the Companies Act. It was, therefore, held that the application was not barred by limitation.

(5) Offences by officers of companies in liquidation: The Act provides certain punishments to be inflicted on past or present officers of a company which is in the course of winding-up (i) who do not disclose to the liquidator all the property of the company and consideration for which the same has been disposed of, (ii) who conceal or fraudulently remove any part of the property of the company of value of ₹ 100 or more within twelve months next before the commencement of the winding-up, (iii) who make any material omission in their statements about the affairs o the company, (iv) who are guilty of any false representation or fraud obtaining consent of the creditor to the agreement relating to the affairs of the company or to a winding-up.

Note: The above is illustrative of offences for which an officer may be punished. For a complete list of such offences read Section 538(1)(a) to (p).

The officers may be punished on any one of the aforementioned grounds with imprisonment or with fine or with both.

Offences against the Act: No Court shall take cognizance of any offence against the Act other than an offence with respect to which proceedings are instituted under section 545, which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing made by the Registrar, or a shareholder or a person authorised by the Central Government in this regard [Section 621(1)]. In spite of anything

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contained in the Code of Criminal Procedure if the complainant is either the Registrar or the Central Government's deputationist, his personal attendance before the Court trying the offence shall not be necessary, unless the Court for reasons to be recorded in writing requires his personal attendance at the trial [Section 621(IA)].

Notwithstanding anything contained in the Code of Criminal Procedure 1973 any offence punishable under this Act (whether committed by a company or any officer thereof, not being an offence punishable with imprisonment only or with imprisonment and also with fine, may, either before or after the institution of any prosecution be compounded by

(a) the Company Law Board, or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed fifty thousand rupees by the Regional Director

on payment or credit by the company or the officer, as the case may be, to the Central Government of such sum as that Board or the regional director as the case may be, may specify:

But in no case the sum so specified shall exceed the maximum amount of fine imposed for the offences so compounded. This provision is not applicable in case of an offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded. [Section 621A, as added by the Companies (Amendment) Act, 1988].

The amount of fine, imposed under the Act by the Court may be applied, under the direction of the Court in or towards the payment of the costs of proceedings, or rewarding the person on whose information the fine is recovered (Section 626).

For false statements made in, as well as omissions intentionally made of, any material fact knowing it to be material, any return, report, certificate, balance sheet, prospectus, statement or other document, Section 628 renders the offence punishable with imprisonment extending-up to 2 years as well as with fine.

Similarly, under Section 629 an offender is punishable for intentionally giving false evidence in any examination on oath.

Falsification of books: If with intent to defraud or deceive, any person, any officer or contributory of a company destroys, mutilates, alters, falsifies, secrets, etc. any books, papers or securities, or is a party to any of these acts, he will be punishable with imprisonment for a period extending up to 7 years and fine. He will also be equally punishable, if he makes or is privy to the making of, any false or fraudulent entry in any register, books of account, etc. belonging to the company (Section 539).

An auditor, being an officer of the company, if culpable in the circumstance would be *liable* to be punished as prescribed. The provisions of this Section can be invoked only when the company is being wound-up.

Liabilities where proper accounts not kept: If in a winding-up it is found that proper books of account have not been kept throughout the period of two years preceding the commencement of winding-up (or the period between the incorporation of the company

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and the commencement of the winding-up whichever is shorter) the officers of the company would be liable to imprisonment for a term extending to one year. They may however, escape liability, if they can show that they had acted honestly, and that in view of the circumstances in which the business was carried on, the default was excusable.

Proper books of account will be deemed to have been kept if there have been kept (a), such books or accounts as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day-to-day in sufficient detail of all cash received and all cash paid, and (b) statement of annual stock taking with all necessary particulars, where the business of the company has involved dealings in goods (Section 541).

Liabilities for fraudulent trading: If, in the course of a winding-up, it appears that the business has been carried on with the intent to defraud creditors or others, the Court may, on the application of the Official Liquidator, or the liquidator or any creditor or contributory, declare that any person who was knowingly a party to such a carrying on of the business shall *be personally liable to on unlimited extent* for all or any of the company's debts or liabilities, he may also be called upon to pay fine up to ₹ 50,000 or sentenced to imprisonment up to two years or with both (Section 542).

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 Court 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).

Now suppose, the Official Liquidator of a company in liquidation institutes misfeasance proceedings against the director thereof and during the pendency of the proceeding itself the director passes away. Can the legal representatives of the decreased director be impleaded and the proceedings continued against them? This question came up for judicial decision in *Official liquidator vs. Pasthasarathi Sinha (1983) 53 Comp. Cases 163 (SC).*

Held: The misfeasance proceedings initiated under Section 543 against a director of a company in winding-up can be continued on his death against his heirs and legal representatives for the purpose of determining and declaring the loss or damage caused to the company though no compulsive order may be made in those proceedings under Section 543 against the heirs and legal representatives. On conclusion of the proceedings under Section 543 a declaration of liability may be made. Such declaration partakes the character of a decree in a suit and can be enforced under Section 634 and 635. The provisions of Section 50 of CPC have to be applied when the person who is made liable dies and the liability of the legal representatives should be determined accordingly.

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Misfeasance is an act or omission, in relation to the company, which causes loss or injury to the company. Although loss to the company has not been expressly stated in Section 543, nevertheless such 'loss' has to be implied in case of misapplication or retainer. Only such an act of misfeasance as results in the loss to the company will fall within the ambit of Section 543. It is essential for the liquidator to establish that the respondents are accountable for some goods or money belonging to the company or that they are guilty of misapplication, retainer or breach of trust *(In re. Vijay Laxmi Sugar Mills Ltd. AIR 1963 All 55)*. For the creation of liability under Section 543, it must be shown that there has been dishonesty or fraud or at least gross and culpable negligence *Piliai Central Bank vs. Augusti AIR 196, Ker. 121)*. An honest mistake, not amounting to culpable negligence or breach of duty, would not be misfeasance *(Ayyangar vs. Official Assignee of Madras, 55 Mad. 153).*

Where the person guilty of the offence is a firm or body corporate, the Court may make the aforesaid order against the individual who was at the relevant time a partner of the firm or a director of the body corporate (Section 544).

Notes:

(i) For the purpose of Section 543 an auditor is an officer [Section 2(30)];

(ii) Section 543 provides for a summary remedy for bringing erring officers of the company to book and the long-winded remedy by way of suit is always available in addition;

(iii) Illustrations of misfeasance are: improper payment of dividends; *ultra vires* investment; selling his own property to company without disclosure; allotting shares in contravention of Section 69, etc.; and

(iv) Misfeasance summons would also lie against directors when they have paid dividend out of capital knowingly allotted shares to infants, etc. Misfeasance lies against the liquidator when he has negligently admitted a claim.

Misfeasance proceedings can be taken against the auditors under Section 543 of the Companies Act. If they are found to have been guilty of any misfeasance or breach of trust in relation to the company. Such a liability may arise due to non-performance or unsatisfactory performance of duties by an auditor in relation to the account of the company, as a result of which the company has suffered losses. The liability is a liability and the Court may call upon the auditor to make good the damages suffered by the company. But the action against the auditor under the aforementioned provision of law can be taken only if the business of the company is in the course of being wound up. The directors of a company while it is functioning can also take an action against the auditor for negligence in the circumstances similar to those aforementioned.

The application must be made within 5 years from the date of the order of winding-up or the first appointment of liquidator or of the misapplication, retainer, misfeasance or breach of trust as the case may be, whichever is longer.

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(6) Power of Court to grant relief to officers against the liability for misfeasance, breach of duty, etc.: If in any proceedings for misfeasance against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the misfeasance, negligence, breach of duty, etc. but that he has acted honestly and reasonably and that having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused the Court may relief him either wholly or partly, from his liability on such terms as it may think fit. But in a criminal proceeding under this Sub-section, the Court shall have no power to grant relief from any liability, which may attach to an officer in respect of such misfeasance [Section 633(i)].

Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any misfeasance, etc. he may apply to the Court for relief and the Court on such application has the same power to relieve him as it would have had if it had been a Court before which proceedings against that officer for misfeasance, etc. had been brought under Sub-section 633 [Section 633(2)].

But the relief under Sub-section (1) or Sub-section (2) can be granted to an officer, only if the relevant Court has, by notice served in the manner specified by it, required the Registrar or any other person to show cause why such relief should not be granted [Section 633(1)].

It should be noted that only an officer of the company and not company itself could apply for relief. But it is for the Court before which the proceeding is pending and not for Court to grant relief. The Court can grant relief only under Sub-section (2) against apprehended prosecution.

(7) Prosecution of delinquent officers and members of the company (Section 545): If it appears to the Court in a winding-up *by or subject to the supervision of the Court* that any past or present officer or any member of the company has been guilty of any offence in relation to the company, the Court may, either on the application of any person interested in the winding-up or of its own motion direct the liquidator either himself to prosecute that offender or to refer the matter to the Registrar. In the latter case, if the Registrar considers it to be a fit case for prosecution he shall report the matter to the Central Government, which may, after taking such advice as it thinks fit, direct the Registrar to institute such proceedings for the purpose. No report shall, however, be made by the Registrar unless an opportunity is given to an accused person to make a statement to him in writing and of being heard thereon.

Similarly, if in the course of the voluntary winding-up it appears to the liquidator that any such person as stated above has been guilty of criminal offence in relation to the company, then he shall forthwith report to the Registrar. The Registrar may, in this case, do any of the three viz. (i) he may refer the matter to the Central Government for further enquiry whereupon they shall investigate the matter and if thought expedient, may apply to the Court for an order conferring on any person designated by them, all the case of compulsory winding-up or (ii) if he is of the opinion that the case is not a fit one for the prosecution, he shall inform the liquidator according and (iii) the liquidator in the last case if he holds a different opinion may himself take proceedings against the offender after

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securing the sanction of the Court. In case, however, the liquidator does not make a report to the Registrar as he should, the Court may, on an application of any person interested in the winding-up or of its own, motion, direct the liquidator to make such report which, on being made shall dealt with by the Registrar in any one of the three ways mentioned above.

In connection with an every prosecution in pursuance of these provisions, it shall be the duty of the liquidator and of every officer and an agent of the company, past and present (other than the defendant in the proceeding) to give to the Registrar all assistance he is reasonably able to give. 'Agent' here includes any banker, legal advisor or an auditor of the company. In case of default, the Court may, on the application of the Registrar, direct performance of this duty. Where the liquidator is in default, the Court may order him to pay the cost of the application personally unless it appears that the default was due to the liquidator not having in the hands the sufficient assets of the company.

(8) Disposal of books and papers of the company: In a winding-up by the Court or subject to the supervision of the Court, the Court will direct how the books and papers of the company and of the liquidator are to be disposed of.

In the case of members' voluntary winding-up they are disposed of in such manner as the company by a special resolution directs and in the case of creditors' voluntary winding-up in such a way as the Committee of Inspection and if there is no such Committee as the creditors of the company may direct.

After the expiry of *five years* from the dissolution of the company, no responsibility will rest on the company the liquidator or any person to whom the custody of the books and papers has been committed, by reason of any books or papers not being forthcoming for any person claiming to be interested therein (Section 55).

The Central Government may, by rules, prevent for such period (not exceeding 5 years from the dissolution of the company) as the Central Government thinks proper, the destruction of the books and papers of a company, which has been wound-up, and of its liquidator. Also it can similarly enable any creditor or contributory of the company to make representation to the Central Government in respect of the matters aforementioned and to appeal to the Court from any direction, which may be given by the Central Government in the matter [Section 540(3)]. If any person acts in contravention of any such rules or of any direction of the Central Government thereunder, he shall be punishable with an imprisonment for a term extending to 6 months or with fine extending to ₹ 50,000 or with both [Section 550(4)].

(9) Information as to pending liquidation (Section 551): You may come across a situation where the winding-up of a company has commenced but it has not been possible to *conclude it* within *one year* since its commencement. In such a case, the liquidator is required to file in the Court (in case of a winding-up/by or subject to supervision of the Court or with the Registrar in case of a voluntary winding-tip a statement in the prescribed form. The statement is to contain the prescribed particulars and is to be duly audited by a qualified auditor with respect to the proceedings in and the position of the liquidation. This statement is to be filed within two months of expiry of such a year. This statement is to be filed at intervals of not more than one year or such shorter intervals as

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may be prescribed. The liquidator has to comply with these requirements unless he is exempted from so doing wholly or partly by the Central Government [Sub-section (1)].

A copy of the statement filed in the Court as aforesaid has to be simultaneously filed with the Registrar who shall keep it along with the other records of the company [Sub-section (2)].

In the case of Government Company in liquidation, copy of the statement shall be forwarded to the Central Government if it is a member of the Government Company or to the state Government if that Government is a member or to the Central and the State Government both, if both are the members of the Government Company [55(2A) as added by the Companies (Amendment) Act, 1988].

The said statement is open to an inspection by any person stating himself in writing to be a creditor or contributory or his agent at all reasonable times on payment of the prescribed fee. He may also have a copy of or an extract from, the statement if he so wants [Sub-section (3)].

The Section provides for the following penalties namely:

(a) fine up to ₹ 5,000 for every day of the liquidator's failure in complying with the requirement of the Section.

(b) imprisonment up to six months or fine up to ₹ 10,000 or both for the liquidators wilful default in causing the statement to be audited by a qualified auditor and

(c) sentence provided in Section 182 of the Indian Penal Code for the person untruthfully stating himself to be a creditor or contributory of the company for inspecting the aforementioned statement or receiving copy or an extract thereof [Sub-section (4) & (5)].

(10) Liquidators' duty as to the payment into a bank: In terms of Section 552, every Official Liquidator is bound to pay all moneys which he receives as the liquidator of the company into the public account of India in the Reserve Bank in such a manner and as at such times as may be prescribed.

Under Section 553, every other liquidator than the Official Liquidator shall pay such money into a scheduled bank to the credit of a special bank account. This account is to be described as "the Liquidation Account of Company 'Company Limited'/Company Private Limited". He has to make this payment into the bank unless the Court for reasons of an advantage to the creditors or contributories otherwise orders him. However, he cannot retain with himself any sum in excess of ₹ 500 or such other amount as the Court may authorise for more than 10 days. If he fails to give any satisfactory explanation he is obliged to pay interest at 12% per annum and such other penalty as may be prescribed by the Registrar. He shall be further liable to disallowance of all or such of his remuneration as the Court may think fit. For the said stipulated amount and period, he shall also be liable to be out as well as to pay expenses occasioned by reason of his default.

According to Section 554, neither, the Official Liquidator nor any other liquidator can pay any money received by him in his capacity as such into any private banking account.

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(11) Unpaid dividend, and undistributed assets to be paid into Company's Liquidation Account (Section 555): Where a company is being wound-up, the liquidator shall forthwith may into the public account of India in the Reserve Bank in a separate account described as the "Company's Liquidation Account" all the money which he has either in his hands or under his control and which represents (a) dividends payable to any creditor which bad remained unpaid for 6 months after the declaration thereof; or (b) assets refundable to any contributory, which have remained undistribution thereof; or (b) assets refundable to any contributory, which have remained undistributed for 6 months after the date on which they became refundable. Similarly, on the dissolution of a company the liquidator must pay any unpaid dividends or undistributed assets in his hands at the date of the dissolution, into the account aforementioned [Sub-section (2) & (3)].

While making the aforesaid payment, the liquidator shall furnish to such officer as appointed by the Central Government with a statement in the prescribed form. Such a statement must set forth the nature of the sums, the names and the last known addresses of thin persons entitled to participate therein, the amount to which each is entitled thereto and nature of the claim thereto, and other prescribed particulars.

For the money paid into the Reserve Bank the liquidator is entitled to a receipt from the former a receipt is an effectual discharge of the liquidator's obligation in this regard [Sub-section (4)].

Where the company is being wound-up by the Court the liquidator shall make the payment mentioned above by transfer from the account referred to in Section 552 [Sub-section (5)].

Visualise situation where the company is being wound-up voluntarily or subject to the supervision of the Court. In such a case, the liquidator shall, when filing a statement pursuant to Section 51(1) indicate the sum of money which is payable to the Reserve Bank under Section 551(1) & (2) as unclaimed dividends or undistributed assets and which he has not in his hands for 6 months preceding the date to which the statement is brought down, and pay that sum into the company's Liquidation Account within 14 days from the date of filing the statement [Sub-section (6)].

Any person entitled to moneys which had been paid into the company's Liquidation Account, may apply to the Court for an order for payment thereof. The Court may order payments, if it is satisfied that the money is due to the applicant. Prior to this order being made; the Court shall, however, serve a notice on an officer who might have been appointed by the Central Government in this connection, asking him to show cause why the order should not be made [Sub-section (7)]. This provision clearly shows that the person entitled to participate in the sums so paid up into the Company's Liquidation Account do not lose their right forever.

It should, however, be noted that the person may also apply to the Central Government, instead of the Court as referred to above, for an order for payment of the money. If no application for such a payment has already been made to the Court, the Central Government may make the order for payment to that person or the sum due after taking such security from him as it may think fit) provided it is satisfied with a certificate to be given in this regard by the liquidator or the Official Liquidator or otherwise [Sub-section (7)].

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It is necessary that if the moneys paid into the company's liquidation account have remained unclaimed for fifteen years, those will have to be transferred to the general revenue account of the Central Government. Even thereafter any person entitled thereto may apply to the Central Government [Sub-section (8)].

Should the liquidator, instead of putting the money into the company's Liquidation Account, retain it, he must: (i) pay interest @ 12% per annum on the sum retained, subject, however to the Central Government's power to remit wholly or partly the amount of interest; (ii) pay any expenses incurred as a result of his default; and (iii) where the winding-up is by or under the 'supervision of the Court, be deprived of his remuneration partly or wholly and be removed from his office [Sub-section (9)].

(12) Dissolution declared void: Within two years of the dissolution of a company, the Court may, on an application being made by the liquidator or any other person interested, make an order declaring the dissolution to have been void. A certified copy of the order must be filed with the Registrar by the person on whose application order was made, within 30 days (Section 559).

(13) By removal of the company's name from the register by the Registrar (without winding-up order) (Section 560): A defunct company is a company which has not been legally dissolved, and the name of which continues on the Register of Companies maintained in the Registrar's office.

Where the Registrar has a reasonable ground to believe that a company is not carrying on business or is not in operation he must send to the company a letter through post enquiring if it is carrying on business or is in operation. If no reply is received by him within one month, the Registrar, within 14 days after the expiry of the period of one month, must send to the company a registered letter referring to the first letter and state that no answer thereto has been received and further stating that if no answer is received to the second letter within one month of the date thereof, a notice will be published in the Official Gazette with a view to striking the companies name off the register. If the Registrar either gets a reply to the effect that it is not carrying on business or is not in operation, or does not within one month, after the second letter, receive any reply, he may publish in the Official Gazette and send to the company by registered post a notice that at the expiry of a period of three months from the date of the notice, the name of the company will, unless cause is shown to the contrary, be struck off the Register and the company will be dissolved.

If the Registrar has reason to believe either that no liquidator is acting or that the affairs of the company have been completely wound up, and any returns required to be made by the liquidator have not been made for consecutive six months, the Registrar must publish in the Official Gazette and send to the company a similar notice. When the time stipulated in such notice expires, the Registrar may, unless cause to the contrary is previously shown, strike its name off the Register and publish notice thereof in the Official Gazette, whereupon the company shall stand dissolved.

But the liability (if any) of every director, manager or other officer who was exercising and power of management and of every member of the company, shall continue, This liability may be enforced as if the company had not been dissolved. Also, the aforesaid

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provisions will not affect the power of the Court to wind up a company the name of which has been struck off the register.

As per present practice, a company desirous of getting its name struck off, has to apply to Registrar of Companies in e-form 61. All pending statutory returns are required to be filed along with e-form 61.

In order to give an opportunity for fast track exit by a defunct company, for getting its name struck off from the Register of Companies, the Ministry of Corporate Affairs vide General Circular No. 36/2011 dated 7th June, 2011 has decided to modify the existing route through e-form – 61 and has prescribed the new Guidelines for "Fast Track Exit mode".

(14) Winding-up unregistered companies: An "unregistered company" includes any partnership, association or company consisting of more than seven members at the time when the petition for winding-up the partnership, etc. is presented before the Court. It does not include, however, a railway company incorporated by an Act of Parliament or other Indian Law or any Act of Parliament of the United Kingdom, or a company registered under the Companies Act, 1956 or under any previous Companies Law (Section 582).

An unregistered company may be wound-up under the Act and all the provisions of the Act with respect to winding-up apply to an unregistered company with the following exceptions and additions:

(a) To determine a Court's jurisdiction in the matter of its winding-up, the principal place of business is, for all the purposes of the winding-up deemed to be the Registered Office of the company.

[*N.B.* The Registered Office of a company is the determining factor for the Court's jurisdiction in this regard].

(b) An unregistered company is not to be wound-up under Act voluntarily or subject to supervision. It is to be wound-up by the Court.

(c) The circumstances in which an unregistered company may be wound-up are as follows:

(i) if the company has been dissolved, or has ceased to carry on business, or is carrying on business for the purpose of winding-up its affairs;

(ii) if the company is unable to pay its debts; or

(iii) if the Court is of the opinion that it is just and equitable that the company should be wound-up.

An unregistered company is deemed to be unable to pay its debts in the following circumstances:

(i) if a creditors (as assignee or otherwise), to whom a sum exceeding ₹ 500 is due, has submitted a demand in writing to the company asking it to pay him the sum due and the company has neglected to pay it or to secure or to compound for it for 3 weeks after the service of the demand;

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(ii) if any suit or legal proceedings has been instituted against any member for any debt or demand due from the company and a notice thereof has been communicated to the company and the company has not, within 10 days of the service of the notice, paid, secured or compounded for the debt;

(iii) if the execution or the process against the company has been returned unsatisfied in whose or in part;

(iv) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

Every person, in the event of an unregistered company being wound-up, who is liable to pay or to contribute to the payment of (a) any debt or liability of the company, (b) any sum for the adjustment of the rights of the members among themselves or (c) the costs, charges and expenses of the winding-up, shall be deemed to be a contributory. He will be liable to contribute to the assets of the company all sums due from him in respect of any liability to pay or contribute. If a contributory dies or becomes insolvent, the provision of the Act as regards legal representatives or assignees shall be applicable (Section 585).

The provisions of the Act with regard to staying and restraining suits and legal proceeding against a company at any time after the presentation of the petition for winding-up *but before a winding up order is made*, in the case of an unregistered company where the application to stay or restrain is made by a creditor, extent to suits and legal proceedings against any contributory (Section 586). If, however, a winding-up order has been made, no suit or legal proceedings can be commenced or proceeded with against a contributory for the debt of the company with leave of the Court (Section 587).

Note: In this chapter, wherever the word 'Act' is used, it refers to the Companies Act, 1956.

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11
Producer Companies

11.0 Introduction

(a) Background of the law relating to producer companies: The co-operative movement in India is considered as the backbone of the Indian economy. The movement was able to make rapid strides in the rural economy, uplifting the standard of living of the rural masses, which enabled them to sell their produce under an organised structure and form of organisation. The co-operative businesses in India are a time tested and successful form of organisation which enabled wider participation of the member constituting it and today there are many co-operative businesses, which are, not only state oriented but have become multi-state and national co-operatives. With the on set of reforms in the Indian economy, a need was felt that such of those producer co-operatives should be able to corporatise themselves into company form of organisation.

In the back drop of corporatisation of businesses, the Central Government constituted on 1st November, 1999, a high powered committee under the Chairmanship of Dr. Y.K. Alagh to examine and make recommendations with regard to the following agenda:

(i) Framing a legislation which would enable incorporation of co-operatives as companies and conversion of co-operatives into companies;

(ii) Ensuring that proposed legislation accommodates the unique principles of co-operative business within a regulatory framework similar to that of companies.

The Committee submitted its report on 15th March, 2000. On the basis of recommendations of the Committee, the Government introduced in the Lok Sabha on 31st August, 2001, the Companies (Second Amendment) Bill, 2001. Thereafter, the Bill was renamed as Companies (Amendment) Bill, 2002 passed by the Lok Sabha on 10th December, 2002, and by the Rajya Sabha on 17th December, 2002. The Bill was given assent by the President of India on 31st December, 2002. The Bill finally became an Act, known as the Companies (Amendment) Act, 2002 [No. 1 of 2003]. The Act came into force w.e.f. 6th February, 2003 vide Notification No. 135(E) dated 5th February, 2003.

The main objective of the amendment is to facilitate the formation of co-operative businesses as companies and to make it possible to convert existing co-operative business into companies. The option of conversion is purely voluntarily. With the Act coming into force, a new part Part-IXA has been included. With this, the Act (Companies Act, 1956) contains new Sections 581A to 581ZT relating to formation of producer companies, their administration and management, conversion of existing co-operative businesses into produce companies and matters connected therewith.

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(b) Structure of the Companies (Amendment) Act, 2002: Part-IXA introduced by the Amendment Act, 2002 contains the twelve chapters dealing with the respective matters as shown below:

Chapter-I	Definitions
Chapter-II	Incorporations of producer companies and other matters.
Chapter-III	Management of producer company.
Chapter-IV	General Meetings.
Chapter-V	Share Capital and Member Rights.
Chapter-VI	Finance, Accounts and Audit.
Chapter-VII	Loans to Member and Investments.
Chapter-VIII	Penalties.
Chapter-IX	Amalgamation, Merger or Division.
Chapter-X	Resolution of Disputes.
Chapter-XI	Miscellaneous Provisions.
Chapter-XII	Re-Conversion of producer company into Inter-State Co-operative Societies.

(c) Over-riding effect: The provisions of Part-IXA shall override other laws (Section 581ZQ). In other words, the provisions of this part shall have effect notwithstanding anything inconsistent therewith contained in this Act or any other law for the time being in force or any instrument having effect by virtue of any such law; but the provisions of any such Act or law or instrument in so far as the same are not varied by, or are inconsistent with, the provisions of this part shall apply to the producer company.

(d) Application of provisions relating to private companies (Section 581ZR): All the limitations, restrictions and provisions of this Act, other than those specified in this part, applicable to a private company, shall, as far as may be, apply to a producer company, as if it is a private limited company under this Act in so far as they are not in conflict with the provisions of this Part. Although, the status of a producer company shall be that of a private company, strictly speaking, it cannot be construed as a private company in terms of section 3(1)(iii) of the Companies Act, 1956 which defines a private company. In terms of its maximum member as in the case of private company, producer company need not limit the number of members to 50. In terms of restriction on the transfer of shares, a producer company shall be restricted as provided in sections 581ZD(ii) and (iv). Besides, it need not have a minimum paid up capital of Rs. 1 lakh. It shall also not possible for a producer company to make any invitation to the public for subscription of any shares or debentures of the company or accept any invitation of deposits.

(e) Major distinctions between Producer Company and the Private Company : All the provisions of Part-IXA (contained in sections 581A to 581ZT) relating to producer companies shall prevail over all the provision of other laws to the extent they are inconsistent therewith.

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Similarly, all the limitations, restrictions and prohibitions under section 3(iii) of the Act applicable to a private company shall not be applicable to producer company as if it is a private company to the extent they are not in conflict with the provisions of this part. Given this contradiction in the formation of producer company, a producer company differs from a private company as a distinct and different class of company. The distinction varies in the matters relating to formation, management, administration, finance, accounts, audit and merger, amalgamation or division of companies. The major distinction between these two classes of companies are as follows:

Producer Company	*Private Company*
1. Incorporation The producer company can be formed by any 10 or more individuals, each of them being individuals or institutions. Its name shall bear the words "Producer Company Ltd." and the liability of the members shall be limited by the memorandum. The objects of a producer company should be as specified in 581B, which contain 11 items. There need not be any conditions attached to articles to state that it is a private company.	Private Company can be formed by two individuals or companies. The name of the private company should bear the words "private limited" and the liability may be limited (by shares or by guarantee) and unlimited by the memorandum. The articles should specifically contain the restrictions as stated in section 3(iii) and the minimum capital should be Rs. 1 lakh. The objects can be main, incidental or ancillary and other objects.
2. Management The minimum and maximum number of directors of a producer company is 5 and 50. Their tenure is for a minimum period of 1 year and the maximum period of 5 years. The Board can opt one or more directors or additional directors which cannot exceed 1/5th of the total number of directors. The period of such directors may be for any period. Vacation of the office of directors is provided in section 581Q and the powers have been mentioned in section 581R. The matters to be transacted by the Board only at general meeting are contained in section 581S. The liability of directors for their acts in contravention of the provisions of the Act shall be joint and several. Further, this liability shall be in addition to or not in derogation of a liability imposed under any other law.	The minimum number of directors of a private company is two. The tenure of directors is not fixed by the law. The board can appoint additional, alternate director and director to fill up casual vacancy. An additional director shall hold the office upto the date of the next Annual General Meeting. The powers and functions of directors are specified in section 292. There is no additional liability for directors as provided for directors in a producer company.

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3. General Meetings The notice of the AGM shall comprise not only the agenda but also to include minutes of the previous AGM and EGM. It shall also contain the names of candidates for elections of office of the director including a statement of their qualifications. The notice of meeting is required to be given not less than 14 days and the quorum shall be 1/4th of the total members unless the articles provide for a higher number. The first AGM is required to be held within 90 days from the date of incorporation of the company.	The first AGM is required to be held within 18 months from the date of incorporation and notice of the meeting should be given not less than 21 days.
4. Share Capital and Members Rights The share capital of a producer company shall consist of equity shares only and a member shall hold shares in proportion to the patronage of that company. Active members shall have special rights and such shares are transferable to any other active member. The transferability is subject to prior or approval of the board and at par value. Nomination facility by members is mandatory. Circumstances for cession of membership are provided. Irrespective of the shareholding one member shall have only one vote.	Share capital may be equity or preference or any other class. There is no provision for holding of shares according to the patronage and there is no distinction between members. Transfer of shares is restricted and nomination is voluntary. There is also no provision for cession of membership and their rights. The voting rights shall be generally governed by the manner prescribed by the articles of association.
5. Loans and Investments Loans to members can be granted only after approval by members in the general meeting. The general reserves of a producer company shall be invested in specified securities. The limit of investment in other companies either by the producer or together with its subsidiaries cannot exceed 30% of the aggregate paid up capital and free reserves.	Excepting that of loan to directors a private company cannot provide loan or advance to its members. The provisions of Section 372A relating to inter-corporate loans and investments are not applicable to a private company.
6. Finance, Accounts and Audit Producer companies shall keep proper books of accounts and internal audit shall be carried out by a chartered accountant. Apart from the matters provided in section	Proper books of accounts shall be kept. Internal audit need not be carried out and auditor's report shall be subject to the provisions as specified in section 227. A

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227, auditor shall report on certain additional matters like debts due with bad debts, verification of cash securities, donations etc. A producer company may donate or subscribe to any institution or individuals for social and economic welfare or for promoting mutual assistance principles. The aggregate amount shall not exceed 3% of the net profit in the financial year immediately proceeding the financial year. It cannot donate directly or indirectly to any political party or purposes.	private company has no restriction for making donations or subscription and it can contribute donation to political party or purpose as specified in section 293A.
7. Penalties Penalties for contravention of provisions relating to producer company are specified generally in section 581ZA.	Penalties for contravention of the applicable provisions is specified in appropriate sections.
8. Amalgamation, Merger or Division Registrar of Companies shall have jurisdiction over the administration of scheme of amalgamation and an appeal can be preferred to High Court.	The Court has the jurisdiction over the matter.
9. Resolution of Disputes Any dispute relating to formation, management or business of a producer company shall be settled by the Arbitration and Conciliation Act, 1996.	The resolution of disputes (oppression and mis-management are handled by the Company Law Board under sections 397, 398 and 399 of the Companies Act, 1956.
10. Miscellaneous Provisions Striking off the name of a producer company shall be done by the Registrar of Companies in accordance with section 560 of the Act. The provisions relating to producer companies shall have an overriding affect over any such Act or law for the time being inforce.	Striking of name of company are generally regulated by section 560 or any other scheme as may be notified by the Central Government. There is no provision which specifies that the provisions relating to private company shall have an overriding effect over any other Act or law for the time being inforce.
11. Reconversion of Companies A producer company can be converted into Inter-State Co-operative Society and vice-versa.	Reconversion is possible by converting a public company into a private company and vice-versa.

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(f) Power to modify Act in its application to producer companies (Section 581ZT)

(1) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act (other than those contained in this Part) specified in the said notification:

(a) shall not apply to the producer companies or any class or category thereof; or

(b) shall apply to the producer companies or any class or category thereof with such exception or adaptation as may be specified in the notification.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

11.1 Definitions

Section 581A summarises the following definitions:

(a) "active member" means a member who fulfils the quantum and period of patronage of the producer company as may be required by the articles;

(b) "chief executive" means an individual appointed as such under sub-section (1) of section 581W;

(c) "limited return" means the maximum dividend as may be specified by the articles;

(d) "member" means a person or producer institution (whether incorporated or not) admitted as a member of a producer company and who retains the qualifications necessary for continuance as such;

(e) "inter-State co-operative society" means a Multi-State co-operative society as defined in clause (p) of Section 3 of the Multi-State Co-operative Societies Act, 2002 (39 of 2002) and includes any co-operative society registered under any other law for the time being in force, which has, subsequent to its formation, extended any of its objects to more than one State by enlisting the participation of persons or by extending any of its activities outside the State, whether directly or indirectly or through an institution of which it is a constituent;

(f) "mutual assistance principles" means the principles set out in sub-section (2) of section 581G;

(g) "officer" includes any director or Chief Executive or Secretary or any person in accordance with whose directions or instructions part or whole of the business of the producer company is carried on;

(h) "patronage" means the use of services offered by the producer company to its member by participation in its business activities;

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(i) "patronage bonus" means payments made by a producer company out of its surplus income to the member in proportion to their respective patronage;

(j) "primary produce" means—

(i) produce of farmers, arising from agriculture (including animal husbandry, horticulture, floriculture, pisciculture, viticulture, forestry, forest products, re-vegetation, bee raising and farming plantation products), or from any other primary activity or service which promotes the interest of the farmers or consumers; or

(ii) produce of persons engaged in handloom, handicraft and other cottage industries;

(iii) any product resulting from any of the above activities, including by-products of such products;

(iv) any product resulting from an ancillary activity that would assist or promote any of the aforesaid activities or anything ancillary thereto;

(v) any activity which is intended to increase the production of anything referred to in sub-clauses (i) to (iv) or improve the quality thereof;

(k) "producer" means any person engaged in any activity connected with or relatable to any primary produce;

(l) "producer company" means a body corporate having objects or activities specified in section 581B and registered as producer company under this Act;

(m) "producer institution" means a producer company or any other institution having only producer or producers or producer company or producer companies as its member whether incorporated or not having any of the objects referred to in section 581B and which agrees to make use of the services of the producer company or producer companies as provided in its articles.

(n) "withheld price" means part of the price due and payable for goods supplied by any member to the producer company; and as withheld by the producer company for payment on a subsequent date.

11.2 Objects and Formation of A Producer Company

Producer company means a body corporate having objects or activities specified in Section 581B and registered as a producer company under the Companies Act, 1956.

Every producer company should deal basically with the produce of its active member for carrying out any of its objects. The objects of the producer company, as per section 581B, may be relating to all or any of the following matters, namely:

(i) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the members or import of goods or services for their benefit:

Provided that the producer company may at its option carry on any of the activities specified in this clause either by itself or through other institution;

(ii) processing including preserving, drying, distilling, brewing, vinting, canning and

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packaging of produce of its member;

(iii) manufacture, sale or supply of machinery, equipment or consumables mainly to its members;

(iv) providing education on the mutual assistance principles to its members and others;

(v) rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its members;

(vi) generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communication relatable to primary produce;

(vii) insurance of producers or their primary produce;

(viii) promoting techniques of mutuality and mutual assistance;

(ix) welfare measures or facilities for the benefit of members as may be decided by the Board;

(x) any other activity, ancillary or incidental to any of the activities referred to in clauses (i) to (ix) or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner;

(xi) financing of procurement, processing, marketing or other activities specified in clauses (i) to (x) which include extending of credit facilities or any other financial services to its members.

(a) Formation and Registration: The formalities relating to registration of a producer company are similar as applicable for all companies. However, for registration of a producer company, the requirements of Part-IXA should also be complied with. [Section 581C].

A producer company can be formed by any ten or more individuals, each of them being a producer, or any two or more producer institutions, or a combination of ten or more individuals and producer institutions, desirous of forming a producer company having its objects specified in section 581B and otherwise complying with the requirements and provisions of this Act in respect of registration, may form Producer Company under this Act.

If the Registrar of Companies is satisfied that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, he shall, within thirty days of the receipt of the documents required for registration, register the memorandum, the articles and other documents, if any, and issue a certificate of incorporation under this Act.

After incorporation, producer company so formed shall have the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them and be termed as company limited by shares.

It also becomes a body corporate as if it is a private limited company to which the provisions contained in this Part apply, without, however, any limit to the number of members thereof, and the producer company shall not, under any circumstance, whatsoever, become or be deemed to become a public limited company under this Act.

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The producer company may reimburse to its promoters all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the members.

The producer company should also be required to submit (a) memorandum and (b) its articles duly signed by the subscribers to the memorandum, to the Registrar of the State in which the registered office of the company is to situate [Section 581G(1)].

(b) Effect of incorporation of producer company (Section 581K): Every shareholder of the inter-state co-operative society immediately before the date of registration of producer company (hereafter referred to as the transformation date) shall be deemed to be registered on and from that date as a shareholder of the producer company to the extent of the face value of the shares held by such shareholder.

(c) Membership and voting rights of members (Section 581D): A person, who has any business interest which is not in conflict with business of the producer company, shall become a member. On the other hand, a member, who acquires any business interest which is in conflict with the business of the producer company, shall cease to be a member and be removed as a member in accordance with articles of the producer company.

The articles of any producer company may provide for the conditions, subject to which a member may continue to retain his membership, and the manner in which voting rights shall be exercised by the members.

These voting's rights are:

(i) In a case where the members consist solely of individual members, the voting rights shall be based on a single vote for every member, irrespective of his shareholding or patronage of the producer company.

(ii) In a case where the member consists of producer institutions only, the voting rights of such Producer institutions shall be determined on the basis of their participation in the business of the producer company in the previous year, as may be specified by articles.

Provided that during the first year of registration of a producer company, the voting rights shall be determined on the basis of the shareholding by such Producer institutions.

(iii) In a case where the members consist of individuals and producer institutions, the voting rights shall be computed on the basis of a single vote for every member.

However, a producer company may, if so authorised by its articles, restrict the voting rights to active members, in any special or general meeting.

(d) Benefits to member (Section 581E): The member of the producer company may get benefited in the following ways:

(1) Every member of producer company, subject to provisions made in the articles, shall initially receive only such value for the produce or products pooled and supplied, as the Board of producer company may determine, and the withheld price may be disbursed later in cash or in kind or by allotment of equity shares, in proportion to the produce

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supplied to the producer company during the financial year to such extent and in such manner and subject to such conditions as may be decided by the Board.

(2) Every member shall, on the share capital contributed, receive only a limited return. However, every such member may be allotted bonus shares in accordance with the provisions contained in ection 581ZJ.

(3) The surplus if any, remaining after making provision for payment of limited return and reserves referred to in section 581ZI, may also be disbursed as patronage bonus, amongst the members, in proportion to their participation in the business of the producer company, either in cash or by way of allotment of equity shares, or both, as may be decided by the members at the general meeting.

11.3 Memorandum of Producer Company (Section 581F)

The memorandum of association of every producer company should contain the following:

(a) the name of the company with *"producer company Limited"* as the last words of the name of such Company;

(b) the State in which the registered office of the producer company is to situate;

(c) the main objects of the producer company shall be one or more of the objects specified in section 581B;

(d) the names and addresses of the persons who have subscribed to the memorandum;

(e) the amount of share capital with which the producer company is to be registered and division thereof into shares of a fixed amount;

(f) the names, addresses and occupations of the subscribers being producers, who shall act as the first directors in accordance with sub-section (2) of section 58IJ.

(g) that the liability of its member is limited;

(h) opposite to the subscriber's name the number of shares each subscriber takes:

Provided that no subscriber shall take less than one share;

(i) in case the objects of the producer company are not confined to one State, the States to whose territories the objects extend.

11.4 Articles of Association (Section 581G)

The articles should contain the following provisions, namely:

(a) the qualifications for member, the conditions for continuance or cancellation of member and the terms, conditions and procedure for transfer of shares;

(b) the manner of ascertaining the patronage and voting right based on patronage;

(c) subject to the provisions contained in sub-section (1) of section 581N, the manner of constitution of the Board, its powers and duties, the minimum and maximum number of directors, manner of election and appointment of directors and retirement by rotation,

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qualifications for being elected or continuance as such and the terms of office of the said directors, their powers and duties, conditions for election or co-option of directors, method of removal of directors and the filling up of vacancies on the Board, and the manner and the terms of appointment of the Chief Executive;

(d) the election of the Chairman, term of office of directors and the Chairman, manner of voting at the general or special meetings of members, procedure for voting, by directors at meetings of the Board, powers of the Chairman and the circumstances under which the Chairman may exercise a casting vote.

(e) the circumstances under which, and the manner in which, the withheld price is to be determined and distributed;

(f) the manner of disbursement of patronage bonus in cash or by issue of equity shares, or both;

(g) the contribution to be shared and related matters referred to in sub-section (2) of section 581ZI;

(h) the matters relating to issue of bonus shares out of general reserves as set out in section 581ZJ;

(i) the basis and manner of allotment of equity shares of the producer company in lieu of the whole or part of the sale proceeds of produce or products supplied by the members;

(j) the amount of reserves, sources from which funds may be raised, limitation on raising of funds, restriction on the use of such funds and the extent of debt that may be contracted and the conditions thereof;

(k) the credit, loans or advances which may be granted to a member and the conditions for the grant of the same;

(l) the right of any member to obtain information relating to general business of the company;

(m) the basis and manner of distribution and disposal of funds available after meeting liabilities in the event of dissolution or liquidation of the producer company;

(n) the authorisation for division, amalgamation, merger, creation of subsidiaries and the entering into joint ventures and other matters connected therewith;

(o) laying of the memorandum and articles of the producer company before a special general meeting to be held within ninety days of its registration;

(p) any other provision, which the member may, by special resolution recommend to be included in articles.

The articles should also contain the following *mutual assistance principles*, namely:

(a) the membership shall be voluntary and available, to all eligible persons who, can participate or avail of the facilities or services of the producer company, and are willing to accept the duties of member;

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(b) each member shall save as otherwise provided in this Part, have only a single vote irrespective of the share holding;

(c) the producer company shall be administered by a Board consisting of persons elected or appointed as directors in the manner consistent with the provisions of this Part and the Board shall be accountable to the members;

(d) save as provided in this Part, there shall be limited return on share capital;

(e) the surplus arising out of the operations of the producer company shall be distributed in an equitable manner by—

(i) providing for the development of the business of the producer company;

(ii) providing for common facilities; and

(iii) distributing amongst the members, as may be admissible in proportion to their respective participation in the business;

(f) provision shall be made for the education of member, employees and others, on the principles of mutuality and techniques of mutual assistance;

(g) the producer company shall actively co-operate with other producer companies (and other organisations following similar principles) at local, national or international level so as to best serve the interest of their members and the communities it purports to serve.

(a) Amendment of memorandum (Section 581H): A producer company shall not alter the conditions contained in its memorandum except in the cases, by the mode and to the extent for which express provision is made in this Act. However, a producer company may, by special resolution, not inconsistent with section 581B, alter its objects specified in its memorandum.

A copy of the amended memorandum, together with a copy of the special resolution duly certified by two directors, shall be filed with the Registrar within thirty days from the date of adoption of resolution.

In case of transfer of the registered office of a producer company from the jurisdiction of one Registrar to another, certified copies of the special resolution certified by two directors shall be filed with both the Registrars within thirty days, and each Registrar shall record the same, and thereupon the Registrar from whose jurisdiction the office is transferred, shall forthwith forward to the other Registrar all documents relating to the producer company.

The alteration of the provisions of memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Company Law Board on petition.

(b) Amendment of articles (Section 581-I): Any amendment of the articles should be proposed by not less than two-third of the elected directors or by not less than one-third of the members of the producer company, and adopted by the members by a special resolution.

A copy of the amended articles together with the copy of the special resolution, both duly certified by two directors, should be filed with the Registrar within thirty days from the date of its adoption.

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11.5 Inter-State Co-operative Societies

(a) Conversion of Inter-State Co-operative Societies to become producer companies (Section 581J): Any inter-State co-operative society having objects for multiplicity for states may make an application to the Registrar for registration as producer company.

Such application shall be accompanied by—

(a) a copy of the special resolution, of not less than two-third of total members of inter-State co-operative society, for its incorporation as a producer company,

(b) a statement showing—

(i) names and addresses or the occupation of the directors and Chief Executive, if any, by whatever name called, of such co-operative; and

(ii) list of members of such inter-State co-operative society;

(c) a statement indicating that the inter-State co-operative society is engaged in any one or more of the objects specified in section 581B;

(d) a declaration by two or more directors of the inter-State co-operative society certifying that particulars given in clauses (a) to (c) are correct.

The word "Producer Company Limited" should form part of its name to show its identity.

On compliance with the requirements of the Act, the Registrar shall, within a period of thirty days of the receipt of application, certify under his hand that the inter-State co-operative society applying for registration is registered and thereby incorporated as a producer company.

A co-operative society formed by producers, by federation or union of co-operative societies of producers or co-operatives of producers, registered under any law for the time being in force which has extended its objects outside the State, either directly or through a union or federation of co-operatives of which it is a constituent, as the case may be, and any federation or union of such co-operatives, which has so extended any of its objects or activities outside the State, shall be eligible to make an application as above to obtain registration as a producer company under this Part.

The Inter-State Co-operative Society upon its registration, under this section transformed into a producer company, and thereafter shall be governed by the provisions of this Part to the exclusion of the law by which it was earlier governed, save in so far as anything done or omitted to be done before its registration as a producer company, and notwithstanding anything contained in any other law for the time being in force, no person shall have any claim against the co-operative institution or the company by reason of such conversion or transformation.

Upon registration as a producer company, the Registrar of Companies who registers the company is required to intimate the Registrar with whom the erstwhile inter-State co-operative society was earlier registered for appropriate deletion of the society from its register.

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(b) Vesting of undertaking in producer company (Section 581L)

(1) All properties and assets, of, or belonging to, the inter-State co-operative society as on the transformation date, shall vest in the producer company.

(2) All the rights, debts, liabilities, interests, privileges and obligations of the inter-State co-operative society as on the transformation date shall stand transferred to, and be the rights, debts, liabilities, interests, privileges and obligations of, the producer company.

(3) Without prejudice to the provisions contained in sub-section (2), all debts, liabilities and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for, the society as on the transformation date for or in connection with their purposes, shall be deemed to have been incurred, entered into, or engaged to be done by, with or for, the producer company.

(4) All sums of money due to the inter-State co-operative society immediately before the transformation date, shall be deemed to be due to the producer company.

(5) Every organisation, which was being managed immediately before the transformation date by the inter-State co-operative society shall be managed by the producer company for such part, to such extent and in such manner as the circumstances may require.

(6) Every organisation which was getting financial, managerial or technical assistance from the inter-state co-operative society, immediately before the transformation date, may continue to be given financial, managerial or technical assistance, as the case may be, by the producer company, for such part, to such extent and in such manner as that company may deem fit.

(7) The amount representing the capital of the erstwhile inter-State co-operative society shall form part of the capital of the producer company.

(8) Any reference to the inter-State co-operative society in any law other than this Act or in any contract or other instrument, shall be deemed to be reference to the producer company.

(9) If, on the transformation date, there is pending any suit, arbitration, appeal or other legal proceeding of whatever nature by or against the inter-State co-operative society, the same shall not abate, be discontinued or be in any way prejudicially affected by reason of the incorporation of the producer company under section 581C or transformation of the inter-State co-operative society as a producer company under section 581J, as the case may be, but the suit, arbitration, appeal or other proceeding, may be continued, prosecuted and enforced by or against the producer company in the same manner and to the same extent as it would have, or may have been continued, prosecuted and enforced by or against the inter-State co-operative society as if the provisions contained in this Part had not come into force.

(c) Concession, etc. to be deemed to have been granted to producer company (Section 581M) : With effect from the transformation date, all fiscal and other concessions, licences, benefits, privileges and exemptions granted to the inter-state co-operative society in connection with the affairs and business of the inter-State co-operative society under any law for the time being in force shall be deemed to have been granted to the producer company.

(d) Provisions in respect of officers and other employees of Inter-State Co-operative Society (Section 581N): (1) All the directors in the inter-State co-operative society before

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the incorporation of the producer company shall continue in office for a part of one year from the transformation date and in accordance with the provisions of this Act.

(2) Every officer or other employee of the inter-State co-operative society (except a director of the Board, Chairman or Managing Director) serving in its employment immediately before the transformation date shall, in so far as such officer or other employee is employed in connection with the inter-State co-operative society which has vested in the producer company by virtue of this Act, become, as from the transformation date, an officer or, as the case may be, other employee of the producer company and shall hold his office or service therein by the same tenure, at the same remuneration, upon the same terms and conditions, with the same obligations and with the same rights and privileges as to leave, leave travel concession, welfare scheme, medical benefit scheme, insurance, provident fund, other funds, retirement, voluntary retirement, gratuity and other benefits as he would have held under the erstwhile inter-State co-operative society if its undertaking had not vested in the producer company and shall continue to do so as an officer or, as the case may be, other employee of the producer company.

(3) Where an officer or other employee of the inter-State co-operative society opts not to be in employment or service of the producer company, such officer or other employee shall be deemed to have resigned.

(4) Notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947) or in any other law for the time being in force, the transfer of the services of any officer or other employee of the inter-State co-operative society to the producer company shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.

(5) The officers and other employees who have retired before the transformation date from the service of the inter-State co-operative society and are entitled to any benefits, rights or privileges, shall be entitled to receive the same benefits, rights or privileges from the producer company.

(6) The trusts of the provident fund or the gratuity fund of the inter-State co-operative society and any other bodies created for the welfare of officers or employees shall continue to discharge functions in the producer company as was being done hitherto in the inter-State co-operative society and any tax exemption granted to the provident fund or the gratuity fund would continue to be applied to the producer company.

(7) Notwithstanding anything contained in this Act or in any other law for the time being in force or in the regulations of the inter-State co-operative society, no director of the Board, Chairman, managing director or any other person entitled to manage the whole or substantial part of the business and affairs of the inter-State co-operative society. The co-operative society shall be entitled to any compensation against the inter-State co-operative society or the producer company for the loss of office or for the premature termination of any contract of management entered into by him with the inter-State co-operative society.

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11.6 Management

(a) Number of directors: Every producer company shall have at least 5 directors and not more than 15 directors. (Section 581O). The proviso to the section states that in the case of the Inter-State Co-operative Society incorporated as a producer company, such company may have more than 15 directors for a period of one year from the date of its incorporation as a producer company.

(b) Appointment of Directors (Section 581P): The members who sign the memorandum and the articles are designated as first directors and shall govern the affairs of the company until the directors are appointed at the Annual General Meeting.

The Election of Directors shall be conducted within 90 days from the date of registration of the producer company.

In the case of Inter-State Co-operative Society the election shall be held within a period of 365 days.

The period of office of a director shall be not less than one year and not exceeding 5 years as may be specified in the articles.

The directors retiring by rotation in accordance with the articles shall be eligible for re-appointment as a director.

Normally, the directors of the Board shall be elected or appointed by the members in the Annual General Meeting.

The Board may also co-opt one or more expert directors or an additional director. Such directors cannot exceed 1/5th of the total number of directors. The expert directors shall not have the right to vote in the election of chairman but shall be eligible to be elected as chairman if it is provided by the articles. The maximum period for which expert director or additional director holds office shall not exceed such period as may be prescribed in the articles.

(c) Vacation of office by directors (Section 581Q): The office of the director of a producer company shall become vacant if—

(a) he is convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months;

(b) the Producer Company, in which he is a director, has made a default in repayment of any advances or loans taken from any company or institution or any other person and such default continues for ninety days;

(c) he has made a default in repayment of any advances or loans taken from the producer company in which he is a director;

(d) the producer company, in which he is a director—

  (i) has not filed the annual accounts and annual return for any continuous three financial years commencing on or after the 1st day of April, 2002; or

  (ii) has failed to, repay its deposit or withheld price or patronage bonus or interest

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thereon on due date, or pay dividend and such failure continues for one year or more;

(e) default is made in holding election for the office of director, in the producer company in which he is a director, in accordance with the provisions of this Act and articles;

(f) the annual general meeting or extraordinary general meeting of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason.

The above provisions may also apply to the director of a Producer institution, which is a member of a producer company.

(d) Powers and functions of Board (Section 581R): The Board of directors of a producer company shall exercise, subject to articles, all such powers and to do all such acts and things, as the company is authorised so to do. These powers may include all or any of the following matters, namely:

(i) determination of the dividend payable;

(ii) determination of the quantum of withheld price and recommend patronage to be approved at general meeting;

(iii) admission of new member;

(iv) pursue and formulate the organisational policy, objectives, establish specific long-term and annual objectives, and approve corporate strategies and financial plans;

(v) appointment of a Chief Executive and such other officers of the producer company, as may be specified in the articles;

(vi) exercise superintendence, direction and control over Chief Executive and other officers appointed by it;

(vii) cause proper books of account to be maintained; prepare annual accounts to be placed before the annual general meeting with the auditor's report and the replies on qualifications, if any, made by the auditors;

(viii) acquisition or disposal of property of the producer company in its ordinary course of business;

(ix) investment of the funds of the producer company in the ordinary course of its business;

(x) sanction any loan or advance, in connection with the business activities of the producer company to any member, not being a director or his relative;

(xi) take such other measures or do such other acts as may be required in the discharge of its functions or exercise of its powers.

All the above powers may be exercised by the Board, through a resolution passed at its meeting on behalf of the producer company. However, a director or a group of directors, who do not constitute the Board, shall not exercise any of the powers exercisable by it.

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(e) Liability of directors (Section 581T): When the directors vote for a resolution, or approve by any other means, anything done in contravention of the provisions of this Act or any other law for the time being in force or articles, they shall be jointly and severally liable to make good any loss or damage suffered by the producer company.

The producer company is having the right to recover from its director—

(i) where such director has made any profit as a result of the contravention of law or articles, an amount equal to the profit so made;

(ii) where the producer company incurred a loss or damage as a result of the contravention of law or articles, an amount equal to that loss or damage.

(iii) The liability imposed under this section shall be in addition to and not in derogation of a liability imposed on a director under this Act or any other law for the time being in force.

(f) Committee of directors (Section 581U): The Board may constitute such number of committees as it may deem fit for the purpose of assisting the Board in the efficient discharge of its functions. However, the Board shall not delegate any of its powers or assign the powers of the Chief Executive, to any committee.

A committee may, with the approval of the Board, co-opt such number of persons as it deems fit as member of the committee. However, the Chief Executive appointed under Section 581W or a director of the producer company shall be a member of such committee.

Every such committee shall function under the general superintendence, direction and control of the Board, for such duration, and in such manner as the Board may direct.

The fee and allowances to be paid to the members of the committee shall be such as may be determined by the Board.

The minutes of each meeting of the committee shall be placed before the Board at its next meeting.

(g) Meetings of Board and quorum (Section 581V): A meeting of the Board shall be held not less than once in every three months and at least four such meetings shall be held in every year.

Notice of every meeting of the Board of directors shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.

The Chief Executive shall give notice as aforesaid not less than seven days prior to the date of the meeting of the Board and if he fails to do so, he shall be punishable with fine which may extend to one thousand rupees. However, a meeting of the Board may be called at shorter notice and the reasons thereof shall be recorded in writing by the Board.

The quorum for a meeting of the Board shall be one-third of the total strength of directors, subject to a minimum of three.

Subject to provisions in the articles, directors including the co-opted director, may be paid such fees and allowances for attendance at the meetings of the Board, as may be decided by the member in the general meeting.

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(h) Chief Executive and his functions (Section 581W): (1) Every producer company shall have a full time Chief Executive to be appointed by the Board from amongst persons other than member.

(2) The Chief Executive shall be *ex officio* director of the Board and such director shall not retire by rotation.

(3) Save as otherwise provided in articles, the qualifications, experience and the terms and conditions of service of the Chief Executive shall be such as may be determined by the Board.

(4) The Chief Executive shall be entrusted with substantial powers of management as the Board may determine.

The Chief Executive shall manage the affairs of the producer company under the general superintendence, direction and control of the Board and be accountable for the performance of the producer company. Without prejudice to the above the Chief Executive may exercise the powers and discharge the functions, namely:

(a) doing administrative acts of a routine nature including managing the day-to-day affairs of the producer company;

(b) operating bank accounts or authorise any person, subject to the general or special approval of the Board in this behalf, to operate the bank account.

(c) making arrangements for safe custody of cash and other assets of the Producer Company;(d) signing such documents as may be authorised by the Board, for and on behalf of the company;

(e) maintaining paper books of account; preparing annual accounts and audit thereof; placing the audited accounts before the Board and in the annual general meeting of the member;

(f) furnishing members with periodic information to appraise them of the operation and functions of the producer company;

(g) making appointments to posts in accordance with the powers delegated to him by the Board;

(h) assisting the Board in the formulation of goals, objectives, strategies, plans and policies;

(i) advising the Board with respect to legal and regulatory matters concerning the proposed and on going activities and taking necessary action in respect thereof;

(j) exercising the powers as may be necessary in the ordinary course of business;

(k) discharging such other functions, and exercising such other powers, as may be delegated by the Board.

(i) Secretary of a producer company (Section 581X): Every producer company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall have a whole-time secretary, who possesses membership of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980). If a producer company fails to comply with this, the company and every officer of the

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company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues:

In any proceedings against a person in respect of an offence, under this section, it shall be a defence to prove that all reasonable efforts to comply with the provisions of section were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.

11.7 General Meetings

(a) Matters to be transacted at general meeting (Section 581S): The Board of directors of a producer company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at the annual general meeting of its members, namely:

(a) approval of budget and adoption of annual accounts of the producer company;

(b) approval of patronage bonus;

(c) issue of bonus shares;

(d) declaration of limited return and decision on the distribution of patronage;

(e) specify the conditions and limits of loans that may be given by the Board to any director; and

(f) approval of any transaction of the nature as is to be reserved in the articles for approval by the members.

(b) Quorum (Section 581Y): Unless the articles require a larger number, one-fourth of the total membership shall constitute the quorum at a general meeting.

(c) Voting Rights (Section 581Z): Subject to sections 581D, (1)&(3), every member shall have one vote and in the case of equality of votes, the Chairman or the person presiding shall have a casting vote except in the case of election of the Chairman.

(d) Annual general meetings (Section 581ZA): (1) Every producer company shall hold, annual general meeting in each year and the time gap between one annual general meeting to another, should not be more than fifteen months.

In this regard, the Registrar may, for any special reason, permit extension of the time for holding any annual general meeting (not being the first annual general meeting) by a part not exceeding three months.

(2) A producer company shall hold its first annual general meeting within a period of ninety days from the date of its incorporation.

(3) The member shall adopt the articles of the producer company and appoint directors of its Board in the annual general meeting.

(4) The notice calling the annual general meeting shall be accompanied by the following

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documents, namely:

(a) the agenda of the annual general meeting;

(b) the minutes of the previous annual general meeting or the extra-ordinary general meeting;

(c) the names of candidates for election, if any, to the office of director including a statement of qualifications in respect of each candidate;

(d) the audited balance-sheet and profit and loss accounts of the producer company and its subsidiary, if any, together with a report of the Board of directors of such Company with respect to—

  (i) the state of affairs of the producer company;

  (ii) the amount proposed to be carried to reserve;

  (iii) the amount to be paid as limited return on share capital;

  (iv) the amount proposed to be disbursed as patronage bonus;

  (v) the material changes and commitments, if any, affecting the financial position of the producer company and its subsidiary, which have occurred in between the date of the annual accounts of the producer company to which the balance sheet relates and the date of the report of the Board;

  (vi) any other matter of importance relating to energy conservation, environmental protection, expenditure or earnings in foreign exchanges;

  (vii) any other matter which is required to be, or may be, specified by the Board;

(e) the text of the draft resolution for appointment of auditors;

(f) the text of any draft resolution proposing amendment to the memorandum or articles to be considered at the general meeting, along with the recommendations of the Board.

(5) The Board of Directors shall, on the requisition made in writing, duly signed and setting out the matters for the consideration, made by one-third of the members entitled to vote in any general meeting, proceed to call an extraordinary general meeting in accordance with the provisions contained in sections 169 to 186 of this Act.

(6) Every annual general meeting should be called during business hours, on a day that is not a public holiday and shall be held at the registered office or at some other place within the city, town or village in which the registered office of the Company is situate.

(7) A general meeting of the producer company shall be called by giving not less than fourteen days prior notice in writing.

(8) The notice of the general meeting indicating the date, time and place of the meeting shall be sent to every member and auditor of the producer company.

(9) Unless the articles of the producer company provide for a larger number, one-fourth of the total number of members of the producer company shall be the quorum for its annual general meeting.

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(10) The proceedings of every annual general meeting along with the Directors' Report, the audited balance-sheet and the profit and loss account shall be filed with the Registrar within sixty days of the date on which the annual general meeting is held, with an annual return along with the filing fees as applicable under the Act.

(11) In the case where a producer company is formed by Producer institutions, such institutions shall be represented in the general body through the Chairman or the Chief Executive thereof who shall be competent to act on its behalf:

Provided that a Producer institution shall not be represented if such institution makes a default or failure referred to in clauses (d) to (f) of sub-section (1) of section 581Q.

11.8 Share Capital and Member Rights

(a) Share capital (Section 581ZB): The share capital of a producer company shall consist of equity shares only. The shares held by a member in a producer company, shall as far as may be, be in proportion to the patronage of that company.

(b) Special user rights (Section 581ZC): The producers, who are active member may, if so provided in the articles, have special rights and the producer company may issue appropriate instruments to them in respect of such special rights.

The instruments shall be issued after obtaining approval of the Board in that behalf, be transferable to any other active member of that producer company. Here special right means any right relating to supply of additional produce by the active member or any other right relating to his produce which may be conferred upon him by the Board.

(c) Transferability of shares and attendant rights (Section 581ZD): The provisions are as follows:

(1) Save as otherwise provided in sub-sections (2) to (4), the shares of a member of a producer company shall not be transferable.

(2) A member of a producer company may, after obtaining the previous approval of the Board, transfer the whole or part of his shares along with any special rights, to an active member at par value.

(3) Every member shall within three months of his becoming a member of Producer Company, nominate, as specified in articles, a person to whom his shares in the producer company shall vest in the event of his death.

(4) The nominee shall, on the death of the member, become entitled to all the rights in the shares of the producer company and the Board of that Company shall transfer the shares of the deceased member to his nominee:

Provided that in a case where such nominee is not a producer, the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board.

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(5) Where the Board of a producer company is satisfied that—

(a) any member has ceased to be a primary producer; or

(b) any member has failed to retain his qualifications to be a member as specified in articles, the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board:

Provided that the Board shall not direct such surrender of shares unless the member has been served with a written notice and given an opportunity of being heard.

11.9 Finance, Accounts and Audit

(a) Books of accounts (Section 581ZE): Every producer company has to maintain books of account registered office with respect to—

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

(b) all sales and purchase of goods by the producer company;

(c) the instruments of liability executed by or on behalf of the producer company;

(d) the assets and liabilities of the producer company;

(e) in case of a producer company engaged in production, processing and manufacturing, the particulars relating to utilisation of materials or labour or other items of costs.

The balance sheet and profit and loss account of the producer company shall be prepared, as far as may be, in accordance with the provisions contained in section 211 of the Companies Act, 1956.

(b) Internal audit (Section 581ZF): Every producer company shall have internal audit of its accounts carried out, at such interval and in such manner as may be specified in articles, by a chartered accountant as defined in clause (b) of sub-section (1) of Section 2 of the Institute of Chartered Accountants Act, 1949 (38 of 1949).

(c) Duties of auditor under this Part (Section 581ZG): Without prejudice to the provisions contained in section 227, the auditor shall report on the following additional matters relating to the producer company, namely:—

(a) the amount of debts due along with particulars of bad debts if any;

(b) the verification of cash balance and securities;

(c) the details of assets and liabilities;

(d) all transactions which appear to be contrary to the provisions of this Part;

(e) the loans given by the producer company to the directors;

(f) the donations or subscriptions given by the producer company;

(g) any other matter as may be considered necessary by the auditor.

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(d) Donations or subscription by producer company (Section 581ZH): A producer company may, by special resolution, make donation or subscription to any institution or individual for the purposes of—

(a) promoting the social and economic welfare of producer member or producers or general public; or

(b) promoting the mutual assistance principles:

Provided that the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the producer company in the financial year immediately preceding the financial year in which the donation or subscription was made.

Further, no producer company shall make directly or indirectly to any political party or for any political purpose to any person any contribution or subscription or make available any facilities including personnel or material.

(e) General and other reserves (Section 581ZI): Every producer company shall maintain a general reserve in every financial year, in addition to any reserve maintained by it as may be specified in articles.

In a case where the producer company does not have sufficient funds in any financial year for transfer to maintain the reserves as may be specified in articles, the contribution to the reserve shall be shared amongst the member in proportion to their patronage in the business of that company in that year.

(f) Issue of bonus shares (Section 581ZJ): 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 member on the date of the issue of such shares.

(g) Loan, etc., to member (Section 581ZK): The Board may, subject to the provisions made in articles, provide financial assistance to the members of the producer company by way of—

(i) credit facility, to any member, in connection with the business of the Producer Company, for a period not exceeding six months;

(ii) loans and advances, against security specified in articles to any member, repayable within a period exceeding three months but not exceeding seven years from the date of disbursement of such loan or advances.

However, any loan or advance to any director or his relative shall be granted only after the approval by the members in general meeting.

(h) Investment in other companies, formation of subsidiaries, etc. (Section 581ZL): The producer company has to follow the following provisions under this section.

(1) The general reserves of any producer company shall be invested to secure the highest returns available from approved securities, fixed deposits, units, bonds issued by the Government or co-operative or scheduled bank or in such other mode as may be prescribed.

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(2) Any producer company may, for promotion of its objectives acquire the shares of another producer company.

(3) Any producer company may subscribe to the share capital of, or enter into any agreement or other arrangement, whether by way of formation of its subsidiary company, joint venture or in any other manner with any body corporate, for the purpose of promoting the objects of the producer company by special resolution in this behalf.

(4) Any producer company, either by itself or together with its subsidiaries, may invest, by way of subscription, purchase or otherwise, shares in any other company, other than a producer company, specified under sub-section (2), or subscription of capital under sub-section (3), for an amount not exceeding thirty per cent of the aggregate of its paid-up capital and free reserves:

Provided that a producer company may, by special resolution passed in its general meeting and with prior approval of the Central Government, invest in excess of the limits specified in this section.

(5) All investments by a producer company may be made if such investment are consistent with the objects of the producer company.

(6) The Board of a producer company may, with the previous approval of members by a special resolution, dispose of any of its investments referred to in sub-sections (3) and (4).

(7) Every producer company shall maintain a register containing particulars of all the investments, showing the names of the companies in which shares have been acquired, number and value of shares; the date of acquisition; and the manner and price at which any of the shares have been subsequently disposed of.

(8) The register referred to in sub-section (7) shall be kept at the registered office of the producer company and the same shall be open to inspection by any member who may take extracts there from.

11.10 Penalties

Penalty for contravention (Section 581ZM):

(1) If any person, other than a producer company registered under this part, carries on business under any name which contains the words “producer company limited”, he shall be punishable with fine which may extend to ten thousand rupees for every day during which such name has been used by him.

(2) If a director or an officer of a producer company, who willfully fails to furnish any information relating to the affairs of the producer company required by a member or a person duly authorised in this behalf, he shall be liable to imprisonment for a term which may extend to six months and with fine equivalent to five per cent of the turnover of that company during preceding financial year.

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(3) If a director or officer of a producer company—

(a) makes a default in handing over the custody of books of account and other documents or property in his custody to the producer company of which he is a director or officer; or

(b) fails to convene annual general meeting or other general meetings,

he shall be punishable with fine which may extend to one lakh rupees, and in the case of a continuing default or failure, with an additional fine which may extend to ten thousand rupees for every day during which such default or failure continues.

11.11 Amalgamation, Merger or Division

Amalgamation, merger or division, etc., to form new producer companies (Section 581ZN)

(1) A producer company may, by a resolution passed at its general meeting,—

(a) decide to transfer its assets and liabilities, in whole or in part, to any other producer company, which agrees to such transfer by a resolution passed at its general meeting, for any of the objects specified in section 581B;

(b) divide itself into two or more new producer companies.

(2) Any two or more producer companies may, by a resolution passed at any general or special meetings of its members, decide to—

(a) amalgamate and form a new producer company; or

(b) merge one producer company (hereafter referred to as 'merging company') with another producer company (hereafter referred to as 'merged company').

(3) Every resolution of a producer company under this section shall be passed at its general meeting by a majority of total Members with right of vote not less than two-thirds of its Members present and voting and such resolution shall contain all particulars of the transfer of assets and liabilities, or division, amalgamation, or merger, as the case may be.

(4) Before passing a resolution under this section, the producer company shall give notice thereof in writing together with a copy of the proposed resolution to all the Members and creditors who may give their consent.

(5) Notwithstanding anything contained in articles or in any contract to the contrary, any Member, or any creditor not consenting to the resolution shall, during the period of one month of the date of service of the notice on him, have the option,

(a) in the case of any such Member, to transfer his shares with the approval of the Board to any active Member thereby ceasing to continue as a Member of that company; or

(b) in the case of a creditor, to withdraw his deposit or loan or advance, as the case may be.

(6) Any Member or creditor, who does not exercise his option within the period specified in sub-section (5), shall be deemed to have consented to the resolution.

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(7) A resolution passed by a producer company under this section shall not take effect until the expiry of one month or until the assent thereto of all the members and creditors has been obtained, whichever is earlier.

(8) The resolution referred to in this section shall provide for—

(a) the regulation of conduct of the producer company's affairs in the future;

(b) the purchase of shares or interest of any members of the producer company by other members or by the producer company;

(c) in the case of purchase of shares of one producer company by another producer company, the consequent reduction of its share capital;

(d) termination, setting aside or modification of any agreement, howsoever arrived between the company on the one hand and the directors, secretaries and manager on the other hand, apart from such terms and conditions as may, in the opinion of the majority of shareholders, be just and equitable in the circumstances of the case;

(e) termination, setting aside or modification of any agreement between the producer company and any person not referred to in clause (d):

Provided that no such agreement shall be terminated, set aside or modified except after giving due notice to the part concerned and also no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property, made or done by or against the producer company within three months before the date of passing of the resolution, which would if made or done against any individual, be deemed in his insolvency to be a fraudulent preference;

(g) the transfer to the merged company of the whole or any part of the undertaking property or liability of the producer company;

(h) the allotment or appropriation by the merged company of any shares, debentures, policies, or other like interests in the merged company;

(i) the continuation by or against the merged company of any legal proceedings pending by or against any producer company;

(j) the dissolution, without winding-up, of any producer company;

(k) the provision to be made for the members or creditors who make dissent;

(l) the taxes if any, to be paid by the producer company;

(m) such incidental, consequential and supplemental matters as are necessary to secure that the division, amalgamation or merger shall be fully and effectively carried out.

(9) When a resolution passed by a producer company under this section takes effect, the resolution shall be a sufficient conveyance to vest the assets and liabilities in the transferee.

(10) The producer company shall make arrangements for meeting in full or otherwise satisfying all claims of the members and the creditors who exercise the option, within the period specified in sub-section (4), not to continue as the member or creditor, as the case may be.

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(11) Where the whole of the assets and liabilities of a producer company are transferred to another producer company in accordance with the provisions of sub-section (9), or where there is merger under sub-section (2), the registration of the first mentioned Company or the merging company, as the case may be, shall stand cancelled and that Company shall be deemed to have been dissolved and shall cease to exist forthwith as a corporate body.

(12) Where two or more producer companies are amalgamated into a new producer company in accordance with the provisions of sub-section (2) and the producer company so formed is duly registered by the Registrar, the registration of each of the amalgamating companies shall stand cancelled forthwith on such registration and each of the Companies shall thereupon cease to exist as a corporate body.

(13) Where a producer company divides itself into two or more producer companies in accordance with the provisions of clause (b) of sub-section (1) and the new producer companies are registered in accordance with the provisions of sub-section (8), the registration of the erstwhile producer company shall stand cancelled forthwith and that Company shall be deemed to have been dissolved and cease to exist as a corporate body.

(14) The amalgamation, merger or division of companies under the foregoing sub-sections shall not in any manner whatsoever affect the pre-existing rights or obligations and any legal proceedings that might have been continued or commenced by or against any erstwhile company before the amalgamation, merger or division, may be continued or commenced by, or against, the concerned resulting company, or merged company, as the case may be.

(15) The Registrar shall strike off the names of every producer company deemed to have been dissolved under sub-sections (11 to 14).

(16) Any member or creditor or employee aggrieved by the transfer of assets, division, amalgamation or merger may, within thirty days of the passing of the resolution, prefer an appeal to the High Court.

(17) The High Court shall, after giving a reasonable opportunity to the person concerned, pass such orders thereon as it may deem fit.

(18) Where an appeal has been filed under sub-section (16), the transfer of assets, division, amalgamation or merger of the producer company shall be subject to the decision of the High Court.

11.12 Resolution of Disputes

(a) Disputes (Section 581ZO): Where any dispute relating to the formation, management or business of a producer company arises—

(i) amongst members, former members or persons claiming to be members or nominees of deceased members; or

(ii) between a member, former member or a person claiming to be a member, or nominee of deceased member and the producer company, its Board of directors, office-bearers, or liquidator, past or present; or

(iii) between the producer company or its Board, and any director, office-bearer or any former director, or the nominee, heir or legal representative of any deceased director of the

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producer company,

such dispute shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996 (26 of 1996) as if the parties to the dispute have consented in writing for determination of such disputes by conciliation or by arbitration and the provisions of the said Act shall apply accordingly.

Explanation—For the purposes of this section, a dispute shall include—

(a) a claim for any debt or other amount due;

(b) a claim by surety against the principal debtor, where the producer company has recovered from the surety amount in respect of any debtor or other amount due to it from the principal debtor as a result of the default of the principal debtor whether such debt or amount due be admitted or not;

(c) a claim by producer company against a member for failure to supply produce as required of him;

(d) a claim by a member against the producer company for not taking goods supplied by him.

If any question arises whether the dispute relates to formation, management or business of the producer company, the question shall be referred to the arbitrator, whose decision thereon shall be final.

(b) Striking off name of producer company (Section 581ZP): If a producer company fails to commence business within one year of its registration or ceases to transact business with the members 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.

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

(c) Re-conversion of producer company to inter-state co-operative society (Section 581ZS): The method is as follows:

(1) Any producer company, being an erstwhile inter-State co-operative society, formed and registered under this Part, may make an application—

(a) after passing a resolution in the general meeting by not less than two-third of its members present and voting; or

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(b) on request by its creditors representing three-fourth value of its total creditors,

to the High Court for its re-conversion to the inter-State co-operative society.

(2) The High Court shall, on the application made under sub-section (1), direct holding meeting of its members or such creditors, as the case may be, to be conducted in such manner as it may direct.

(3) If a majority in number representing three-fourths in value of the creditors, or members, as the case may be, present and voting in person at the meeting conducted in pursuance of the directions of the High Court under sub-section (2), agree for re-conversion, if sanctioned by the High Court, be binding on all the members and all the creditors, as the case may be, and also on the company which is being converted:

Provided that no order sanctioning re-conversion shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, 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, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

(4) An order made by the Court under sub-section (3) shall have no effect until a certified copy of the order has been filed with the Registrar.

(5) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(6) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees, for each copy in respect of which default is made.

(7) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(8) Every producer company which has been sanctioned re-conversion by the High Court, shall make an application, under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) or any other law for the time being in force for its registration as multi-State co-operative society or co-operative society, as the case may be, within six months of sanction by the High Court and file a report thereof to the High Court and the Registrar of companies and to the Registrar of the co-operative societies under which it has been registered as a multi-State Co-operative society or co-operative society, as the case may be.

Note: In this chapter, wherever the word 'Act' is used, it refers to the Companies Act, 1956.

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12

Companies Incorporated Outside India

12.1 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.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to -

(a) business to business and business to consumer transactions, data interchange and other digital supply transactions;

(b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;

(c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;

(d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and

(e) all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

12.2 Application of Act to foreign companies (Section 379 of the Companies Act, 2013)

A new section 379 of the Companies Act, 2013 came into on 12th September, 2013 which provides for Application of Act to foreign companies. According to this section:

Where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by:

(i) one or more citizens of India; or

(ii) by one or more companies or bodies corporate incorporated in India; or

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(iii) 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 and such other provisions of this 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.

Note: Chapter XXII referred to above deals with the legal provisions for companies incorporated outside India.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 591 of the Companies Act, 1956 i.e. Application of sections 592 to 602 to foreign companies.

(ii) First clause of section 591 of Companies Act, 1956 has been dispensed with because there is no relevance of dividing companies under two classes i.e. between companies incorporated outside India after the commencement of 1956 Act and companies incorporated outside India which have before the commencement of 1956 Act established a Place of business (POB) within India and continue to have an established POB within India.

12.3 Documents, etc., to be delivered to Registrar by foreign companies (Section 380 of the Companies Act, 2013)

A new section 380 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Documents, etc., to be delivered to Registrar by foreign companies. According to this section:

According to section 380 (1) of the Companies Act, 2013,

(i) Every foreign company is required to deliver to the Registrar for registration, the following:

(a) 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. If the instrument is not in the English language, a certified translation thereof in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the *Companies (Registration of Foreign Companies) Rules, 2014*, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

(1) personal name and surname in full;

(2) any former name or names and surname or surnames in full;

(3) father's name or mother's name and spouse's name;

(4) date of birth;

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(5) residential address;

(6) nationality;

(7) if the present nationality is not the nationality of origin, his nationality of origin;

(8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)

(9) income-tax permanent account number (PAN), if applicable;

(10) occupation, if any;

(11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);

(12) other directorship or directorships held by him;

(13) Membership Number (for Secretary only); and

(14) e-mail ID.

(d) 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;

(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;

(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

(h) any other information as may be prescribed.

(ii) According to the *Companies (Registration of Foreign Companies) Rules, 2014*, the above informations shall be filed with the Registrar within 30 days of the establishment of its place of business in India, in Form *FC-1* along with prescribed fees. The application shall also be supported with an attested copy of approval from the Reserve Bank of India under the Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.

(iii) Office where documents to be delivered and fee for registration of documents: According to the *Companies (Registration of Foreign Companies) Rules, 2014*, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

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(iv) Under section 380 (2) every foreign company existing at the commencement of the Companies Act 2013, which has not delivered to the Registrar the documents and particulars specified in section 592(1) of the Companies Act, 1956, it shall continue to be subject to the obligation to deliver those documents and particulars in accordance with the Companies Act, 1956.

(v) Section 380 (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The *Companies (Registration of Foreign Companies) Rules, 2014*, has prescribed that the return containing the particulars of the alteration shall be filed in form *FC-2* along with prescribed fees.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 592 and 593 of the Companies Act, 1956 i.e. 'Documents, etc., to be delivered to Registrar by foreign companies carrying on business in India' and Return to be delivered to Registrar by foreign company where documents, etc., altered.

12.4 Accounts of foreign company (Section 381 of the Companies Act, 2013)

A new section 381 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Accounts of foreign company. According to this section:

(i) Every foreign company shall, in every calendar year,—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and having attached or annexed thereto such documents as may be prescribed, and

(b) deliver a copy of those documents to the Registrar.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

(1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.

(2) The documents relating to copies of latest consolidated financial statements of the parent foreign company as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.

(ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) of section 381(1) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf.

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(iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]

(iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, 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 section 381(1) is made.

According to the *Companies (Registration of Foreign Companies) Rules, 2014*, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

(v) According to the *Companies (Registration of Foreign Companies) Rules, 2014*,

(a) Every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as may be possible for each financial year including-

(1) documents required to be annexed thereto in accordance with the provisions of Chapter IX of the Act i.e. Accounts of Companies.

(2) documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the provisions of the law for the time being in force in that country.

(b) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-

(1) Statement of related party transaction

(2) Statement of repatriation of profits

(3) Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the *Companies (Registration of Foreign Companies) Rules, 2014*.

(c) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

(vi) Audit of accounts of foreign company: According to the *Companies (Registration of Foreign Companies) Rules, 2014,*

(a) The accounts of the foreign company pertaining to the Indian business operations prepared in accordance with section 381(1) and Rules thereunder, shall be audited by a practicing Chartered Accountant in India or a firm or limited liability partnership of practicing chartered accountants.

(b) The provisions of Chapter X i.e. Audit and Auditors and rules made there under, as far as applicable, shall apply, *mutatis mutandis*, to the foreign company.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 594 of the Companies Act, 1956 i.e. Accounts of foreign company.

12.5 Display of name, etc., of foreign company (Section 382 of the Companies Act, 2013)

A new section 382 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Display of name, etc., of foreign company. According to this section:

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, bill- heads 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—

(i) 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

(ii) 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 situated.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 595 of the Companies Act, 1956 i.e. Obligation to state name of foreign company, whether limited, and country where incorporated.

(ii) Under the Companies Act, 1956, every foreign company shall in every prospectus inviting subscriptions in India for its shares or debentures, state the country in which the company is incorporated. This obligation has been dispensed with under the Companies Act, 2013.

12.6 Service on foreign company (Section 383 of the Companies Act, 2013)

A new section 383 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Service on foreign company. According to this section:

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

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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.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 596 of the Companies Act, 1956 i.e. Service on foreign company.

(ii) Under the Companies Act, 2013, service of document on foreign company can now also be served through any electronic mode. This provision was not present under the Companies Act, 1956.

(iii) Under the Companies Act, 1956, where any such company failed to deliver to the Registrar, the name and address of the person responsible for accepting documents on behalf of the company or in case the said person is dead or refused to accept or ceases to be so authorised, a document may be served on the company by leaving it at, or sending it by post to, any place of business established by the company in India. This provision is not present under the Companies Act, 2013.

12.7 Debentures, annual return, registration of charges, books of account and their inspection (Section 384 of the Companies Act, 2013)

A new section 384 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Debentures, annual return, registration of charges, books of account and their inspection. According to this section:

(i) The provisions of section 71 (Issue of Debentures) shall apply *mutatis mutandis* to a foreign company.

(ii) The provisions of section 92 (Preparation and filing of Annual return) 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.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* every foreign company shall prepare and file an annual return in Form *FC-4* along with prescribed fees, within a period of 60 days from the last day of its financial year, to the Registrar containing the particulars as they stood on the close of the financial year.

(iii) The provisions of section 128 (Books of account, etc., to be kept by company) 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.

(iv) The provisions of Chapter VI (Registration of Charges) shall apply *mutatis mutandis* to charges on properties which are created or acquired by any foreign company.

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(v) The provisions of Chapter XIV (Inspection, inquiry and investigation) shall apply *mutatis mutandis* to the Indian business of a foreign company as they apply to a company incorporated in India.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 600 of the Companies Act, 1956 i.e. Registration of charges, appointment of receiver and books of account.

(ii) According to the Companies Act, 1956, as per section 600, the provisions of sections 233B (related to Audit of cost accounts in certain cases) shall, so far as may be, apply only to the Indian business of a foreign company having an established place of business in India, as they apply to a company incorporated in India. However, as per the Companies Act, 2013, section 384 does not give reference of applicability of section 148 (Central Government to specify audit of items of cost in respect of certain companies) to Indian business of a foreign company.

12.8 Fee for registration of documents (Section 385 of the Companies Act, 2013)

A new section 385 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Fee for registration of documents. According to this section:

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as may be prescribed.

According to the *Companies (Registration of Foreign Companies) Rules, 2014*, fee to be paid to the Registrar for registering any document relating to a foreign company shall be such as provided in the *Companies (Registration Offices and Fees) Rules, 2014*.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 601 of the Companies Act, 1956 i.e. Fees for registration of documents.

12.9 Interpretation (Section 386 of the Companies Act, 2013)

A new section 386 of the Companies Act, 2013 provides for Interpretation. It provides for interpretation of "certified", "director" and "place of business". Section 386 of the Companies Act, 2013 partially came into force on 12th September, 2013 by providing the Interpretation of clause (b) and (c) i.e. "director" and "place of business".

For the purposes of the foregoing provisions of this Chapter, the expression:

(a) "Certified" means certified in the prescribed manner to be a true copy or a correct translation;

(b) "Director", in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and

(c) "Place of business" includes a share transfer or registration office.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 602 of the Companies Act, 1956 i.e. Interpretation of foregoing sections of Part.

(ii) Under the Companies Act, 1956, the terms prospectus and secretary are defined under section 602 itself. However, these two terms are not defined under section 386 of the Companies Act, 2013.

12.10 Dating of prospectus and particulars to be contained therein (Section 387 of the Companies Act, 2013)

A new section 387 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Dating of prospectus and particulars to be contained therein. According to this section:

(i) Prospectus to be dated and signed [Section 387(1)]: No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and—

(a) contains particulars with respect to the following matters, namely:—

(1) the instrument constituting or defining the constitution of the company

(2) the enactments or provisions by or under which the incorporation of the company was effected;

(3) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected;

(4) the date on which and the country in which the company would be or was incorporated; and

(5) whether the company has established a place of business in India and, if so, the address of its principal office in India; and

(b) states the matters specified under section 26 (Matters to be stated in prospectus).

Provided that points (1), (2) and (3) of point (a) above shall not apply in the case of a prospectus issued more than 2 years after the date at which the company is entitled to commence business.

(ii) No waiver of compliance in prospectus [Section 387(2)]: Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of section 387(1) or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be void.

(iii) Form of application for securities to be issued along with prospectus [Section 387(3)]: No person shall issue to any person in India a form of application for securities of

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such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:

Exception: If it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.

(iv) Section 387(4) further provides that the provisions of section 387—

(a) shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons; and

(b) except in so far as it requires a prospectus to be dated, to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange, but, subject as aforesaid, section 387 shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(v) Nothing in section 387 shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under the Companies Act, 2013 apart from section 387.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 603 of the Companies Act, 1956 i.e. Dating of prospectus and particulars to be contained therein.

(ii) According to the Companies Act, 1956, the prospectus shall be dated. According to the Companies Act, 2013, the prospectus shall be dated and signed.

(iii) Under the New Act, the scope has widened to include securities and not only shares and debentures. The term securities as defined under section 2(81) means the securities as in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.

12.11 Provisions as to expert's consent and allotment (Section 388 of the Companies Act, 2013)

A new section 388 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Provisions as to expert's consent and allotment. According to this section:

(i) No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India,—

(a) if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and

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context in which it is included, or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid; or

(b) if the prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of sections 33 and 40, so far as applicable.

(ii) For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 604 of the Companies Act, 1956 i.e. Provisions as to expert's consent and allotment.

(ii) Under the old Act, section 604(2) defined the expression 'expert'. However, under the new Act, the expression 'expert' is not defined under section 388 itself (the expression 'expert' has been defined under section 2(38).

(iii) Same as section 377 of the Companies Act, 2013, the scope of section 388 has been widened to include securities. The term securities as defined under section 2(81) means the securities as in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.

12.12 Registration of prospectus (Section 389 of the Companies Act, 2013)

A new section 389 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Registration of prospectus. According to this section:

No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* the following documents shall be annexed to the prospectus, namely:

(a) any consent to the issue of the prospectus required from any person as an expert;

(b) a copy of contracts for appointment of managing director or manager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;

(c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;

(d) a copy of underwriting agreement; and

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(e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 605 of the Companies Act, 1956 i.e. Registration of prospectus.

(ii) Same as section 377 of the Companies Act, 2013, the scope of section 389 has been widened to include securities. The term securities as defined under section 2(81) means the securities as in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.

(iii) Under section 605 of the Companies Act, 1956, the documents to be attached or annexed to the prospectus are mention in section 605 itself. However, according to new Act, such documents are prescribed by the Rules.

12.13 Offer of Indian Depository Receipts (Section 390 of the Companies Act, 2013)

A new section 390 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Offer of Indian Depository Receipts. According to this section:

For the purposes of this section, and according to the *Companies (Registration of Foreign Companies) Rules, 2014,* Indian Depository Receipts (IDR) means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts.

According to section 390, notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

(i) the offer of Indian Depository Receipts (IDR);

(ii) the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;

(iii) the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and

(iv) the manner of sale, transfer or transmission of IDR,

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* no company incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India) shall make an issue of Indian Depository Receipts (IDRs) unless it complies with the conditions mentioned under this rule, in addition to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and any directions issued by the Reserve Bank of India.

The Rules relating to offer, disclosure requirements and manner of transfer, sale etc., related to IDR are contained in *Companies (Registration of Foreign Companies) Rules, 2014*.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 605A of the Companies Act, 1956 i.e. Offer of Indian Depository Receipts.

12.14 Application of sections 34 to 36 of Chapter XX (Section 391 of the Companies Act, 2013)

A new section 391 of the Companies Act, 2013 came into force partially[1] from 1st April, 2014 which provides for Application of sections 34 to 36 of Chapter XX. According to this section:

The provisions of sections 34 to 36 (both inclusive) shall apply to—

(i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;

(ii) the issue of IDR by a foreign company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 606 and 607 of the Companies Act, 1956 i.e. 'Penalty for contravention of sections 603, 604 and 605' and 'Civil liability for mis-statements in prospectus'.

12.15 Punishment for contravention (Section 392 of the Companies Act, 2013)

A new section 392 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Punishment for contravention. According to this section:

(i) Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of Chapter XXII of the Companies Act, 2013 (i.e. Chapter on Companies incorporated outside India), the foreign company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and in the case of a continuing offence, with an additional fine which may extend to fifty thousand rupees for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty- five thousand rupees but which may extend to five lakh rupees, or with both.

Thus, the punishment for contravention may be summed up as under:

1. Fine on defaulting foreign company in the range of 1 lac to 3 lac rupees.
2. In case of continuing default an additional fine on the foreign company to the tune of ₹ 50,000 per day after the first during which the contravention continues.
3. Punishment for every officer of the foreign company who is default shall be:
   (a) Imprisonment for a maximum term of 6 months, or

[1] *Only sub-section (1) to section 391 of the Companies Act, 2013 is notified upto 30th September, 2014.*

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(b) Imposition of a fine of a minimum amount of ₹ 25,000, or

(c) Both - imprisonment and fine.

(ii) Further, according to the *companies (Registration of Foreign Companies) Rules, 2014,* if any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made there under, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made there under, shall be liable for investigation under section 210 of the Companies Act, 2013 and action consequent upon that investigation shall be taken against that person.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 598 and 606 of the Companies Act, 1956 i.e. 'Penalties' and 'Penalty for contravention of sections 603, 604 and 605'.

(ii) The penalties have been increased considerably in the new Act.

12.16 Company's failure to comply with provisions of this Chapter not to affect validity of contracts, etc (Section 393 of the Companies Act, 2013)

A new section 393 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Company's failure to comply with provisions of this Chapter not to affect validity of contracts, etc. According to this section:

Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013, shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof. However, the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of the Companies Act, 2013, applicable to it.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 599 of the Companies Act, 1956 i.e. Company's failure to comply with Part not to affect its liability under contracts, etc.

The MCA vide General Circular No. 23/2014 dated 25.06.2014, has issued a clarification about the status of subsidiaries incorporated/to be incorporated by companies incorporated outside India, due to the absence of deeming provision of sub-section (7) of section 4 of the Companies Act, 1956 in the Companies Act, 2013.

Thus, in the light of the provisions of sections 2(68), 2(71) and 2(87) of the Companies Act, 2013, there is no bar in the companies Act, 2013 for a company incorporated outside India to incorporate a subsidiary either as a public company or a private company. An existing company, being a subsidiary of a company incorporated outside India, registered under the Companies Act, 1956, either as private company or a public company by virtue of section 4(7) of the Companies Act, 1956 will continue as a private company or public company as the case may be, without any change in the incorporation status of such company.

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13
Offences and Penalties

13.0 Types of Penalties

There are five types of penalties that have been contemplated under the Companies Act, 1956/2013. They are

1. Fine only
2. Imprisonment or fine
3. Imprisonment or fine or with both
4. Imprisonment and fine and
5. Imprisonment only

Of the above, the offences referred to in 1 to 3 are compoundable and others are not compoundable.

13.1 Offences to be non-cognizable (Section 439 of the Companies Act, 2013)

A new section 439 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for offences to be non-cognizable. According to this section:

(i) Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

(ii) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf.

(iii) The court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

(iv) Nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

(v) Where the complainant is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.

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(vi) The above provisions shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

(vii) The liquidator of a company shall not be deemed to be an officer of the company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) As per section 624 of Companies Act, 1956, all offences are non-cognizable. Section 621 of the Companies Act, 1956, provides that the court shall not take cognizance except on a complaint by Registrar, Shareholder or Government.

(ii) An exception has been provided that the offences related to investigation into the affairs of a company by Serious Fraud Investigation Office under section 212, shall be deemed to be cognizable offence and besides this every offence shall be deemed to be non cognizable within the meaning of the said Code, notwithstanding anything in the Code of Criminal Procedure, 1973.

13.2 Application of fines (Section 446 of the Companies Act, 2013)

A new section 446 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Application of fines. According to this section:

The court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings, or in or towards the payment of a reward to the person on whose information the proceedings were instituted.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 626 of the Companies Act, 1956 i.e. Application of fines.

(ii) The provisions of both the sections i.e. section 626 of the Companies Act, 1956 and section 446 of the Companies Act, 2013 are same.

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14
E-Governance

14.0 MCA 21 Project

This is an innovative project and initiative of the Ministry of Corporate Affairs to enable e-filing. This project covers all the services provided by the Registrar of Companies (ROC) starting from the incorporation of a new company. The project would provide e-services including registration of new companies, filing of various returns and statutory documents under the Companies Act, 1956/2013. The system would also enables filing and access for statutory documents like memorandum of association, articles of association, certificate of incorporation etc.

The project serves the interest of all the key stake holders and the public at large. Also professionals need no longer to visit the officers of ROC and are able to interact with the Ministry using MCA 21 portal from their offices or home. The services of the Ministry of Company Affairs with the introduction of MCA 21 will be e-form driven. Form filing will be done using freely downloadable software and it can be done offline. The prerequisite for using the MCA 21 portal will be P-4 computer with printer, windows 2000 / XP / Vista / 7, internet explorer 6.0 version, Adobe Acrobat Reader from version in 9.4 to version 7.5 and digital signature certificate.

To know better about how MCA 21 will function, one need to know about the set up of the Ministry of Corporate Affairs.

14.1 Set Up of MCA

MCA has a three tier organizational set-up:

- Headquarters at New Delhi
- Regional Directors (RD) at Mumbai, Kolkata, Chennai, Noida, Ahmedabad and Hyderabad
- Registrar of Companies (RoC) in States and Union Territories

MCA Headquarters handles cases that require approval of the Government of India (GoI) for citizen related functions. RD supervises the functioning of RoCs and handles the matters delegated by GoI while the RoC offices handle the bulk of citizen facing functions.

The Official Liquidators (OL) attached to various High Courts functioning in the country are also under the overall administrative control of the MCA. Its headquarters at Delhi also includes two Directors of Inspection and Investigation and Director of Research and Statistics.

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14.2 MCA 21 Program

Ministry of Corporate Affairs (MCA), Government of India (GoI) initiated MCA 21 program, for easy and secure access to MCA services in a manner that best suits the businesses and citizens.

The program goals have been set as follows keeping in mind stakeholders' needs:

- Business enabled to register a company and file statutory documents quickly and easily
- Public to get easy access to relevant records and effective grievances redressal
- Professionals to be able to offer efficient services to their client companies
- Financial Institutions to easily find charges registration and verification
- Employees to ensure proactive and effective compliance of relevant laws and corporate governance

MCA 21 has been envisioned to provide anytime and anywhere services to businesses. It is a pioneering program being the first mission mode e-governance project undertaken in the country. This program builds on the GoI vision to introduce a Service Oriented Approach in the design and delivery of Government services, establish a healthy business ecosystem and make the country globally competitive.

14.3 Program Scope

MCA 21 program provides for anytime anywhere electronic services with speed and certainty to all the stakeholders. It includes:

- Design and development of application system
- Setting up of IT infrastructure
- Setting up the Digital Signature/PKI delivery mechanisms and associated security requirements
- Setting up of Physical Front Offices (PFOs)
- Setting up of temporary Front Offices (FOs) for the peak periods to meet with the requirements and subsequent shutdown of temporary FOs at the end of such peak periods
- Migrating legacy data and digitization of paper documents to the new system
- Providing MCA services to all MCA 21 stakeholders in accordance with the Service Oriented Approach
- Providing user training at all levels and all offices (Front and Back Offices)

The MCA 21 is designed to automate processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 1956/2013. However, it does not include processes related to OL.

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14.4 Front Office

The implementation of FO is done in two ways. These can be called as Virtual Front Office (VFO) and Physical Front Office (PFO).

The VFO is what the citizen has in front while accessing the MCA 21 portal. The PFO will be a replacement to the existing RoC counters. The PFO will also accept paper documents. However, these will be converted into electronic documents by customer service agents manning PFO. Also, the authorised person(s) will have to sign these documents digitally. Consequently the authorised signatories for a given document will need to appear in person at the PFO for the purpose of digitally signing the document.

The user can avail the following services on MCA 21 portal

- eFiling
- Viewing public document
- Requesting certified copies
- Registering investor complaint
- Tracking transaction status

14.5 Back Office

The back office process relates to:

- Dynamic routing of documents that have been electronically filed to the concerned official within MCA based on the type of service request.
- Electronic workflow systems to support speed and certainty in service delivery
- Supporting all routine tasks such as registrations and approvals
- Storing of all approved documents of companies as part of electronic records, including provision of access to electronic records for the stakeholders
- Enhancing identification of defaulters
- Increasing efficiency of Technical Scrutiny
- Ensuring close follow-up on matters related to compliance management including prosecutions
- Enabling quicker responses to investor grievances
- Providing alerts when the tasks are not carried out within stipulated period

14.6 Key Benefits

MCA 21 seeks to fulfill the requirements of the various stakeholders. The key benefits of MCA 21 project are :

- Expeditious incorporation of companies
- Simplified and ease of convenience in filing of Forms/ Returns
- Better compliance management

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- Total transparency through e-Governance
- Customer centric approach
- Increased usage of professional certificate for ensuring authenticity and reliability of the Forms / Returns
- Building up a centralised database repository of corporate operating
- Enhanced service level fulfillment
- Inspection of public documents of companies anytime from anywhere
- Registration as well as verification of charges anytime from anywhere
- Timely redressal of investor grievances
- Availability of more time for MCA employees for monitoring and supervision

14.7 Director Identification Number (DIN)

The concept of a Director Identification Number (DIN) is contained in Sections 153 to 159 of Companies Act, 2013 which is as follows:

(i) Application for allotment of Director Identification Number (Section 153): Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with prescribed fees.

(ii) Allotment of Director Identification Number (Section 154): The Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number to an applicant in the prescribed manner.

(iii) Prohibition to obtain more than one Director Identification Number (Section 155): No individual, who has already been allotted a Director Identification Number under section 154, shall apply for, obtain or possess another Director Identification Number. Thus, a person cannot hold two or more DIN.

(iv) Director to intimate Director Identification Number (Section 156): Every existing director 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.

(v) Company to inform Director Identification Number to Registrar (Section 157):

(1) Every company shall, within 15 days of the receipt of intimation under section 156, furnish the DIN of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government:

(a) with prescribed fees, or

(b) with such additional fees as may be prescribed

(c) within the time specified under section 403, and

(d) every such intimation shall be furnished in prescribed form and manner.

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(2) If a company fails to furnish DIN under sub-section (1), 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 rupees but which may extend to one lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to one lakh rupees.

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

(vii) Punishment for contravention (Section 159): If any individual or director of a company, contravenes any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to 50,000 rupees and where the contravention is a continuing one, with a further fine which may extend to 500 rupees for every day after the first during which the contravention continues.

14.8 Some FAQ's on DIN and e-filing

1. What is Director Identification Number (DIN)?

It is an unique Identification Number allotted to an individual who is an existing director of a company or intends to be appointed as director of a company pursuant to section 153 and 154 of the Companies Act, 2013.

2 Who can file an application for allotment of DIN?

Every individual, intending to be appointed as a director of the company, can file an application for allotment of DIN.

3 Who will allot the DIN?

Central Government [Office of Regional Director (Northern Region), Ministry of Corporate Affairs] will allot the DIN.

4 What is the procedure of obtaining DIN?

Any person intending to apply for DIN shall have to make an application in eForm DIR-3 and should follow the following procedure:

(i) e-Form DIR-3 has to follow the online e-Filing process. For more details regarding the same visit e-Filing FAQ's given in

(ii) Attach the photograph and scanned copy of supporting documents i.e. proofwww.mca.gov.in of identity, and proof of residence as per the guidelines. Physical documents are not required to submit at DIN cell.

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(iii) Along with the supporting documents, Verification as per Form DIR-4 shall also be attached. This shall contain the Name, Father's name, date of birth and text of declaration and physical signature of the applicant.

(iv) The eForm shall have to be digitally signed and shall be uploaded on MCA21 portal.

(v) Upon upload, pay the fees for eForm DIR-3. Only electronic payment of the fees shall be allowed (I.e. Netbanking / Credit Card). No challan payment will be accepted under revised procedure of DIN allotment.

The applicant is required to get himself/herself registered on the MCA21 Portal to obtain login id, which is necessary for payment of the fees. After obtaining the login-id, Login to the MCA21 portal and click on 'eForm upload' link available under the 'eForms' tab for uploading the eForm DIR-3. eForm DIR-3 will be processed only after the DIN application fee is paid.

(vi) Upon upload and successful payment, Form DIR-3 is mandatorily to be signed by an Applicant and a practicing professional or secretary (who is a member of ICSI) in whole time employment or the Director of the existing company.

Approved DIN shall be generated in case the form is being signed by a practicing professional and details have not been identified as potential duplicate. Provisional DIN shall be generated in case form is signed by secretary in whole time employment or Director of existing company and details have been found as potential duplicate. A suitable informational message and an email shall be provided to the user that the DIN shall be approved after due verification by the DIN cell.

(vii) Processing of e Form DIR-3: In case, DIR-3 gets certified by the professional (i.e. CA (in whole time practice)/ CS (in whole time practice)/ CWA (in whole time practice)/, the DIN will be approved by the system immediately online (in case it is not potential duplicate).

(viii) Post-approval changes in particulars of Form DIR-3: If there is any change in the particulars submitted in eform DIR-3, applicant can submit e-form DIR-6 online. For instance in the event of change of address of a director, he/ she is required to intimate this change by submitting eform DIR-6 along with the required attested documents.

5 Who can sign e-Form DIR-6?

The e-Form DIR-6 is required to be digitally signed by an Applicant and a Chartered Accountant or a Company Secretary or a Cost Accountant in whole- time practice.

6 What things should be taken care of while filling form DIR-3?

Please note that Income Tax PAN is mandatory in case of Indian applicants so the applicant details (name, father's name, date of birth) should be as per the PAN details. The particulars filled in form DIR-3 should match with the details given in the supporting documents to be submitted along with DIN application. Any mis-match will lead to rejection of DIN application.

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7 Any fee is payable along with application for allotment of DIN?

Yes, DIN application fee of ₹ 500/- is payable.

8 How to enquire about the status of the payment made for Form DIR-3?

Status of the payment made for Form DIR-3 can be enquired from 'Track Payment Status' link on the homepage of www.mca.gov.in.

9 What are the scanned documents required to be attached with eform DIR-3?

(i) High resolution photograph of the applicant

(ii) PAN is mandatory now. So copy of pan is mandatory for identity, name, father's name and date of birth. Proof of father's name is not required in the case of foreign nationals

(iii) Copy of passport is mandatory as an id proof in the case of foreign nationals.

(iv) Present Address proof which should not be older than 2 months

(v) Verification as per form DIR-4 as per the format given on the website

10 What things should be taken care of with regard to supporting documents?

Please ensure following before attaching supporting documents with DIN application:

(i) Documents submitted are currently valid and not expired.

(ii) Documents issued by LIC may be enclosed as Date of Birth and Address proof.

(iii) Bank Statements, Utility Bills like telephone, electricity bill etc furnished as residence proof are in the applicant's name only and not older than two months.

(iv) All supporting documents attached with form DIR-3 must be duly attested by an authorized person/ authority.

(v) In case the director is illiterate, thumb impression should be certified from the concerned revenue authority (where the applicant resides) and then all the documents should be notarized or attested OR if applicant is not in a position to sign the application due to medical reasons and affixed thumb impression on the application then duly attested medical certificate from Government hospital is must with the application stating the reason of his / her ailment.

11 What are the additional informational documents required in case of a foreign national?

Details of a valid passport should be filled in form DIR-3 and a certified copy of same should be attached with DIN application. All supporting documents including photograph should be certified by the Indian Embassy or a notary in the home country of the applicant or by the Managing Director / CEO / Company Secretary of the company registered in India, in which applicant is a director. If a foreign director has a valid multiple-entry Indian visa or Person of Indian Origin card or Overseas Citizen of India

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card, then the attestation could also be done by Public Notary / Gazetted Officer in India or practicing CA / CS / CWA.

12 What are the grounds for rejection of DIN application?

A provisional DIN is approved only after scrutiny of the documents attached with the application. Some of the common mistakes committed by applicants and on account of which the DIN application gets rejected are as under:

Non-submission of supporting documents

(i) The proof of identity of the applicant is not submitted.

(ii) The proof of father's name of the applicant is not submitted.

(iii) The proof of father's name of the applicant is not submitted.

(iv) The proof of date of birth of the applicant is not submitted.

(v) The proof of residential address of the applicant is not submitted.

(vi) The copy of passport (for foreign nationals) is not submitted

Invalid Application/supporting Documents

(i) The supporting documents are invalid or expired.

(ii) The proof of identity submitted has not been issued by a Government Agency.

(iii) The application/enclosed evidence has handwritten entries.

(iv) The submitted application is a duplicate DIN application and already one application of that applicant is pending or approved.

(v) The submitted application does not have photograph affixed.

(vi) The signatures are not appended to the prescribed place.

(vii) The applicant's name filled in application form does not match with the name in the enclosed evidence.

(viii) The applicant's father's name filled in application form does not match with the father's name in the enclosed evidence.

(ix) The applicant's date (DD/MM/YY) of birth filled in application form does not match with the date of birth in the enclosed evidence.

(x) The address details filled in the application do not match with those contained in the enclosed supporting evidence.

(xi) The gender is not entered correctly in Form DIR-3.

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(xii) Identification number entered in application does not match with the identity proof enclosed.

(xiii) If enclosed documents are not self attested.

13 My DIN application has been rejected. Am I required to apply for a fresh DIN?

Yes, you will have to apply for fresh DIN.

14 My DIN application has been put under Resubmission. Am I required to obtain a fresh DIN?

No. If the DIN application is put under Resubmission due to following reasons, you can submit additional documents for rectifying your DIN application, within a period of 15 days from the date on which it is marked as Resubmission

(i) Proof of Identity/ residence is not enclosed or expired.

(ii) Proof of Date of Birth is not enclosed.

(iii) Supporting documents are not properly attested.

(iv) Non-submission of affidavit (if required).

On resubmitting with the additional documents, same DIN will be approved, if documents are found in correct order as per marked in resubmission.

15 What procedure has to be followed, if there is any change in particulars of Director?

Director is required to download and fill up eForm DIR-6 for such changes and follow the same process for uploading the same as mentioned for eForm DIR-3. The requested change is taken into the system on verification of the proof enclosed with the application for change request. In the case of change in applicant's name, gazette notification is must with form DIR-6. Married ladies, who are having Id proof with their maiden name, can submit marriage certificate along with application. Verification as per Form DIR-7 of Companies Act, 2013 also needs to be attached to Form DIR-6 as it is a mandatory attachment now.

16 Whether provisional DIN can be used for e-Filing?

No, the particulars of the person with the provisional DIN number can not be filled in the eforms but the person cannot sign as a director.

17 Whether Single Name in applicant's name or applicant's father's name is allowed?

Single name shall be allowed in Form DIR-3 and DIR-6 in Applicant name and Father's name only if single name is there in Income tax PAN. The same shall be validated from PAN database.

18 I am a Director of the company and applying for my DIN. Can I sign the eform DIR-3?

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Yes, the form DIR-3 is to be signed by Applicant and also to be digitally signed by a Chartered Accountant or a Company Secretary or a Cost Accountant in whole- time practice or Secretary (who is member of ICSI) in whole time employment or director of the existing company.

19 My DIN application has been identified as a Potential Duplicate. What does it mean?

If the contents specified in the DIN form matches with an already filled DIN application form, then the application shall be marked as a potential duplicate and shall then be processed by DIN Cell.

20 Whether Income tax PAN is mandatory while applying for DIN?

Income tax PAN is mandatory for Indian nationals. If Income tax PAN is entered, it shall be mandatory to click on 'Verify income-tax PAN' button. Applicant's name (first, middle and last name), applicant father's name (first, middle and last name) and date of birth should be as per the income-tax PAN details.

In case of foreign nationals, passport number is a mandatory requirement.

21 What will happen if the details entered in DIN application are not as per the Income tax PAN database?

Filing of DIN application shall not be allowed if the details entered in the form are not as per the Income tax database in case of Indian Nationals.

22 Is Income tax PAN also mandatory while applying for correction in particulars of Director in Form DIR-6?

In case of Indian national, it is mandatory to enter Income tax PAN in all cases even if there is no change in Income-tax PAN. In such case, it shall be mandatory to click on 'Verify income-tax PAN' button. Director's name (first, middle and last name), Father's name (first, middle and last name) and date of birth should be verified from the income-tax PAN details.

Moreover, all existing DIN holders who have not furnished their PAN earlier at the time of obtaining DIN, are required to furnish their PAN by filling Form DIR-6.

23 What are the steps for online e-filing?

(i) When the business or the registered users access the MyMCA portal, they enter their username and authentication details - Password/ Digital Certificate.

(ii) The user will be shown a list of eForms category-wise under eForms tab.

(iii) At any time, the users can read the related instruction kit, available under Help menu, to familiarise themselves with the procedures.

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(iv) The users can then fill the appropriate eForm for the service required. There is an option of pre-fill facility in the eForms, where the static details such as name and address of the company will be pre-filled by the system automatically on entering the Corporate Identity Number (CIN).

(v) The users attach the necessary documents to the eForm.

(vi) The users may avail the pre-scrutiny service of the eForm. The documents will be verified (pre-scrutinised) by the system. In case of any inadequacies, for example, if a mandatory column in the eForm is not filled in, the user will be asked to rectify before the document is ready for execution (signature).

(vii) The applicant or a representative of the applicant will then submit the duly signed documents electronically.

(viii) The system will calculate the fee, including late payment fees, if applicable.

(ix) Payments will have to be made through appropriate mechanisms - electronic (credit card, Internet banking) or traditional means (at the bank counter).

(a) Electronic payments can be made at the Virtual Front Office (VFO).

(b) If the user selects the traditional payment option, the system will generate a pre-filled challan in the prescribed format. Traditional payments through cash, cheques can be done at the designated network of banks using the system generated challan. There will be five banks with estimated 200 branches authorised for accepting challan payments.

(x) The payment will be exclusively confirmed for all online (Internet) payment transactions using payment gateways.

(xi) Acceptance or rejection of any transaction will be explicitly communicated to the applicant (including facility to print a receipt for successful transactions).

(xii) MCA21 will provide a unique transaction number, which can be used by the applicant for enquiring status pertaining to that transaction.

(xiii) Filing will be complete only when the necessary payments are made.

(xiv) In case of a rejection, helpful remedial tips will be provided to the applicant.

(xv) The applicants will be provided an acknowledgement through e-mail or alternatively they can check the MCA portal.

24 How can I apply for a Company Name?

File e Form INC-1 by logging in the portal along with a payment of fees of ₹1000/- and attaching the digital signature of the applicant proposing to incorporate the company.

25 Can I apply for a company name online?

Yes, You can avail this service at MCA portal.

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26 What is the validity period of the Name approved?

The approved name is valid for a period of 60 days from the date of filing of Form INC-1. If, the proposed company is not incorporated within such period, the name shall be lapsed and will be available for other applicants. Please note that there shall not be any provision for renewal of the name.

27 What is the minimum number of directors required to form a company?

Minimum no. of directors for One Person Company: One,

Private Limited Company: Two,

Public Limited Company: Three and,

producer company: Five.

28 What is the minimum number of subscribers required for registration of a company?

Minimum no. of subscribers for One Person Company: One,

Private Limited Company: Two,

Public Limited Company: Seven and

Producer company: Ten.

29 What is the minimum Paid-up Capital at the time of registration of a company?

The minimum paid up capital for Private Limited Company: ₹ 1,00,000/- For Public Limited Company: ₹ 5,00,000/-.

32 What are the documents to be filed with RoC every year?

Invariably, the Balance Sheet and Annual Return have to be filed every year. Other documents such as, Return of Allotment (Form No. Pas-3), Change of Registered office (Form No. INC-22), Change among the Directors (Form No. DIR-12), Charges (Form No. CHG- 1, 9, 4) etc., have to be filed within the due date from the events taking place in the company as per the Companies Act, 2013.

33 What is an e-form?

An e-form is the electronic equivalent of the paper form. The Ministry of Corporate Affairs has recently launched a major e-governance initiative MCA 21. In the new system, it is envisaged that all company related documents would be filed electronically. The new e-forms have been devised and notified by the Ministry for this purpose.

34 I need assistance to file e-forms as I have no knowledge of operating a computer.

The process of e-Filing is very simple. No prior knowledge of computer is required to file the e-form. If you need assistance, you may visit your nearest MCA21 Facilitation Centre for e-Filing. The list of facilitation centres is given on the 'Facilitation Centres' link on the

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MCA portal. These Facilitation Centres have been opened by Infosys Limited on behalf of The Ministry of Corporate Affairs to provide assistance in e-Filing.

35 I have scanned documents and want to upload/ submit the same.

You can upload / submit the scanned documents by attaching the same with the e-form and submitting on the MCA Portal.

36 Can I have a copy of the filed e-form for my office records?

Yes, if you are carrying a pen drive. On your request, the Customer Services Executive (CSE) will save a copy of the filed e-form on your pen drive. If you are filing the e-form from you office / home, you can save the copy of the form on your computer for future reference.

37 How to sign an e-form?

An e-form can be signed by the authorized signatory/ representative using the Digital Signature Certificate (DSC). Click the red colour signature box in the e-form to affix the digital signature. To avoid increase in size of the e-form beyond permissible limit of 2.5 MB, always affix the DSC using the 'Sign and Save As' option.

38 How are payments made electronically? What if I do not have a credit card or access to Banking?

Payments can be made electronically through credit card or Internet Banking. During the e-Filing process, the system will prompt you to make payment. You can choose the mode of payment and make the payment accordingly.

If you are not having a credit card or Internet banking facility, you can make payment at the counter of an authorized bank through the pre-filled challan generated by the system after e-Filing.

39 Is it safe to make online payments?

Use of Credit cards and Internet Banking is widely prevalent. It is a completely secure process.

40 What about the privacy of data. Are the details/information submitted through Internet freely accessible to all?

The process of e-Filing is completely secure. Online Inspection of documents is allowed strictly in accordance with the provisions of the Companies Act, 2013 on payment of a prescribed fee.

41 Can the form once submitted, be rectified by the company user?

Once filed, the eForm cannot be rectified. You may, however, re-submit the e-Form, if the concerned MCA office has marked the status of your SRN as 'Required Re-submission'.

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14.9 List of E-Forms

Mapping of e-forms prescribed under the Companies Act, 2013 with e-forms prescribed under Companies Act, 1956

S. No.	e-Form (Companies Act, 2013)	Corresponding eForm (Companies Act, 1956)	Purpose of Form as per Companies Act, 2013
1	INC-1	1A	Application for reservation of name
2	INC-2	New form	Form for Incorporation and nomination (One Person Company)
3	INC-3	New form	Form for consent of nominee of One Person Company
4	INC-4	New form	Form for change in member/nominee of One Person Company
5	INC-5	New form	Form for intimation of exceeding threshold of One Person Company
6	INC-6	New form	Application for Conversion
7	INC-7	1	Application for Incorporation of Company (Other than One Person Company)
8	INC-18	New form	Application to Regional Director for conversion of section 8 company into any other kind of company
9	INC-20	New form	Intimation to Registrar of revocation or surrender of license issued under section 8
10	INC-21	19	Declaration prior to the commencement of business
11	INC-22	18	Notice of situation or change of situation of registered office and verification
12	INC-23	1AD, 24AAA	Application to Regional director for approval to shift the registered office from one state to another state or from jurisdiction of one registrar to another within the state
13	INC-24	1B	Application for approval of Central Government for change of name
14	INC-27	1B, 62	Conversion of public company into private company or private company into public company
15	INC-28	21	Notice of order of the Court or other authority

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16	PAS-3	2	Return of allotment
17	SH-7	5	Notice to Registrar for alteration of share capital
18	SH-8	New form	letter of offer
19	SH-11	4C	Return in respect of buy back of securities
20	CHG-1	8	Application for registration of creation, modification of charge (other than those related to debentures) including particulars of modification of charge by Asset Reconstruction Company in terms of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI)
21	CHG-4	17	Particulars for satisfaction of charge
22	CHG-6	15	Notice of appointment or cessation of receiver or manager
23	CHG-9	10	Application for registration of creation or modification of charge for debentures or rectification of particulars filed in respect of creation or modification of charge for debentures
24	MGT-6	22B	Form of return to be filed with the Registrar
25	MGT-14	23	Filing of Resolutions and agreements to the Registrar under section 117
26	DIR-3	DIN1	Application for allotment of Director Identification Number
27	DIR-6	DIN4	Intimation of change in particulars of Director to be given to the Central Government
28	DIR-11	New form	Notice of resignation of a director to the Registrar
29	DIR-12	32, 32AD	Particulars of appointment of directors and the key managerial personnel and the changes amongst them
30	MR-1	25C	Return of appointment of managing director or whole time director or manager
31	MR-2	25A	Form of application to the Central Government for approval of appointment or reappointment and remuneration or increase in remuneration

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			or waiver for excess or over payment to managing director or whole time director or manager and commission or remuneration to directors
32	URC-1	37, 39	Application by a company for registration under section 366
33	FC-1	44	Information to be filed by foreign company
34	FC-2	49, 52	Return of alteration in the documents filed for registration by foreign company
35	FC-3	52	List of all principal places of business in India established by foreign company
36	FC-4	PTII	Annual Return
37	GNL-1	61	Form for filing an application with Registrar of Companies
38	GNL-2	62	Form for submission of documents with Registrar of Companies
39	GNL-3	1AA	Particulars of person(s) or director(s) or charged or specified for the purpose of section 2(60)
40	ADJ	New form	Memorandum of Appeal
41	MSC-1	New form	Application to ROC for obtaining the status of dormant company
42	MSC-3	New form	Return of dormant companies
43	MSC-4	New form	Application for seeking status of active company
44	RD-1	24A	Form for filing application to Regional Director
45	RD-2	24AAA	Form for filing petitions to Central Government (Regional Director)
46	CG-1	65	Form for filing application or documents with Central Government
47	-	66	Form for submission of compliance certificate with the Registrar
48	-	5INV	Statement of unclaimed and unpaid amounts
49	-	14LLP	Form for intimating to Registrar of Companies of conversion of the company into limited liability partnership (LLP).
50	-	20B	Form for filing annual return by a company having a share capital with the Registrar

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51	-	21A	Particulars of annual return for the company not having share capital
52	-	23AC	Form for filing balance sheet and other documents with the Registrar
53	-	23ACA	Form for filing Profit and Loss account and other documents with the Registrar
54	-	23ACA-XBRL	Form for filing XBRL document in respect of Profit and Loss account and other documents with the Registrar
55	-	23AC-XBRL	Form for filing XBRL document in respect of balance sheet and other documents with the Registrar
56	-	23C	Form of application to the Central Government for appointment of cost auditor
57	-	23D	Form for Information by Cost Auditor to Central Government
58	-	35A	Information to be furnished in relation to any offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the
59	-	A-XBRL	Form for filing XBRL document in respect of compliance report and other documents with the Central Government
60	-	FTE	Application for striking off the name of company under the Fast Track Exit(FTE) Mode
61	-	I-XBRL	Form for filing XBRL document in respect of cost audit report and other documents with the Central Government
62	-	Refund	Application for requesting refund of fees paid
63	-	BankACC	Application for simplifying bank account opening process as user shall not be required to submit any physical application form.
64	-	Investor Complaint Form	Form for filing complaint(s) against the company
65	-	67AD.	Clarification

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In order to facilitate easy understanding of the e-forms being rolled out under the provisions of Companies Act, 2013 and Rules made thereunder, forms under the new Act are mandatorily numbered alpha-numeric. Initial of forms is to be started with alphabet of two or three letters based on the subject of the Chapter, followed by serial number of the form. This will define the nature of the forms and would be easy to recognise.

Following table is the summary of chapter wise nomenclature of forms provided by MCA:

Sl no	Chapter No	Particulars of chapter	Form no start with	remarks
01	II	INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO	INC	Alphabet followed by numeric number
02	III	PROSPECTUS AND ALLOTMENT OF SECURITIES	PAS	
03	IV	SHARE CAPITAL AND DEBENTURES	SH	
04	V	ACCETANCE OF DEPOSIT BY COMPANIES	DPT	
05	VI	CHARGES	CHG	
06	VII	MANAGEMENT AND ADMINISTRATION	MGT	
07	VIII	DECLARATION ANY PAYMENT OF DIVIDEND	DIV	
08	IX	ACCOUNTS OF COMPANIES	AOC	
09	X	AUDIT AND AUDITORS	ADT	
10	XI	APPOINTMENT AND QUALIFICATIONS OF DIRECTORS	DIR	
11	XII	MEETINGS OF BOARD AND ITS POWERS	MBP	
12	XIII	APPOINTMENT AND REMUNERATION OF PERSONNEL	MR	
13	XXI	COMPANIES AUTHORISED TO REGISTER UNDEDR THIS ACT	URC	
14	XXII	COMPANIES INCORPORATED OUTSIDE INDIA	FC	
15	XXIV	REGISTRATION OFFICES AND FEES	GNL	
16	XXVI	NIDHIS	NDH	
17	XXVIII	SPECIAL COURT	MAC	
18	XXIX	MEMORANDUM OF APPEAL	ADJ	
19	XXIX	MISCELLANEOUS	MSC	

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15

National Company Law Tribunal and Appellate Tribunal

Important Note: Keeping in view the fact that the NCLT and NCLAT are not in operation till date, students are hereby informed that this chapter is not applicable for May 2015 examinations.

15.0 Introduction

In the past there were number of quasi-judicial forums and tribunals to provide speedier and specialized judicial settlement in a wide range of business issues for dispensation of justice to companies.

Later, the Companies (Second Amendment) Act, 2002 provided for a National Company Law Tribunal (NCLT) for combining the jurisdiction of various bodies administering the Companies Act, 1956.

Now, the Companies Act, 2013 provides for the constitution of National Company Law Tribunal (NCLT) & National Company Law Tribunal and Appellate Tribunal (NCLAT). NCLT will replace the Company Law Board, the Board for Industrial and Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction and will have judicial and technical members. The NCLT under the new Companies Act, 2013 is being set up to bring all lawsuits pertaining to companies under one body.

The provisions dealing with the various parts of NCLT and NCLAT are covered under the Chapter XXVII of the Companies Act, 2013. Earlier, the same were covered in the Part I-B of the Companies Act, 1956. Relevant sections relating to the constitution of NCLT & NCLAT, qualifications and selection, term of office, salary, allowance and other terms and conditions of service of members being covered under sections 407 to 414 in the Companies Act, 2013 were notified on 12th of September, 2013. Out of a total of 28 sections in Chapter XXVII of the Companies Act, 2013, these 8 sections were notified while the remaining 20 sections are yet to be notified. Rules under this chapter of the Companies Act, 2013 have also not been notified in the Official Gazette (till September 2014).

15.1 Definitions

Section 407 of the Companies Act, 2013 provides the definitions of chairperson, judicial members, member, president and technical member. The section defines the following key members constituting the NCLT & NCLAT-

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Members		Definitions
Chairperson	Means	the Chairperson of the Appellate Tribunal
Judicial Member		a member of the Tribunal or the Appellate Tribunal appointed as such and includes the President or the Chairperson
Member		a member, whether Judicial or Technical of the Tribunal or the Appellate Tribunal and includes the President or the Chairperson.
President		the President of the Tribunal
Technical Member		a member of the Tribunal or the Appellate Tribunal appointed as such

Various points of comparison with respect to old law i.e. the Companies Act, 1956

(i) This section replaces the section 10 FD and 10 FR (Qualifications for appointment of President and Members) of the 1956 Act.

(ii) New Act, 2013 defines the various categories of persons (Chairperson, Members, and President) constituting the tribunal and appellate tribunal.

15.2 Constitution of National Company Law Tribunal

According to section 408 of the Companies Act, 2013, the Central Government shall, by notification, constitute with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of (Judicial and Technical) members, as the Central Government may deem necessary, to be appointed by notification, to exercise and discharge such powers and functions as conferred on it by or under this Act or any other law for the time being in force.

Various points of comparison with respect to old law i.e. the Companies Act, 1956

(i) This provision replaces Section 10FB (Constitution of National Company Law Tribunal) and 10 FC (Composition of tribunal) of the 1956 Act.

(ii) The new law contained in the 2013 Act, erased the ceiling on the appointment of the number of members from 'not exceeding sixty two' as given in the 1956 Act, to 'as may deem necessary'.

15.3 Qualification of President and Members of Tribunal

Section 409 of the Companies Act, 2013, deals with qualifications of the President and members of Tribunal.

(i) Qualification for the President: He shall be a person who is or has been a Judge of a High Court for five years.

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(ii) Qualification for the Judicial member: A person shall not be qualified for appointment as a Judicial Member unless he is or has been—

(1) a judge of a High Court; or

(2) a District Judge for at least five years; or

(3) an advocate of a court for at least ten years.

For the purposes of clause (3) above, in computing the period for which a person has been an advocate of a court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he become an advocate.

(iii) Qualification for Technical member: A person shall not be qualified for appointment as a Technical Member unless he—

(1) has been a member of the Indian Corporate Law Service or Indian Legal Service for at least fifteen years out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service; or

(2) is or has been in practice as a chartered accountant, or a cost accountant , or as a company secretary for at least fifteen years

(3) is a person of proven ability, integrity and standing having special knowledge and experience, of not less than fifteen years, in industrial finance, management or administration, reconstruction, investment, accountancy, labour matters or such other disciplines which are related to the management of the affairs including reconstruction, rehabilitation and winding up of companies,

(4) is or has been a presiding officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 for at least five years.

Various points of comparison with respect to old law i.e. the Companies Act, 1956

(i) This provision replaces section 10 FD (Qualifications for appointment of President and Members) of the 1956 Act.

(ii) The new Act, 2013 specifically prescribes the qualification of a president of the tribunal that person should be a judge of a high court for the term of five years.

(iii) Eligibility for appointment of judicial and technical member changed under the Companies Act, 2013.

15.4 Constitution of Appellate Tribunal

As per section 410 of the Companies Act, 2013, the Central Government shall, by notification constitute with effect from such date as may be specified therein, an Appellate Tribunal to be known as the National Company Law Appellate Tribunal (NCLAT) consisting of a chairperson and such number of judicial and technical members, not exceeding eleven, as the Central Government may deem fit.

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NCLAT when constituted will be for hearing appeals against the orders of the Tribunal.

Various points of comparison with respect to old law i.e. the Companies Act, 1956
(i) This section replaces section 10 FR (Constitution of Appellate Tribunal) of the Companies Act, 1956.
(ii) New Act, 2013 increases the strength from maximum 3 members (including chairperson) to maximum 11.

15.5 Qualifications of Chairperson and members of Appellate Tribunal

Section 411 of the Companies Act, 2013 prescribes the qualifications of the chairperson and the members of the Appellate Tribunal.

(i) Qualification of Chairperson: The chairperson shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(ii) Qualification of members: (1) A Judicial Member shall be a person who is or has been a Judge of a High Court or is a Judicial Member of the Tribunal for five years.

(2) A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience, of not less than twenty-five years in various specified disciplines related to the management, conduct of affairs, revival, rehabilitation and winding up of companies.

Various points of comparison with respect to old law i.e. the Companies Act, 1956
(i) This section replaces section 10 FR (Constitution of Appellate Tribunal) of the 1956 Act.
(ii) New Act of 2013 prescribes qualification separately for both the judicial member and the technical member unlike the 1956 Act, where a common qualification was prescribed for the members.

15.6 Selection of Members of Tribunal and Appellate Tribunal

Section 412 of the Companies Act, 2013, deals with the selection of the members of the Tribunal and Appellate Tribunal.

(i) The President of the Tribunal and the chairperson and Judicial Members of the Appellate Tribunal shall be appointed after consultation with the Chief Justice of India. [Section 412(1)]

(ii) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee. [Section 412 (2)]

(iii) Constitution of selection Committee: The selection committee shall consist of—

(1) Chief Justice of India or his nominee—Chairperson;

(2) a senior Judge of the Supreme Court or a Chief Justice of High Court — Member;

(3) Secretary in the Ministry of Corporate Affairs—Member;

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(4) Secretary in the Ministry of Law and Justice—Member; and

(5) Secretary in the Department of Financial Services in the Ministry of Finance— Member.

Under section 412 (3) the Secretary, Ministry of Corporate Affairs shall be the Convener of the Selection Committee.

(iv) Functioning of the Selection committee: The Selection Committee shall determine its procedure for recommending persons for the appointment of the members of the Tribunal and the technical members of the Appellate Tribunal [Section 412 (4)]

(v) No appointment of members shall be invalid: No appointment of the Members of the Tribunal or the Appellate Tribunal shall be invalid merely by reason of any vacancy or any defect in the constitution of the Selection Committee. [Section 412(5)]

Various points of comparison with respect to old law i.e. the Companies Act, 1956

(i) The new law given under the Companies Act, 2013 provides that president, chairperson, judicial member of the tribunal shall be appointed after consultation with the chief justice of India.

(ii) The 2013 Act, in addition to the existing members as provided under the 1956 Act, shall consist of a senior judge of the Supreme Court or Chief Justice of High Court as member.

15.7 Term of office of President, Chairperson and other Members

Section 413 of the Companies Act, 2013, provides the term for the holding of office for the members constituting Tribunal and Appellate Tribunal along with the age bar on the holding of the same.

(i) Term of holding office in the case of Tribunal: The President and every other Member of the Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re appointment for another term of five years. [Section 413 (1)].

(ii) Age bar on holding of office: Under section 413 (2), a Member of the Tribunal shall hold office as such until he attains,—

(a) in the case of the President, the age of sixty-seven years;

(b) in the case of any other Member, the age of sixty-five years.

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member.

Provided further that the Member may retain his lien with his parent cadre or Ministry or Department, while holding office for a period not exceeding one year.

(iii) Term of holding office in the case of Appellate Tribunal: The chairperson or a Member of the Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office, and shall be eligible for re-appointment for another term of

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five years. [Section 413(3)]

(iv) Restriction on holding of office: Under section 413(4), a member of the Appellate Tribunal shall hold office as such until he attains,—

(a) in the case of the Chairperson, the age of seventy years;

(b) in the case of any other Member, the age of sixty-seven years.

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member.

Provided further that a member may retain his lien with his parent cadre or Ministry or Department, while holding office for a period not exceeding one year.

Various points of comparison with respect to old law i.e. the Companies Act, 1956

(i) This section 413 of the Act, 2013 replaces Section 10 FT and 10 FE (Term of office of Chairperson and Members, and President and members) of the 1956 Act.

(ii) New law increases the term of office to be held by the President and members of the NCLAT and the Chairperson and the member of NCLT from three years to five years.

(iii) The Act of 2013 allows Member to retain his lien with his parent cadre or Ministry or Department, while holding office for a period not exceeding one year.

(iv) The Act of 2013 further provides for the member of Tribunal and Appellate Tribunal an additional eligibility that a person who has not completed fifty years of age shall not be eligible for appointment as Member.

15.8 Salary, allowances and other terms and conditions of service of Members

According to section 414 of the Companies Act, 2013, the salary, allowances and other terms and conditions of service of the Members of the Tribunal and the Appellate Tribunal shall be such as may be prescribed.

Provided that, neither the salary and allowances nor the other terms and conditions of service of the Members shall be varied to their disadvantage after their appointment.

Various points of comparison with respect to old law i.e. the Companies Act, 1956

Section 414 of the Act, 2013 replaces this Section 10 FG and 10 FW (Salary, allowances and other terms and conditions of service of President and other Members, chairperson and members) of the 1956 Act.

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RELEVANT SECTIONS OF THE COMPANIES ACT, 1956

National Company Law Tribunal

Financial and administrative powers of Member Administration (Section 10FF): The Central Government shall designate any Judicial Member or Technical Member as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules which may be made by the Central Government:

Provided that the Member Administration shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the Tribunal subject to the condition that such officer shall, while exercising such delegated powers continue to act under the direction, superintendence and control of the Member Administration.

Vacancy in Tribunal (Section 10FH)

(1) In the event of the occurrence of any vacancy in the office of the President of the Tribunal by reason of his death, resignation or otherwise, the senior-most Member shall act as the President of the Tribunal until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member or, as the case may be, such one of the Members of the Tribunal, as the Central Government, may, by notification, authorise in this behalf, shall discharge the functions of the President until the date on which the President resumes his duties.

(3) If, for reason other than temporary absence, any vacancy occurs in the office of the President or a Member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Tribunal from the stage at which the vacancy is filled.

Resignation of President and Member (Section 10FI): The President or a Member of the Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the President or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of the term of office, whichever is the earliest.

Removal and suspension of President or Member (Section 10FJ)

(1) The Central Government may, in consultation with the Chief Justice of India, remove from office the President or any Member of the Tribunal, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

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(c) has become physically or mentally incapable of acting as such President or Member of the Tribunal; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President or Member of the Tribunal; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that no such President or a Member shall be removed on any of the grounds specified in clauses (b) to (e) without giving him reasonable opportunity of being heard in respect of those charges.

(2) The President or a Member of the Tribunal shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which such President or a Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(3) The Central Government may suspend from office the President or Member of the Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

(4) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the President or a Member referred to in sub-section (2).

Officers and employees of Tribunal (Section 10FK)

(1) The Central Government shall provide the Tribunal with such officers and other employees as it may deem fit.

(2) The officers and other employees of the Tribunal shall discharge their functions under the general superintendence of the Member Administration.

(3) The salaries and allowances and other terms and conditions of service of the officers and other employees of the Tribunal shall be such as may be prescribed.

Benches of Tribunal (Section 10FL)

(1) Subject to the provisions of this section, the powers of the Tribunal may be exercised by Benches, constituted by the President of the Tribunal, out of which one shall be a Judicial Member and another shall be a Technical Member referred to in clauses (a) to (f) of sub-section (3) of section 10FD:

Provided that it shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the

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Member of the Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.

(2) The President of the Tribunal shall, for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, constitute one or more Special Benches consisting of three or more Members, each of whom shall necessarily be a Judicial Member, a Technical Member appointed under any of the clauses (a) to (f) of sub-section (3) of section 10FD, and a Member appointed under clause (g) or clause (h) of sub-section (3) of section 10FD :

Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding up proceedings of such company may be conducted by a Bench consisting of a single Member.

(3) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it.

(4) There shall be constituted such number of Benches, as may be notified by the Central Government.

(5) In addition to the other Benches, there shall be a Principal Bench at Delhi presided over by the President of the Tribunal.

(6) The Principal Bench of the Tribunal shall have powers of transfer of proceedings from any Bench to another Bench of the Tribunal in the event of inability of any Bench from hearing any such proceedings for any reason:

Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.

Order of Tribunal (Section 10 FM)

(1) The Tribunal may, after giving the parties to any proceeding before it, an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under subsection (1), and shall make such amendment if the mistake is brought to its notice by the parties.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

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Power to review (Section 10FN)

The Tribunal shall have power to review its own orders.

Delegation of powers (Section 10FO)

The Tribunal may, by general or special order, delegate, subject to such conditions and limitations, if any, as may be specified in the order, to any Member or officer or other employee of the Tribunal or other person authorised by the Tribunal to manage any industrial company or industrial undertaking or any operating agency, such powers and duties under this Act as it may deem necessary.

Power to seek assistance of Chief Metropolitan Magistrate and District Magistrate (Section 10FP)

(1) The Tribunal or any operating agency, on being directed by the Tribunal may, in order to take into custody or under its control all property, effects and actionable claims to which a sick industrial company is or appears to be entitled, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any property, books of account or any other document of such sick industrial company, be situate or be found, to take possession thereof, and the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, shall, on such request being made to him,—

(a) take possession of such property, books of account or other documents; and

(b) cause the same to be entrusted to the Tribunal or the operating agency.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.

National Company Law Appellate Tribunal

Appeal from order of Tribunal (Section 10FQ): Any person aggrieved by an order or decision of the Tribunal, within the period of 45 days from the date on which a copy of the order or decision of the tribunal, may prefer an appeal to Appellate Tribunal. On receipt of an appeal from an aggrieved person, the Appellate Tribunal may pass such orders, after giving an opportunity of being heard, as it thinks fit, confirming, modifying or setting aside the order appealed against. The Appellate Tribunal shall be made to dispose the appeal within six months from the date of the receipt of the appeal.

Vacancy (Section 10FS): In the event of the occurrence of any vacancy in the office of the Chairperson of the Appellate Tribunal by reason of his death, resignation or otherwise, the

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senior-most Member of the Appellate Tribunal shall act as the Chairperson of the Appellate Tribunal until the date on which a Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

When the Chairperson of the Appellate Tribunal is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member or, as the case may be, such one of the member of the Appellate Tribunal, as the Central Government may, by notification, authorize in this behalf, shall discharge the functions of the Chairperson resumes his duties.

If for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled.

Resignation (Section 10FU): The Chairperson or a Member of the Appellate Tribunal may resign his office by giving notice in writing to the Central Government. However, the Chairperson or member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

Removal and suspension of Chairperson and Members of Appellate Tribunal (Section 10FV)

(1) The Central Government may, in consultation with the Chief Justice of India, remove from office the Chairperson or any Member of the Appellate Tribunal, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such Chairperson or Member of the Appellate Tribunal; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest.

(2) The Chairperson or a Member of the Appellate Tribunal shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which such Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(3) The Central Government may suspend from office the Chairperson or a Member of the

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Appellate Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

(4) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the Chairperson or a Member referred to in sub-section (2).

Selection Committee (Section 10FX): The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of—

(a)	Chief Justice of India or his nominee	Chairperson;
(b)	Secretary in the Ministry of Finance and Company Affairs	Member;
(c)	Secretary in the Ministry of Labour	Member;
(d)	Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department)	Member;
(e)	Secretary in the Ministry of Finance and Company Affairs (Ministry of Corporate Affairs)	Member.

The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convener of the Selection Committee.

The Central Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal and six months before the superannuation or end of tenure of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, make a reference to the Selection Committee for filling up of the vacancy. The Selection Committee shall recommend within one month a panel of three names for every vacancy referred to it.

Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal or President or Member of the Tribunal, as the case may be.

No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

Chairperson, etc., to be public servants (Section 10FY) : The Chairperson, Members, officers and other employees of the Appellate Tribunal and the President, Members, officers and other employees of the Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

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Protection of action taken in good faith (Section 10FZ): No suit, prosecution or other legal proceedings shall lie against the Appellate Tribunal or its Chairperson, Member, officer or other employee or against the Tribunal, its President, Member, officer or other employee or operating agency or liquidator or any other person authorised by the Appellate Tribunal or the Tribunal in the discharge of any function under this Act for any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.

Procedure and powers of Tribunal and Appellate Tribunal (Section 10FZA): The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it ex parte;

(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(i) any other matter which may be prescribed by the Central Government.

Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,—

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

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All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Tribunal and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Power to punish for contempt (Section 10G): The Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as the High Court has and may exercise, for this purpose under the provisions of the Contempt of Courts Act, 1971 (70 of 1971), shall have the effect subject to modifications that—

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such law officers as the Central Government may specify in this behalf.

Staff of Appellate Tribunal (Section 10GA): The Central Government shall provide the Appellate Tribunal with such officers and other employees as it may think fit. The officers and other employees of the Appellate Tribunal shall discharge their functions under the general superintendence of the Chairperson of the Appellate Tribunal. The salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal shall be such as may be prescribed.

Civil court not to have jurisdiction. (Section 10GB): No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force.

Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings (Section 10GC): No act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of existence of any vacancy or defect in the establishment of the Tribunal or the Appellate Tribunal, as the case may be.

Right to legal representation (Section 10GD): The applicant or the appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

Explanation.—For the purposes of this section,—

(a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

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(b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, a vakil or any attorney of any High Court, and includes a pleader in practice.

Limitation (Section 10GE): The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to an appeal made to the Appellate Tribunal.

Appeal to Supreme Court (Section 10GF): Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

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16
Special Courts

16.0 Introduction

Chapter XXVIII of the Companies Act, 2013 deals with the concept of Special Courts. This concept has assumed greater importance especially in the recent times as this will help in speedy trial of all offences under the Act. Hence, this will definitely facilitate in good corporate governance and stricter implementation of the Law. Due to this, the stakeholders will be benefited at large. With intent to punish the guilty, the Legislature has bring in, the Special Courts in the Companies Act, 2013. The Act focuses on establishment and the jurisdiction of the Special court. The Companies Act, 2013 overrides the related provisions of the Cr.PC. Following sections (439, 442 to 446) related to the Special Court have been notified of the Companies Act, 2013 vide notification dated 12th September, 2013 and 26th March, 2014. Remaining sections of this chapter is yet to be notified.

16.1 Offences to be non-cognizable (Section 439)

This section has been notified and made effective from 12th of September, 2013. Earlier, it was covered under the section 621 and 624 of the Companies Act, 1956.

Section 439 deals with the offences that are considered of non cognizable nature under the Companies Act, 2013.

The term "Non-cognizable offence" is defined under section 4 of the Cr.PC. It is an offence for which a police officer may not arrest without warrant.

(i) Offences under the Companies Act, 2013 deemed as non-cognizable: Overriding the provisions given under the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in section 212(6) of the Companies Act, 2013, which deals with the investigation into affairs of company by serious fraud investigation office, shall be deemed to be non-cognizable within the meaning of the said Code.

Therefore, the offences as covered under section 212(6) shall now be deemed to be cognizable where police officer may arrest person without warrant and are non- bailable. The Companies Act, 2013 establishes the offence covered under the section 212(6) as a public wrong which has to be prevented and controlled. This non- bailable nature of the offences deter the offender and the others from committing further and similar offences.

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(ii) Cognizance of offence: A court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof only on the written complaint of -

(a) The Registrar,

(b) A shareholder of the company, or

(c) Of a person authorised by the Central Government in that behalf.

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

Provided that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

(iii) Attendance of complainant: where the complainant is the Registrar or a person authorised by the Central Government as given under sub-section (2), the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.

(iv) Non-application of sub-section (2) on the action of the liquidator: The provisions of sub-section (2) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

The liquidator of a company shall not be deemed to be an officer of the company within the meaning of sub-section (2).

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section correspond to sections 621 and 624 of the Companies Act, 1956.

(ii) The 2013 Act provides an exception that the offences under section 212(6) shall be deemed to be cognizable offence whereas every other offence shall be deemed to be non-cognizable within the Companies Act, 2013, overriding the CR.PC. This exception was not included in the 1956 Act.

(iii) Cognizance of an offence which said to commit by the company or any officer thereof, shall be taken by the court only on the written complaint of the Registrar, shareholder of company or person authorized by the Central Government. This is not there in the 1956 Act.2013 Act incorporates the law with respect to the cognizance of offences relating to the issue and transfer of securities and nonpayment of dividend on complaint made by the SEBI.

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16.2 Mediation and Conciliation Panel (Section 442)

In common parlance Mediation means intervention of some third party in a dispute with the intention to resolve the dispute.

Conciliation means the process of adjusting or settling disputes in a friendly manner through extra judicial means. This new provision introduced by the Companies Act, 2013 has come into force with effect from 1st April, 2014 vide notification dated 26th of March, 2014. Section 442 of the Companies Act, 2013 deals with the constitution and functioning of the mediation and conciliation panel in order to dispose the matter.

Section 442 lays the following law with respect to the constitution and working of the Mediation and Conciliation Panel:

(1) Central Government to maintain the Panel of Mediators: The Central Government shall maintain a panel of experts to be known as Mediation and conciliation panel for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

Hence, it is important that the case should be pending before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

(2) Panel consisting of experts: The panel shall consist of such number of experts having such qualification as may be prescribed.

(3) Filing of application: Application for mediation and conciliation can be made by:

(i) any parties to the proceedings. (It shall be accompanied with such fees and in such form as may be prescribed.)

(ii) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, *suo motu* refer any matter pertaining to such proceeding to such number of experts as it may deem fit.

(4) Appointment of expert/s from panel: The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may appoint one or more experts from the Panel as may be deemed fit.

(5) Fees, terms and conditions of the experts: The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(6) Procedure for the disposal of matter: In order to dispose the matter, the Mediation and Conciliation Panel shall follow such procedure as may be prescribed.

(7) Period for the disposal of matter: The Mediation and Conciliation Panel shall dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(8) Filing of objection on the recommendation of the panel: Any party aggreived by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This is a new insertion in the 2013 Act. For the purpose of mediation and conciliation, Central government shall maintain a panel of experts for mediation between the parties during the pendency of any proceedings before the Central Government/ Tribunal/Appellate Tribunal.

16.3 Power of Central Government to appoint company prosecutors (Section 443)

This section 443 of the Companies Act, 2013 has come into force with effect from 12th September, 2013. This section lays down the provisions seeking to provide that the Central Government may appoint company prosecutors with the same powers as given under the Cr. PC on Public Prosecutors.

(i) Appointment of company prosecutors: The Central Government may appoint (generally, or for any case, or in any case, or for any specified class of cases in any local area) one or more persons, as company prosecutors for the conduct of prosecutions arising out of this Act; and

(ii) Powers and Privileges: The persons so appointed as company prosecutors shall have all the powers and privileges conferred on Public Prosecutors appointed under section 24 of the Cr. PC.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 624A of the Companies Act, 1956.

(ii) The provisions of the 2013 Act is modified with respect to the powers and privileges conferred on the Public Prosecutors by the Cr.PC, 1973 under the sections 24 instead of section 492 as provided under the Companies Act, 1956.

16.4 Appeal against acquittal (Section 444)

According to section 444 of the Companies Act, 2013, the Central Government may, in any case arising under this Act, direct –

(i) any company prosecutor, or

(ii) authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court.

Appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section is corresponding to section 624 B of the 1956 Act. There is no change in the provision.

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16.5 Compensation for accusation without reasonable cause (Section 445)

Under section 445 of the Companies Act 2013 the provisions of section 250 of the Code of Criminal Procedure, 1973 shall apply *mutatis mutandis* (with such changes as may be necessary) to compensation for accusation without reasonable cause before the Special Court or the Court of Session.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
Under the 2013 Act, the provisions of section 250 of the Cr.PC shall be applied *mutatis mutandis* for accusation before the special court or the court of session.

16.6 Application of fines (Section 446)

Under section 446 of the Companies Act 2013, the court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings, or in or towards the payment of a reward to the person on whose information the proceedings were instituted.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
This section corresponds to section 626 of the Companies Act, 1956. There is a significant change in the law with the introduction of this segment in the Companies Act 2013.

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17

Miscellaneous Provisions

17.1 Companies capable of being registered (Section 366 of the Companies Act, 2013)

A new section 366 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Companies capable of being registered. According to this section:

(i) For the purposes of this Part (Chapter XXI, Part I - Companies Authorised to register under this Act), the word "company" includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity formed under any other law for the time being in force which applies for registration under this Part.

(ii) With the exceptions and subject to the provisions contained in this section, any company formed, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other law for the time being in force or being otherwise duly constituted according to law, and consisting of 7 or more members, may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee, in such manner as may be prescribed and the registration shall not be invalid by reason only that it has taken place with a view to the company's being wound up.

Exceptions-

(a) a company registered under the Indian Companies Act, 1882 or under the Indian Companies Act, 1913 or the Companies Act, 1956, shall not register in pursuance of this section (this means that existing companies when the new Act came into existence were not required to be registered again under the new Act);

(b) a company having the liability of its members limited by any Act of Parliament other than this Act or by any other law for the time being in force, shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(c) a company shall be registered in pursuance of this section as a company limited by shares only if it has a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person, or where proxies are allowed, by proxy, at a general meeting summoned for the purpose;

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(e) where a company not having the liability of its members limited by any Act of Parliament or any other law for the time being in force is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person, or where proxies are allowed, by proxy, at the meeting;

(f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute 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, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

According to *the Companies (Authorised to Registered) Rules, 2014,* provision of Chapter II (Incorporation of Company and Matters Incidental Thereto) relating to incorporation of company and matters incidental thereto shall be applicable *mutatis mutandis* for such registration.

However, there shall be 7 or more members for the purposes of registration of a company under this sub-rule.

(iii) In computing any majority required for the purposes of registration, when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 565 of the Companies Act, 1956 i.e. Companies capable of being registered. Broadly speaking the provisions is similar.

(ii) However, the new Act has introduced a broad definition of companies authorised to register under the Companies Act, 2013, as any partnership firm, limited liability partnership, cooperative society, society or any other business entity formed under any other law for the time being in force which applies for registration under this Part.

17.2 Certificate of registration of existing companies (Section 367 of the Companies Act, 2013)

A new section 367 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Certificate of registration of existing companies. According to this section:

On compliance with the requirements of this Chapter (Chapter XXI) with respect to registration, and on payment of such fees, if any, as are payable under section 403 (Fee for filing etc.) the Registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited and thereupon the company shall be so incorporated.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 574 of the Companies Act, 1956 i.e. Certificate of registration of existing companies.

17.3 Vesting of property on registration (Section 368 of the Companies Act, 2013)

A new section 368 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Vesting of property on registration. According to this section:

All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this Part, shall, on such registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 575 of the Companies Act, 1956 i.e. Vesting of property on registration.

17.4 Saving of existing liabilities (Section 369 of the Companies Act, 2013)

A new section 369 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for saving of existing liabilities. According to this section:

The registration of a company in pursuance of this Part (Chapter XXI, Part I - Companies Authorised to register under this Act) shall not affect its rights or liabilities in respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of, the company before registration.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 576 of the Companies Act, 1956 i.e. saving for existing liabilities.

17.5 Continuation of pending legal proceedings (Section 370 of the Companies Act, 2013, except the Proviso)

A new section 370 of the Companies Act, 2013 partially[1] came into force from 1st April, 2014 which provides for Continuation of pending legal proceedings. According to this section:

All suits and other legal proceedings taken by or against the company, or any public officer or member thereof, which are pending at the time of the registration of a company in pursuance of this Part (Chapter XXI, Part I - Companies Authorised to register under this Act), may be continued in the same manner as if the registration had not taken place.

[1] *Proviso to section 370 of the Companies Act, 2013 is yet to be notified.*

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 577of the Companies Act, 1956 i.e. Continuation of pending legal proceedings.

17.6 Effect of registration under this Part (Section 371 of the Companies Act, 2013)

A new section 371 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Effect of registration under this Part. According to this section:

(i) When a company is registered in pursuance of this Part (Chapter XXI, Part I - Companies Authorised to register under this Act), the under mentioned provisions shall apply.

(ii) All provisions contained in any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles.

(iii) All the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows:—

(a) Table F in Schedule I shall not apply unless and except in so far as it is adopted by special resolution;

(b) the provisions of this Act relating to the numbering of shares shall not apply to any company whose shares are not numbered;

(c) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability, or to pay or contribute to the payment of the costs, charges and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid;

(d) in the event of the company being wound up, every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives of deceased contributories, or with respect to the assignees of insolvent contributories, as the case may be, shall apply.

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(iv) The provisions of this Act shall apply, notwithstanding anything in any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company, with respect to—

(a) the registration of an unlimited company as a limited company;

(b) the powers of an unlimited company on registration as a limited company, to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called-up except in the event of winding up;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called-up except in the event of winding up,

(v) Nothing in this section shall authorise the company to alter any such provisions contained in any instrument constituting or regulating the company as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act.

(vi) None of the provisions of this Act (apart from those of section 242- Powers of Tribunal) shall derogate from any power of altering its constitution or regulations which may be vested in the company, by virtue of any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company. This means that a company cannot in any manner whatsoever, dilute the applicability of any provisions of this Act (Except those under section 242) by altering either its Memorandum of Association or Articles of Association or any instrument which constitutes or regulates the company.

(vii) Here, the expression "instrument" (used above) includes deed of settlement, deed of partnership, or limited liability partnership

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to and is broadly similar to section 578 of the Companies Act, 1956 i.e. Effect of registration under Part.

(ii) Section 371(7) of the 2013 Act provides that "In this section the expression 'instrument' includes deed of settlement, deed of partnership, or limited liability partnership". This section paves the way for conversion of LLPs into companies. There was no specific mention of LLP agreement in definition of 'instrument' in the 1956 Act.

17.7 Obligation of Companies registering under this Part (Section 374 of the Companies Act, 2013)

A new section 374 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Obligation of Companies registering under this Part. According to this section:

Every company which is seeking registration under this Part (Chapter XXI, Part I- Companies Authorised to register under this Act) shall,—

(i) ensure that secured creditors of the company, prior to its registration under this Part, have either consented to or have given their no objection to company's registration under this Part;

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(ii) publish in a newspaper, advertisement one in English and one in vernacular language in such form as may be prescribed giving notice about registration under this Part , seeking objections and address them suitably;

(iii) file an affidavit, duly notarised, from all the members or partners to provide that in the event of registration under this Part, necessary documents or papers shall be submitted to the registering or other authority with which the company was earlier registered, for its dissolution as partnership firm, limited liability partnership, cooperative society, society or any other business entity, as the case may be;

(iv) comply with such other conditions as may be prescribed under the *Companies (Authorised to Registered) Rules, 2014.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to Obligation of Companies registering under this Part, these have been introduced by the Companies Act, 2013.

17.8 Annual reports on Government companies (Section 394 of the Companies Act, 2013)

As per section 2(45) of the Companies Act, 2013, "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.

A new section 394 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Annual reports on Government companies.

It provides for Annual reports on Government companies in the cases where the central government and the state Government is a member of the Government company. According to this section:

(i) Where the Central Government is a member of a Government company, the Central Government shall cause an annual report on the working and affairs of that company to be—

(a) prepared within three months of its annual general meeting before which the comments given by the Comptroller and Auditor-General of India and the audit report are placed under the proviso to sub-section (6) of section 143; and

(b) as soon as may be after such preparation, laid before both Houses of Parliament together with a copy of the audit report and comments upon or supplement to the audit report, made by the Comptroller and Auditor-General of India.

(ii) Where in addition to the Central Government, any State Government is also a member of a Government company, that State Government shall cause a copy of the annual report prepared under sub-section (1) to be laid before the House or both Houses of the State Legislature together with a copy of the audit report and the comments upon or supplement to the audit report above.

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Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 619A of the Companies Act, 1956 i.e. Annual reports on Government companies.

(ii) Under the Companies Act, 1956, provision for annual report by a company in which only the state government is a member and the Central Government is not a member was provided. This provision has been dispensed with under the Companies Act, 2013.

(iii) The provisions of section 619A of the Companies Act, 1956 as they were applied to any other Government Company was also applicable to a Government company in liquidation. This provision has been dispensed with under the Companies Act, 2013.

17.9 Annual reports where one or more State Governments are members of companies (Section 395 of the Companies Act, 2013)

A new section 395 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Annual reports where one or more State Governments are members of companies.

This section seeks to provide that one or more state governments who is a member of a company where no Central government is a member shall prepare annual reports on the working and affairs of the company. According to this section:

(i) 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—

(a) Prepared within the time specified in sub-section (1) of section 394; and

(b) as soon as may be after such preparation, laid before the House or both Houses of the State Legislature together with a copy of the audit report and comments upon or supplement to the audit report referred to in sub-section (1) of that section.

(ii) Application of the provisions to the Government Company in liquidation: The provisions of this section and section 394 shall, so far as may be, apply to a Government company in liquidation as they apply to any other Government company.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 619A of the Companies Act, 1956 i.e. annual reports on Government companies.

17.10 Registration offices (Section 396 of the Companies Act, 2013)

A new section 396 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Registration offices. According to this section:

(i) Establishment of offices: For the purposes of exercising such powers and discharging such functions as are conferred on the Central Government by or under this Act or under the rules made thereunder and for the purposes of registration of companies under this Act, the

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Central Government shall, by notification, establish such number of offices at such places as it thinks fit, specifying their jurisdiction.

The Companies (Registration Offices and Fees) Rules, 2014 shall apply in relation to Registration offices:

(a) The Central Government shall establish such number of offices at such places as it thinks fit, specifying their jurisdiction for the purpose of exercising such powers and discharge of such functions as are conferred on the Central Government by or under this Act or under the rules made there under and for the purposes of registration of companies under the Act.

(b) The office of the Registrar shall observe such normal working hours as may be approved by the Central Government and shall be open for the transaction of business with the public on all days except Saturday, Sunday and public holidays during working hours between 10.30 a.m. and 3.30 p.m.

(c) The offices other than the office of the Registrar shall observe such normal working hours as may be approved by the Central Government.

(ii) (a) Appointment of officers: The Central Government may appoint such Registrars, Additional, Joint, Deputy and Assistant Registrars as it considers necessary for the registration of companies and discharge of various functions under this Act.

(b) Powers and duties of officers: The powers and duties that may be exercisable by such officers shall be such as may be prescribed.

According to *the Companies (Registration Offices and Fees) Rules, 2014,* the following powers and duties have been prescribed:

(1) The Registrars shall exercise such powers and discharge such duties as are conferred on them by the Act or the rules made there under or delegated to them by the Central Government, wherever the power or duty has been conferred upon the Central Government by the Act or the rules made there under.

(2) Whenever according to the Act, any function or duty is to be discharged by the Registrar, it shall, until the Central Government otherwise directs, be done by the Registrar, or in his absence, by such person as the Central Government may for the time being authorize.

However, in the event of the Central Government altering the constitution of the existing registry offices or any of them, any such function or duty shall be discharged by such officer and at such place, with reference to the local situation of the registered offices of the companies concerned, as the Central Government may appoint.

(iii) Terms & conditions of Salaries payable to officers: The terms and conditions of service, including the salaries payable to persons appointed, shall be such as may be prescribed.

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(iv) Seal for authentication: The Central Government may direct a seal or seals to be prepared for the authentication of documents required for, or connected with, the registration of companies.

According to *the Companies (Registration Offices and Fees) Rules, 2014*, the Registrar shall have a seal and such seal shall bear the words "Registrar of Companies, _____ (Place and State)".

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 609 of the Companies Act, 1956 i.e. Registration offices.

(ii) Under the new Act, it has been specified that the appointment of Registrars, Additional, Joint and Deputy and Assistant Registrars shall also be for the purpose of discharge of various functions under this Act. However, under the old Act, it was limited to just for registration of Company.

17.11 Admissibility of certain documents as evidence (Section 397 of the Companies Act, 2013)

A new section 397 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Admissibility of certain documents as evidence. According to this section:

Notwithstanding anything contained in any other law for the time being in force, any document reproducing or derived from returns and documents filed by a company with the Registrar on paper or in electronic form or stored on any electronic data storage device or computer readable media by the Registrar, and authenticated by the Registrar or any other officer empowered by the Central Government in such manner as may be prescribed, shall be deemed to be a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder without further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence is admissible.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 610A of the Companies Act, 1956 i.e. Admissibility of micro films, facsimile copies of documents, computer printouts and documents on computer media as documents and as evidence.

17.12 Provisions relating to filing of applications, documents, inspection, etc., in electronic form (Section 398 of the Companies Act, 2013)

A new section 398 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Provisions relating to filing of applications, documents, inspection, etc., in electronic form. According to this section:

(i) Notwithstanding anything to the contrary contained in this Act, and without prejudice to the provisions contained in section 6 of the Information Technology Act, 2000, the Central

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Government may make rules so as to require from such date as may be prescribed in the rules that—

(a) such applications, balance sheet, prospectus, return, declaration, memorandum, articles, particulars of charges, or any other particulars or document as may be required to be filed or delivered under this Act or the rules made thereunder, shall be filed in the electronic form and authenticated in such manner as may be prescribed;

(b) such document, notice, any communication or intimation, as may be required to be served or delivered under this Act, in the electronic form and authenticated in such manner as may be prescribed;

(c) such applications, balance sheet, prospectus, return, register, memorandum, articles, particulars of charges, or any other particulars or document and return filed under this Act or rules made thereunder shall be maintained by the Registrar in the electronic form and registered or authenticated, as the case may be, in such manner as may be prescribed;

(d) such inspection of the memorandum, articles, register, index, balance sheet, return or any other particulars or document maintained in the electronic form, as is otherwise available for inspection under this Act or the rules made thereunder, may be made by any person through the electronic form in such manner as may be prescribed;

For details, refer *the Companies (Registration Offices and Fees) Rules, 2014, Rule 8: Authentication of documents.*

(e) such fees, charges or other sums payable under this Act or the rules made thereunder shall be paid through the electronic form and in such manner as may be prescribed; and

According to *the Companies (Registration Offices and Fees) Rules, 2014,* the fees, charges or other sums payable for filing any application, form, return or any other document in pursuance of the Act or any rule made thereunder shall be paid by means of credit card; or internet banking; or remittance at the counter of the authorised banks or any other mode as approved by the Central Government.

(f) the Registrar shall register change of registered office, alteration of memorandum or articles, prospectus, issue certificate of incorporation, register such document, issue such certificate, record the notice, receive such communication as may be required to be registered or issued or recorded or received, as the case may be, under this Act or the rules made thereunder or perform duties or discharge functions or exercise powers under this Act or the rules made thereunder or do any act which is by this Act directed to be performed or discharged or exercised or done by the Registrar in the electronic form in such manner as may be prescribed.

Explanation— It is clarified that the rules made under this section shall not relate to imposition of fines or other pecuniary penalties or demand or payment of fees or contravention of any of the provisions of this Act or punishment therefor.

(ii) The Central Government may, by notification, frame a scheme to carry out the provisions of section 398(1) through the electronic form.

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For details, refer *the Companies (Registration Offices and Fees) Rules, 2014.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 610B of the Companies Act, 1956 i.e. Provisions relating to filing of applications, documents inspection, etc., through electronic form.

(ii) Section 398 of the new Act clarifies that the rules made by Central Government shall not relate to imposition of fines or other pecuniary penalties or demand or payment of fees or contravention of any of the provisions of this Act or punishment therefor. Section 610B of the 1956 Act contained no such clarification such as this.

17.13 Inspection, production and evidence of documents kept by Registrar (Section 399 of the Companies Act, 2013)

A new section 399 of the Companies Act, 2013 partially came into force from 1st April, 2014 which provides for Inspection, production and evidence of documents kept by Registrar. According to this section:

(i) Save as otherwise provided elsewhere in this Act, any person may—

(a) inspect by electronic means any documents kept by the Registrar in accordance with the rules made, being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of such fees as may be prescribed;

(b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment in advance of such fees as may be prescribed:

(ii) The rights conferred as mentioned above shall be exercisable—

(a) in relation to documents delivered to the Registrar with a prospectus in pursuance of section 26, only during the 14 days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government; and

(b) in relation to documents so delivered in pursuance of clause (b) of subsection (1) of section 388, only during the 14 days beginning with the date of the prospectus; and at other times, only with the permission of the Central Government.

(iii) According to section 399(2) of the Companies Act, 2013, no process for compelling the production of any document kept by the Registrar shall issue from any court or the Tribunal except with the leave of that court or the Tribunal[2] and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court or the Tribunal.

2 *Reference of word Tribunal in sub-section (2) of section 399 has not been notified upto 30th September, 2014. Thus, point (iii) shall be read accordingly.*

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(iv) A copy of, or extract from, any document kept and registered at any of the offices for the registration of companies under this Act, certified to be a true copy by the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document.

According to *the Companies (Registration Offices and Fees) Rules, 2014,* the inspection of the documents maintained in the electronic registry so set up in pursuance of rule 9 of the Companies (Registration Offices and Fees) and which are otherwise available for inspection under the Act or rules made thereunder, shall be made by any person in electronic form.

Inspection of documents- The *Companies (Registration Offices and Fees) Rules, 2014*, provides that any person may-

(a) inspect any document kept by the Registrar, being documents filed or registered by him in pursuance of this Act or the Companies Act, 1956 (1 of 1956) or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of fee.

(b) require a certificate of incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment of fee.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 610 of the Companies Act, 1956 i.e. Inspection, production and evidence of documents kept by Registrar.

(ii) The new Act also allows for the inspection in electronic form of documents kept by ROC.

17.14 Electronic form to be exclusive, alternative or in addition to physical form (Section 400 of the Companies Act, 2013)

A new section 400 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Electronic form to be exclusive, alternative or in addition to physical form. According to this section:

The Central Government may also provide in the rules made under section 398 and section 399 that the electronic form for the purposes specified in these sections shall be exclusive, or in the alternative or in addition to the physical form, therefor.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to Electronic form to be exclusive, alternative or in addition to physical form. The Companies Act, 2013 has provided a new section for it.

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17.15 Provision of value added services through electronic form (Section 401 of the Companies Act, 2013)

A new section 401 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Provision of value added services through electronic form. According to this section:

The Central Government may provide such value added services through the electronic form and levy such fee thereon as may be prescribed.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
This section corresponds to and is similar to section 610D of the Companies Act, 1956 i.e. providing of value added services through electronic form.

17.16 Application of provisions of Information Technology Act, 2000 (Section 402 of the Companies Act, 2013)

A new section 402 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Application of provisions of Information Technology Act, 2000. According to this section:

All the provisions of the Information Technology Act, 2000 relating to the electronic records, including the manner and format in which the electronic records shall be filed, in so far as they are not inconsistent with this Act, shall apply in relation to the records in electronic form specified under section 398.

Various points of comparison in respect to old law i.e. the Companies Act, 1956
This section corresponds to and is similar to section 610E of the Companies Act, 1956 i.e. Application of provision of Act 21 of 2000.

17.17 Fee for filing, etc (Section 403 of the Companies Act, 2013)

A new section 403 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Fee for filing, etc. According to this section:

(i) Submission within time: Any document, required to be submitted, filed, registered or recorded, or any fact or information required or authorised to be registered under this Act, shall be submitted, filed, registered or recorded within the time specified in the relevant provision on payment of such fee as may be prescribed.

(ii) Submission after the time specified in relevant provision: Any document, fact or information may be submitted, filed, registered or recorded, after the time specified in relevant provision for such submission, filing, registering or recording, within a period of 270 days from the date by which it should have been submitted, filed, registered or recorded, as the case may be, on payment of such additional fee as may be prescribed.

(iii) Submission after the expiration of above 270 days also: Any such document, fact or information may, without prejudice to any other legal action or liability under the Act, be also

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submitted, filed, registered or recorded, after the first time specified in the expiration of above mentioned 270 days, on payment of fee and additional fee specified under this section.

(iv) Penalty or punishment on submission after the expiration of above 270 days also: Where a company fails or commits any default to submit, file, register or record any document, fact or information within 270 days from the date by which it should have been submitted, filed, registered or recorded, as the case may be under sub-section (1) before the expiry of the period specified in the first proviso to that sub-section with additional fee, the company and the officers of the company who are in default, shall, without prejudice to the liability for payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 611 of the Companies Act, 1956 i.e. Fees in Schedule X to be paid.

(ii) Under the Old Act, section 611 provided for Fees in Schedule X to be paid. Under the new Act, there is no such corresponding schedule. Rather fees have been provided by way of Rules.

(iii) Section 611 of the old Act provided that any document required or authorised by the Companies Act, 1956 to be filed or registered, or any fact required or authorised by this Act to be registered, with the Registrar on payment of the fee specified therefor in Schedule X, may, without prejudice to any other liability, be filed or registered after the time, if any, specified in this Act for its filing or registration on payment of such additional fee not exceeding 10 times the amount of the fee so specified as the Registrar may determine.

The new act provides for "levy of additional fee in a non-discretionary manner for procedural non-compliance, such as late filing of statutory documents, to be enabled through rules". Thus, section 403 of the 2013 Act provides that any document, fact or information may be submitted, filed, registered or recorded, after the time specified in relevant provision (i.e.,delayed filing, submission etc.), if not filed within prescribed time, has to be filed within period of 270 days on payment of such additional fees as may be prescribed.

17.18 Fees, etc., to be credited into public account (Section 404 of the Companies Act, 2013)

A new section 404 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Fees, etc., to be credited into public account. According to this section:

All fees, charges and other sums received by any Registrar, Additional, Joint, Deputy or Assistant Registrar or any other officer of the Central Government in pursuance of any provision of this Act shall be paid into the public account of India in the Reserve Bank of India.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 612 of the Companies Act, 1956 i.e. Fees, etc., paid to Registrar and other officers to be accounted for to Central Government.

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17.19 Power of Central Government to direct companies to furnish information or statistics (Section 405 of the Companies Act, 2013)

A new section 405 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power of Central Government to direct companies to furnish information or statistics. According to this section:

(i) The Central Government may, by order, require companies generally, or any class of companies, or any company, to furnish such information or statistics with regard to their or its constitution or working, and within such time, as may be specified in the order.

(ii) Every above order shall be published in the Official Gazette and may be addressed to companies generally or to any class of companies, in such manner, as the Central Government may think fit.

(iii) The date of such publication shall be deemed to be the date on which requirement for information or statistics is made on such companies or class of companies, as the case may be.

(iv) For the purpose of satisfying itself that any information or statistics furnished by a company or companies in pursuance of any above order is correct and complete, the Central Government may by order require such company or companies to produce such records or documents in its possession or allow inspection thereof by such officer or furnish such further information as that Government may consider necessary.

(v) If any company fails to comply with an order made above or knowingly furnishes any information or statistics which is incorrect or incomplete in any material respect, the company shall be punishable with fine which may extend to twenty-five thousand rupees and every officer of the company who is in default, shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to three lakh rupees, or with both.

(vi) Where a foreign company carries on business in India, all references to a company in this section shall be deemed to include references to the foreign company in relation, and only in relation, to such business.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 615 of the Companies Act, 2013 i.e. Power of Central Government to direct companies to furnish information or statistics.

(ii) The amount of punishment in case a company fails to comply with any order under this section or furnishes incorrect or incomplete information or statistics has been increased to ₹ 25,000. Earlier under the Companies Act, 1956, it was ₹ 10, 000. Punishment in case of default by the officer has been increased from ₹ 10, 000 to ₹ 25,000 and which may extend to ₹ 3 Lacs.

(iii) The period of imprisonment has also been increased to maximum of six months from the maximum of three months.

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(iv) Under the Companies Act, 1956, if a company has failed to furnish any information or statistics as required by the order or for satisfying that any information or statistics furnished by a company in pursuance of order is correct and complete, the Central Government may direct an inquiry. This provision has been dispensed with under the Companies Act, 2013.

17.20 Power to modify Act in its application to *Nidhis* (Section 406 of the Companies Act, 2013)

A new section 406 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Power to modify Act in its application to *Nidhis.* According to this section:

(i) Definition: Here, "Nidhi" means a company which has been incorporated as a Nidhi with the object of:

(a) cultivating the habit of thrift and savings amongst its members,

(b) receiving deposits from, and lending to, its members only, for their mutual benefit, and

(c) which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

(ii) The Central Government may, by notification, direct that any of the provisions of this Act shall not apply, or shall apply with such exceptions, modifications and adaptations as may be specified in that notification, to any Nidhi or Nidhis of any class or description as may be specified in that notification.

(iii) A copy of every notification proposed to be issued under point (ii), shall be laid in draft before each House of Parliament, while it is in session, for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

The *Nidhi Rules, 2014,* shall apply in relation to the following:

(i) Application: These rules shall apply to-

(a) every company which had been declared as a Nidhi or Mutual Benefit Society under sub - section (1) of Section 620A of the Companies Act, 1956,

(b) every company functioning on the lines of a Nidhi company or Mutual Benefit Society but has either not applied for or has applied for and is awaiting notification to be a Nidhi or Mutual Benefit Society under sub- Section (1) of Section 620A of the Companies Act, 1956; and

(c) every company incorporated as a Nidhi pursuant to the provisions of Section 406 of the Act.

(ii) Incorporation and incidental matters.—

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(a) A Nidhi to be incorporated under the Act shall be a public company and shall have a minimum paid up equity share capital of 5 lakh rupees.

(b) On and after the commencement of the Act, no Nidhi shall issue preference shares.

(c) If preference shares had been issued by a Nidhi before the commencement of this Act, such preference shares shall be redeemed in accordance with the terms of issue of such shares.

(d) Except as provided under the proviso to sub-rule (e) to rule 6, no Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.

Exception as provided under the proviso to sub-rule (e) to rule 6: Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.

(e) Every Company incorporated as a "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

(iii) General restrictions or prohibitions

No Nidhi shall—

(a) carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any body corporate;

(b) issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;

(c) open any current account with its members;

(d) acquire another company by purchase of securities or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management, unless it has passed a special resolution in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over such Nidhi;

Explanation.—For the purposes of this sub-rule, "control" shall have the same meaning assigned to it in section 2(27) of the Act;

(e) carry on any business other than the business of borrowing or lending in its own name:

However Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.

(f) accept deposits from or lend to any person, other than its members;

(g) pledge any of the assets lodged by its members as security;

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(h) take deposits from or lend money to any body corporate;

(i) enter into any partnership arrangement in its borrowing or lending activities;

(j) issue or cause to be issued any advertisement in any form for soliciting deposit:

However private circulation of the details of fixed deposit Schemes among the members of the Nidhi carrying the words "for private circulation to members only" shall not be considered to be an advertisement for soliciting deposits.

(k) pay any brokerage or incentive for mobilising deposits from members or for deployment of funds or for granting loans.

(iv) Membership.—

(a) A Nidhi shall not admit a body corporate or trust as a member.

(b) Except as otherwise permitted under the rules, every Nidhi shall ensure that its membership is not reduced to less than 200 members at any time.

(c) A minor shall not be admitted as a member of Nidhi:

However, deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.

(v) Rules relating to Directors.—

(a) The Director shall be a member of Nidhi.

(b) The Director of a *Nidhi* shall hold office for a term up to 10 consecutive years on the Board of *Nidhi*.

(c) The Director shall be eligible for re-appointment only after the expiration of 2 years of ceasing to be a Director.

(d) Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure.

(e) The person to be appointed as a Director shall comply with the requirements of sub-section (4) of Section 152 of the Act and shall not have been disqualified from appointment as provided in section 164 of the Act.

(vi) Dividend.- A Nidhi shall not declare dividend exceeding 25% or such higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions, namely:—

(a) an equal amount is transferred to General Reserve;

(b) there has been no default in repayment of matured deposits and interest; and

(c) it has complied with all the rules as applicable to Nidhis.

(vii). Auditor.—

(a) No Nidhi shall appoint or re-appoint an individual as auditor for more than one term of 5 consecutive years.

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(b) No Nidhi shall appoint or re-appoint an audit firm as auditor for more than 2 terms of 5 consecutive years:

Provided that an auditor (whether an individual or an audit firm) shall be eligible for subsequent appointment after the expiration of 2 years from the completion of his or its term:

Explanation: For the purposes of this proviso:

(1) in case of an auditor (whether an individual or audit firm), the period for which he or it has been holding office as auditor prior to the commencement of these rules shall be taken into account in calculating the period of 5 consecutive years or 10 consecutive years, as the case may be;

(2) appointment includes re-appointment.

(viii) Auditor's certificate.—

The Auditor of the company shall furnish a certificate every year to the effect that the company has complied with all the provisions contained in the rules and such certificate shall be annexed to the audit report and in case of non-compliance, he shall specifically state the rules which have not been complied with.

(ix) Penalty for non-compliance.-

If a company to which the Nidhi Rules, 2014 applies contravenes any of the provisions of the prescribed rules, the company and every officer of the company who is in default shall be punishable with fine which may extend to 5,000 rupees, and where the contravention is a continuing one, with a further fine which may extend to 500 rupees for every day after the first during which the contravention continues.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 620A of the Companies Act, 2013 i.e. Power to modify Act in its application to Nidhis, etc.

(ii) The new act has prescribed a new definition of Nidhi. Accordingly, Nidhi company specifies the activity of a nidhi as 'cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit and which complies with such rules as are prescribed by the Central Government for regulation of such Nidhis.' However, under the old act, defined "nidhi" as company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi.

17.21 Punishment for fraud (Section 447 of the Companies Act, 2013)

A new section 447 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Punishment for fraud. According to this section:

(i) Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud

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(ii) Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

Explanation.—For the purposes of this section—

(a) "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

(b) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;

(c) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to punishment for fraud which has been introduced by the Companies Act, 2013.

17.22 Penalty for false statements (Section 448 of the Companies Act, 2013)

A new section 448 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Penalty for false statements. According to this section:

Save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,—

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 628 of the Companies Act, 1956 i.e. Penalty for false statements.

(ii) Under the new Act the penalty has been made more stringent.

17.23 Penalty for false evidence (Section 449 of the Companies Act, 2013)

A new section 449 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Penalty for false evidence. According to this section:

Save as otherwise provided in this Act, if any person intentionally gives false evidence—

(a) upon any examination on oath or solemn affirmation, authorised under this Act; or

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(b) in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act,

he shall be punishable with imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and with fine which may extend to 10 lakh rupees.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 629 of the Companies Act, 1956 i.e. Penalty for false evidence.

(ii) Under the Companies Act, 2013, the minimum punishment has been specified and amount of fine has been defined which was not the case in the earlier Act.

17.24 Punishment where no specific penalty or punishment is provided (Section 450 of the Companies Act, 2013)

A new section 450 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Punishment where no specific penalty or punishment is provided. According to this section:

(i) Applicability of section 450: The penalty under this section applies only in those cases where penalty or punishment is not provided elsewhere in this Act.

(ii) Penalty under this section: The company and every officer of the company who is in default or such other person:

(a) shall be punishable with fine which may extend to 10,000 rupees, and

(b) Where the contravention is continuing one, with a further fine which may extend to 1,000 rupees for every day after the first during which the contravention continues.

(iii) List of contraventions: If a company or any officer of a company or any other person contravenes:

(a) any of the provisions of this Act; or

(b) the rules made thereunder; or

(c) any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 629A of the Companies Act, 1956 i.e. Penalty where no specific penalty is provided elsewhere in the Act.

(ii) Under section 629A of the Companies Act, 1956, contravention by any company or any other person was only included. Whereas, under section 450 of the Companies Act, 2013, contravention by any officer of a company is also included.

(iii) Under the Companies Act, 2013, punishment where no specific penalty or punishment is provided has been increased to 10,000 rupees as compared to 5,000 rupees under the

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Companies Act, 1956 and in case of continuation of the contravention, with a further fine of ₹ 1,000 for every day after the first during which the contravention continues as compared to ₹ 500 as provided under the Companies Act, 1956.

17.25 Punishment in case of repeated default (Section 451 of the Companies Act, 2013)

A new section 451 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Punishment in case of repeated default. According to this section:

If a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of 3 years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to punishment in case of repeated default which has been introduced by the Companies Act, 2013.

17.26 Penalty for wrongful withholding of property (Section 452 of the Companies Act, 2013)

A new section 452 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Penalty for wrongful withholding of property. According to this section:

(i) If any officer or employee of a company—

(a) wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

(ii) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 630 of the Companies Act, 1956 i.e. Penalty for wrongful withholding of property.

(ii) Section 452 of the Companies Act, 2013, specifically provides that property also includes cash. It was not mentioned in the Companies Act, 1956.

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(iii) Under the Companies Act, 2013, members can also make a complaint against any officer or employee of the company for wrongful withholding of property which was not allowed under the Companies Act, 1956.

(iv) Under the Companies Act, 2013, penalty for wrongful withholding of property has been increased from 10,000 rupees as provided under the Companies Act, 1956, to 1 lakh rupees which may further extend to 5 lakh rupees.

17.27 Punishment for improper use of "Limited" or "Private Limited" (Section 453 of the Companies Act, 2013)

A new section 453 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Punishment for improper use of "Limited" or "Private Limited". According to this section:

If any person or persons trade or carry on business under any name or title, of which the word "Limited" or the words "Private Limited" or any contraction or imitation thereof is or are the last word or words, that person or each of those persons shall, unless duly incorporated with limited liability, or unless duly incorporated as a private company with limited liability, as the case may be, punishable with fine which shall not be less than 500 rupees but may extend to 2,000 rupees for every day for which that name or title has been used.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 631 of the Companies Act, 1956 i.e. Penalty for improper use of words "Limited" and "Private Limited".

(ii) Penalty for improper use of "limited" or "private Limited" has been increased under the Companies Act, 2013. In the earlier Act the fine could extend to 500 rupees for every day of default was provided whereas under the Companies Act, 2013, the minimum fine has been provided of 500 rupees but which may extend to 2,000 rupees for every day of default has been provided.

17.28 Adjudication of penalties (Section 454 of the Companies Act, 2013)

A new section 454 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Adjudication of penalties. According to this section:

(i) The Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of this Act in the manner as may be prescribed [Section 454 (1)].

(ii) The Central Government shall while appointing adjudicating officers, specify their jurisdiction in the order under sub section (1) referred above [Section 454 (2)].

(iii) The adjudicating officer may, by an order impose the penalty on the company and the officer who is in default stating any non-compliance or default under the relevant provision of the Act [Section 454 (3).

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(iv) The adjudicating officer shall, before imposing any penalty, give a reasonable opportunity of being heard to such company and the officer who is in default [Section 454 (4)]

(v) Any person aggrieved by an order made by the adjudicating officer under sub section (3) above may prefer an appeal to the Regional Director having jurisdiction in the matter [Section 454 (5)]

(vi) Every appeal under sub section (5) above, made by any person aggrieved by an order made by the adjudicating officer, shall be filed within 60 days from the date on which the copy of the order made by the adjudicating officer is received by the aggrieved person and shall be in such form, manner and be accompanied by such fees as may be prescribed [Section 454 (6)]

(vii) The Regional Director may, after giving the parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, modifying or setting aside the order appealed against [Section 454 (7)].

(viii) Section 454 (8):

(a) Where company does not pay the penalty imposed by the adjudicating officer or the Regional Director within a period of 90 days from the date of the receipt of the copy of the order, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.

(b) Where an officer of a company who is in default does not pay the penalty within a period of 90 days from the date of the receipt of the copy of the order, such officer shall be punishable with imprisonment which may extend to 6 months or with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, or with both.

For further details, refer the *Companies (Adjudication of Penalties) Rules, 2014.*

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to adjudication of penalties and the same were introduced by the Companies Act, 2013.

17.29 Dormant company (Section 455 of the Companies Act, 2013)

A new section 455 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Dormant Company. According to this section:

(i) Status as a 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, 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.

Explanation.—For the purposes of this section,—

(a) "*inactive company*" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two

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financial years, or has not filed financial statements and annual returns during the last two financial years;

(b) "*significant accounting transaction*" means any transaction other than—

(1) payment of fees by a company to the Registrar;

(2) payments made by it to fulfill the requirements of this Act or any other law;

(3) allotment of shares to fulfill the requirements of this Act; and

(4) payments for maintenance of its office and records.

According to the *Companies (Miscellaneous) Rules, 2014,* a company may make an application in Form *MSC-1* along with such fee as provided in the *Companies (Registration Offices and Fees) Rules, 2014* to the Registrar for obtaining the status of a Dormant Company in accordance with the provisions of section 455 after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value).

A company shall be eligible to apply under this rule only, if-

(a) no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

(b) no prosecution has been initiated and pending against the company under any law;

(c) the company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;

(d) the company is not having any outstanding loan, whether secured or unsecured:

However if there is any outstanding unsecured loan, the company may apply under this rule after obtaining concurrence of the lender and enclosing the same with Form *MSC-1*;

(e) there is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form *MSC-1*;

(f) the company does not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc.;

(g) the company has not defaulted in the payment of workmen's dues;

(h) the securities of the company are not listed on any stock exchange within or outside India.

(ii) Certificate of status of dormant company: The Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect.

According to the *Companies (Miscellaneous) Rules, 2014,* the Registrar shall, after considering the application filed in Form *MSC-1*, issue a certificate in Form *MSC-2* allowing the status of a Dormant Company to the applicant.

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(iii) Register of dormant company: The Registrar shall maintain a register of dormant companies in such form as may be prescribed.

According to the *Companies (Miscellaneous) Rules, 2014,* the Register maintained under the portal maintained by the Ministry of Corporate Affairs on its web-site www.mca.gov.in or any other website notified by the Central Government, shall be the register for dormant companies.

(iv) Consequences of non filing of annual returns or financial statements: In case of a company which has not filed financial statements or annual returns for 2 financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

According to the *Companies (Miscellaneous) Rules, 2014,* a dormant company shall file a "Return of Dormant Company" annually, *inter alia*, indicating financial position duly audited by a chartered accountant in practice in Form *MSC-3* along with such annual fee as provided in the *Companies (Registration Offices and Fees) Rules, 2014* within a period of 30 days from the end of each financial year.

The company shall also continue to file the return or returns of allotment and change in directors in the manner and within the time specified in the Act, whenever the company allots any security to any person or there is any change in the directors of the company.

(v) Directors of dormant company: A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed.

According to the *Companies (Miscellaneous) Rules, 2014,* a dormant company shall have a minimum number of 3 directors in case of a public company, 2 directors in case of a private company and 1 director in case of a One Person Company.

Rotation of auditors: According to the *Companies (Miscellaneous) Rules, 2014,* the provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.

Application for seeking status of an active company: According to the *Companies (Miscellaneous) Rules, 2014,*

(a) An application for obtaining the status of an active company shall be made in Form *MSC-4* along with fees as provided in the *Companies (Registration Offices and Fees) Rules, 2014* and shall be accompanied by a return in Form *MSC-3* in respect of the financial year in which the application for obtaining the status of an active company is being filed:

However, the Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive 5 years.

(b) The Registrar shall, after considering the application filed for obtaining the status of an active company, issue a certificate in Form *MSC-5* allowing the status of an active company to the applicant.

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(c) Where a dormant company does or omits to do any act mentioned in the Grounds of application in Form *MSC-1* submitted to Registrar for obtaining the status of dormant company, affecting its status of dormant company, the directors shall within 7 days from such event, file an application for obtaining the status of an active company.

(d) Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under section 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company.

(vi) Striking off the name by the Registrar: The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to a dormant company which have been now introduced by the Companies Act, 2013

17.30 Protection of action taken in good faith (Section 456 of the Companies Act, 2013)

A new section 456 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Protection of action taken in good faith. According to this section:

No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government or any other person in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder, or in respect of the publication by or under the authority of the Government or such officer, of any report, paper or proceedings.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 635A of the Companies Act, 1956 i.e. Protection of acts done in good faith.

17.31 Non-disclosure of information in certain cases (Section 457 of the Companies Act, 2013)

A new section 457 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Non-disclosure of information in certain cases. According to this section:

Notwithstanding anything contained in any other law for the time being in force, the Registrar, any officer of the Government or any other person shall not be compelled to disclose to any court, Tribunal or other authority, the source from where he got any information which—

(a) has led the Central Government to order an investigation under section 210; or

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(b) is or has been material or relevant in connection with such investigation.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 635AA of the Companies Act, 1956 i.e. Non-disclosure of information in certain cases.

(ii) Under the Companies Act, 1956, non-disclosure of information in certain cases also include Special audit under section 233A of the Companies Act, 1956. This has been dispensed with under the Companies Act, 2013.

17.32 Delegation by Central Government of its powers and functions (Section 458 of the Companies Act, 2013)

A new section 458 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Delegation by Central Government of its powers and functions. According to this section:

(i) The Central Government may, by notification, and subject to such conditions, limitations and restrictions as may be specified therein, delegate any of its powers or functions under this Act other than the power to make rules to such authority or officer as may be specified in the notification.

However, the powers to enforce the provisions contained in section 194 and section 195 relating to forward dealing and insider trading shall be delegated to SEBI for listed companies or the companies which intend to get their securities listed.

In such case, any officer authorised by the SEBI shall have the power to file a complaint in the court of competent jurisdiction.

(ii) A copy of every notification issued under point (i) shall, as soon as may be after it is issued, be laid before each House of Parliament.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 637 of the Companies Act, 1956 i.e. Delegation by Central Government of its powers and functions under Act.

(ii) Now the Central Government can delegate its powers and functions under all the provisions of the Companies Act, 2013, whereas under the Companies Act, 1956, some sections have been specified, where no delegation is allowed.

17.33 Powers of Central Government or Tribunal to accord approval, etc., subject to conditions and to prescribe fees on applications (Section 459 of the Companies Act, 2013)

A new section 459 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Powers of Central Government or Tribunal to accord approval, etc., subject to conditions and to prescribe fees on applications. According to this section:

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(i) Where the Central Government or the Tribunal is required or authorised by any provision of this Act—

(a) to accord approval, sanction, consent, confirmation or recognition to, or in relation to, any matter; or

(b) to give any direction in relation to any matter; or

(c) to grant any exemption in relation to any matter,

then, the Central Government or the Tribunal may in the absence of anything to the contrary contained in that provision or any other provision of this Act, accord, give or grant such approval, sanction, consent, confirmation, recognition, direction or exemption, subject to such conditions, limitations or restrictions as it may think fit to impose and may, in the case of a contravention of any such condition, limitation or restriction, rescind or withdraw such approval, sanction, consent, confirmation, recognition, direction or exemption.

(ii) Every application which may be, or is required to be, made to the Central Government or the Tribunal under any provision of this Act—

(a) in respect of any approval, sanction, consent, confirmation or recognition to be accorded by that Government or the Tribunal to, or in relation to, any matter; or

(b) in respect of any direction or exemption to be given or granted by that Government or the Tribunal in relation to any matter; or

(c) in respect of any other matter,

shall be accompanied by the prescribed fees which have been specified in the *Companies (Registration Offices and Fees) Rules, 2014* .

(iii) Different fees may be prescribed for applications in respect of different matters or in case of applications by different classes of companies.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 637A of the Companies Act, 1956 i.e. Power of Central Government or Company Law Board to accord approval, etc., subject to conditions and to prescribe fees on applications.

(ii) The power of the Company Law Board has been shifted to the Tribunal under the Companies Act, 2013.

17.34 Condonation of delays in certain cases (Section 460 of the Companies Act, 2013)

A new section 460 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Condonation of delays in certain cases. According to this section:

Notwithstanding anything contained in this Act,—

(a) where any application required to be made to the Central Government under any provision of this Act in respect of any matter is not made within the time specified therein, that Government may, for reasons to be recorded in writing, condone the delay; and

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(b) where any document required to be filed with the Registrar under any provision of this Act is not filed within the time specified therein, the Central Government may, for reasons to be recorded in writing, condone the delay.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 637B of the Companies Act, 1956 i.e. Condonation of delays in certain cases.

17.35 Annual report by Central Government (Section 461 of the Companies Act, 2013)

A new section 461 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Annual report by Central Government. According to this section:

The Central Government shall cause a general annual report on the working and administration of this Act to be prepared and laid before each House of Parliament within one year of the close of the year to which the report relates.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 638 of the Companies Act, 1956 i.e. Annual report by Central Government.

17.36 Power to exempt class or classes of companies from provisions of this Act (Section 462 of the Companies Act, 2013)

A new section 462 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power to exempt class or classes of companies from provisions of this Act. According to this section:

(i) The Central Government may in the public interest, by notification direct that any of the provisions of this Act,—

(a) shall not apply to such class or classes of companies; or

(b) shall apply to the class or classes of companies with such exceptions, modifications and adaptations as may be specified in the notification.

(ii) A copy of every notification proposed to be issued as above shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 620 of the Companies Act, 1956 i.e. power to modify Act in relation to Government companies.

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(ii) Instead of specific exemptions in the Companies Act, 2013 itself, the Central Government has been authorized, in the public interest to decide on the applicability of the provisions of this Act whereas under the Companies Act, 1956, such power could only be exercised in relation to Government companies.

17.37 Power of court to grant relief in certain cases (Section 463 of the Companies Act, 2013)

A new section 463 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power of court to grant relief in certain cases. According to this section:

(i) If it appears to the court hearing the case that an officer of a company is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust but he has acted honestly and reasonably, he ought fairly to be excused having regard to all the circumstances of the case, including those connected with his appointment, the court may relieve him, either wholly or partly, from his liability on such term, as it may think fit.

(ii) In a criminal proceeding, the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(iii) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a court before which a proceedings against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought.

(iv) No court shall grant any relief to any officer unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 633 of the Companies Act, 1956 i.e. Power of court to grant relief in certain cases.

17.38 Prohibition of association or partnership of persons exceeding certain number (Section 464 of the Companies Act, 2013)

A new section 464 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for Prohibition of association or partnership of persons exceeding certain number. According to this section:

(i) Maximum number of persons: According to section 464(1) of the Companies Act, 2013, No association or partnership consisting of more than such number of persons as may be prescribed 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,

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unless it is registered as a company under this Act or is formed under any other law for the time being in force.

However, the number of persons which may be prescribed shall not exceed one hundred.

The *Companies (Miscellaneous) Rules, 2014,* provides that no association or partnership shall be formed, consisting of more than 50 persons for the purpose of carrying on any business that has for its objects the acquisition of gain by the association or partnership or by individual members thereof, unless it is registered as a company under the Act or is formed under any other law for the time being in force.

Thus, the above provision can be read as under:

No association or partnership consisting of more than 50 persons (as provided under the Rules) 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.

Further, the Act has put a cap of maximum 100 persons. Thus, the number of persons as provided in the Rules can not exceed the maximum cap of 100 persons.

(ii) Exceptions: The above provision is not applicable to-

(a) a Hindu undivided family carrying on any business; or

(b) an association or partnership, if it is formed by professionals who are governed by special Acts.

(iii) Penalty: Every member of an association or partnership carrying on business in contravention of section 464(1) shall be punishable with fine which may extend to 1 lakh rupees and shall also be personally liable for all liabilities incurred in such business.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to section 11 of the Companies Act, 1956 i.e. Prohibition of associations and partnerships exceeding certain number.

17.39 Power of Central Government to amend Schedules (Section 467 of the Companies Act, 2013)

A new section 467 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power of Central Government to amend Schedules. According to this section:

(i) The Central Government may, by notification, alter any of the regulations, rules, Tables, forms and other provisions contained in any of the Schedules to this Act.

(ii) Any alteration notified as above shall have effect as if enacted in this Act and shall come into force on the date of the notification, unless the notification otherwise directs.

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(iii) No such alteration in Table F of Schedule I shall apply to any company registered before the date of such alteration.

(iv) Every alteration made by the Central Government shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the alteration, or both Houses agree that the alteration should not be made, the alteration shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done in pursuance of that alteration.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and is similar to section 641 of the Companies Act, 1956 i.e. Power to alter Schedules.

17.40 Power of Central Government to make rules relating to winding up (Section 468 of the Companies Act, 2013)

A new section 468 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power of Central Government to make rules relating to winding up. According to this section:

(i) The Central Government shall, make rules consistent with the Code of Civil Procedure, 1908 providing for all matters relating to the winding up of companies, which by this Act, are to be prescribed, and may make rules providing for all such matters, as may be prescribed.

(ii) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) as to the mode of proceedings to be held for winding up of a company by the Tribunal;

(b) for the voluntary winding up of companies, whether by members or by creditors;

(c) for the holding of meetings of creditors and members in connection with proceedings under section 230;

(d) for giving effect to the provisions of this Act as to the reduction of the capital;

(e) generally for all applications to be made to the Tribunal under the provisions of this Act;

(f) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;

(g) the settling of lists of contributories and the rectifying of the register of members where required, and collecting and applying the assets;

(h) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator;

(i) the making of calls; and

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(j) the fixing of a time within which debts and claims shall be proved.

(iii) All rules made by the Supreme Court on the matters referred to in this section as it stood immediately before the commencement of this Act and in force at such commencement, shall continue to be in force, till such time the rules are made by the Central Government and any reference to the High Court in relation to winding up of a company in such rules shall be construed as a reference to the Tribunal.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

(i) This section corresponds to section 643 of the Companies Act, 1956 i.e. Power of Supreme Court to make rules.

(ii) The power of Supreme Court to make rules relating to winding up under the Companies Act, 1956 has been shifted to Central Government under the Companies Act, 2013.

17.41 Power of Central Government to make rules (Section 469 of the Companies Act, 2013)

A new section 469 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power of Central Government to make rules. According to this section:

(i) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(ii) The Central Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provision is to be or may be made by rules.

(iii) Any rule made as above may provide that a contravention thereof shall be punishable with fine which may extend to five thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which such contravention continues.

(iv) Every rule made under this section and every regulation made by Securities and Exchange Board under this Act, shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

This section corresponds to and are similar to section 642 of the Companies Act, 1956 i.e. Power of Central Government to make rules.

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17.42 Power to remove difficulties (Section 470 of the Companies Act, 2013)

A new section 470 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for Power to remove difficulties. According to this section:

(i) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty.

(ii) No such order shall be made after the expiry of a period of 5 years from the date of commencement of section 1 of this Act.

(iii) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Various points of comparison in respect to old law i.e. the Companies Act, 1956

The Companies Act, 1956 did not contain any provision relating to power to remove difficulties if arises in giving effect to the provisions of this Act. These have been introduced by the Companies Act, 2013.

RELEVANT SECTIONS OF THE COMPANIES ACT, 1956 APPLICABLE FOR EXAMINATIONS

1. Definition of "joint stock company" (Section 566): For the purposes of Part IX of the Act, a joint stock company means a company having:
   (i) a permanent paid-up or nominal share capital of a fixed amount,
   (ii) divided into shares also of fixed amount or held and transferable as stock, or
   (iii) divided and held partly in shares and partly in stocks and
   (iv) the members are the holders of these shares or stocks.

   When such a company is registered under the Companies Act, 1956, then it shall be deemed to be a company limited by shares.
2. Requirements for registration of joint-stock companies (Section 567): Prior to the registration of a joint-stock company (under Part IX), the following documents have to be delivered to the Registrar:
   (i) a list of names, addresses and occupations of all persons who on a day named in the list (not being more than 6 clear days before the day of registration) were members of the company. The list also embodies the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its member.

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(ii) a copy of any Act of Parliament or other Indian Law, Act of Parliament of the U.K., Royal Charter, Letters Patent, Deed of Settlement, Deed of Partnership or other instrument constituting or regulating the company; and

(iii) if the company is intended to be registered as limited company, a statement specifying such particulars as:

(a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists,

(b) the number of shares taken and the amount paid on each share,

(c) the name of the company with the addition of the word "Limited" or "Private Limited" as the last word or words; and

(d) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

The application to the Registrar of Companies should be in Form 37. The list of numbers should be in Form No. 39. Particulars of capital should be in Form No. 40.

3. Requirements for registration of companies not being joint-stock companies (Section 568): This section lays down the procedure for registration of companies other than joint-stock companies. Prior to registration, the following documents have to be delivered to the Registrar, namely (i) a list showing the names, addresses and occupation of the directors, and the manager, if any; (ii) a copy of any Act of Parliament or other Indian Laws, Acts of the U.K. Parliament, Letters Patent, Deed of Settlement, Deed of Partnership or other instrument constituting or regulating the company; and (iii) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

   The application for the registration of companies should be in Form No. 38 and the particulars of directors or managers or secretaries etc. in Form No. 42.

4. Authentication of statements of existing companies (Section 569): The documents to be filed with the Registrar of Companies (mentioned above) have got to verify by the declaration of at least 2 directors or other principal officers of the company.

5. Power of the Registrar to require evidence as to nature of the company (Section 570): The Registrar has the discretion to call for such evidence as he thinks necessary for the purpose of satisfying himself, whether any company proposing to be registered is or is not a joint-stock company within the meaning of Section 566.

   The Registrar has the discretion to refuse registration of a company, but he must not exercise this discretion arbitrarily. Against refusal by the Registrar, an application under Article 226 of the Constitution would lie in the High Court.

6. Change of name for purposes of registration (Section 572): It is open to the Registrar of Companies to refuse registration of a company if its name is undesirable. In such a situation, the company may, with the approval of the Central Government signified in writing, change its name with effect from the date of its registration (under Part IX).

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However, for changing the name as aforesaid, a resolution has to be passed at a meeting of the members comprising the same. The passage of such resolution must be by a majority as specified in Section 565.

7. Addition of "Limited" or "Private Limited" to name: Under Section 573, on registration (under Part IX), every company must have the word "Limited" or "Private Limited", in its name. However, such a company may obtain a license under Section 25 (Section 8 of the Companies Act, 2013) for the omission of the word "Limited" or "Private Limited".

8. Power to substitute Memorandum and Articles for Deed of Settlement (Section 579): A company registered in pursuance of Part IX may by a special resolution, alter the form of its constitution, memorandum or articles for a deed of settlement (i.e., any Deed of Partnership, Act of U.K., Parliament, Royal Charter and Letters Patent or other instrument constituting or regulating the company. But the term does not include any Indian Act).

   The provisions of Sections 17, 18 and 19 regarding alteration of the objects, shall so far as applicable apply to any alteration under this Section with the following modifications:

   (i) there shall be substituted for the printed copy of the altered memorandum required to be filed with the Registrar a printed copy of the substituted memorandum and articles; and

   (ii) on the registration of the alteration being certified by the Registrar, the substituted memorandum and articles shall apply to the company in the same manner, as if it were a company registered under this Act with that memorandum and those articles, and company's deed of settlement shall cease to apply to the company.

9. Power of Court to stay or restrain proceedings (Section 580): After the presentation of a petition for winding-up but before the order of winding-up is made, the Court may, on an application made under Section 442, stay any suit or legal proceedings already pending and may restrain any person from filing a suit or taking legal proceedings against the company. Under Section 580, the same jurisdiction of the Court may be exercised.

   The company, a contributory and a creditor may apply for stay of any suit or legal proceedings against the company. A suit or legal proceedings pending against a contributory, who might have been previously personally liable for company's debts, can be stayed only on the application of the creditor Section 586 [discussion in Chapter 10] makes a similar provision in respect of unregistered companies.

   N.B: (i) Section 422 applies to companies within the meaning of the Companies Act, 1956.

   (ii) Section 580 applies to companies not incorporated under this Act but are allowed to be registered under the Act.

   (iii) Section 586 can be invoked when an Indian Court is winding-up an "unregistered company" including a foreign company.

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10. Suits stayed on winding-up order (Section 581): The provisions of this Section are similar to those of Section 446. No person can file or proceed with any suit or legal proceeding against the company or any contributory of the company except by leave of the court. This provision applies when a winding up order has been made or a provisional liquidator has been appointed and the company is registered under Part IX of the Act.

11. Composition of certain offences: Section 621A inserted by the Companies (Amendment) Act, 1988 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 any offence punishable under this act, not being an offence punishable with imprisonment only, or with imprisonment and also with fine may, either before or after the institution of any prosecution be compounded by (i) the Company Law Board (ii) the Regional Director, where the fine imposed for such offence does not exceed ₹ 5,000 on payment or credit of such sum, as may be specified.

12. Jurisdiction to try offences: An offence against the Act shall be tried at least by the Court of Presidency Magistrate or a magistrate of the First Class (Section 622).

    In as much as a company is judicial person, it can be prosecuted like any other individual also it can be convicted and fined, if it is found guilty. Suppose an offence is punishable under the Act only by fine and nothing else. In such a situation, if the offence were committed within Presidency town, it would be punishable upon summary conviction by any Presidency Magistrate of that town (Section 623).

13. Compensation in the case of frivolous and vexations prosecution: For the institution of frivolous and vexatious prosecution against a company or an officer thereof by a share holder, he may be ordered by the trying Magistrate to pay to the aggrieved party by way of compensation an amount not exceeding ₹ 1,000. In case of default in payment of the said amount the shareholder may be ordered to undergo a simple imprisonment for a maximum period of two months. The shareholder, however, shall have the right to appeal against such order (Section 625).

14. Contracts by agents where a company is an undisclosed principal: Section 416 prescribes a special rule with regard to contracts entered into on behalf of a public company (or a private company which is a subsidiary of a public company) by the manager or other agent, in which the company is an undisclosed principal. It provides that any such person, when entering into such a contract, must draw up a memorandum of the terms of the contract, at the time of contract is entered into, specifying the names of the persons with whom it has been done. The memorandum must be placed in the record of the company and the copies thereof must be sent to all the directors. Subsequently, the memorandum should be placed before the Board at its next following meeting. In case of default, the contract, at the option of the company, shall be voidable as against the company, and the person who had entered into the contract or every officer of the company in default, as the case may be, would be liable to penalty, which may extend to ₹ 2000/-. However, the Central Government may grant relief under Section 463 of the Companies Act, 2013, to an officer in default, if it appears to it that the person has acted honestly and reasonably and that having regard to all the

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circumstances of the case, he ought fairly to be excused. The relief may be granted either wholly or partially.

15. Employees' Security and Provident Funds: Sections 417-420 of the Companies Act, 1956 deal with the Employees' Securities and Provident Funds. They provide as follows:

    (i) Any money or security deposit made by an employee of a company under the terms of his contract of services, must be kept or deposited by the company within 15 days from the date of deposit in a Post Office Savings Bank Account or in a special account to be opened with the State Bank of India or a Scheduled Bank or, where the company itself is a Scheduled Bank, in a special account to or be opened by it at or with the State Bank of India or any other Scheduled Bank.

    The Company must not utilise any portion of such moneys or securities except for the purposes agreed to, in the contracts of service (Section 417).

    (ii) Where a provident fund has been constituted by a company for its employees or any class of its employees, all money contributed to such fund (whether by the company or by the employees) or received or accruing by way of interest or otherwise to such fund, within 15 days from the date of contribution, receipt or accrual should be deposited in a Post Office Savings bank Account or in a special account in a Scheduled Bank or in the State Bank of India, or where the company itself is a Scheduled Bank in, a special account to be opened either in itself or in the State Bank of India, or in any other Scheduled Bank or suitably invested in securities mentioned or referred to in Sections 20(a) to (e) to the Indian Trusts Act, 1882 [Section 418(1)].

    (iii) In no case will an employee be entitled to receive an interest in respect of the amount standing to his credit at a rate in excess of that yielded by the investment made in accordance with the requirements aforementioned [Section 418(2)].

    (iv) An employee may obtain advances from the fund or with draw money standing to his credit in the fund, if the fund is a recognised provident fund within the meaning of Section 58A(a) of the Income Tax Act, 1922 or if the rules of the fund contain provisions corresponding to the rules 4 to 9 of the Income-tax (Provident Funds Relief) Rules [Section 418(3)].

    Tutorial Note: Section 2(38) of the Income Tax Act, 1961 defines a recognised provident fund and the relevant rules thereto are provided in Part XII (Rules 67 to 81) of the Income-tax Rules, 1962.

    (v) If a trust has been created by the company with regard to any provident fund, the company must collect and pay the employee's contributions together with its own contributions to the trustees within 16 days from the date of their collection. Thereafter the trustees will be obliged to comply with the aforesaid requirements as regards their investment [Section 418(4)].

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An employee, on making request to the company or to the trustees, as the case may be, may look into the receipts issued by banks for provident fund money and securities deposited with them as well as the bonds or securities in respect of investments in trust securities (Section 419). But such a right can be exercised only by an existing employee and not by an ex-employee or past employee or a person whose service has been terminated. [*The State vs. Girdhari Bajaj, 63 Bom. L.R. 743*].

Any contravention of the provisions of Sections 417, 418 & 419 by an officer of the company or by a trustee of the provident fund will render him punishable with imprisonment for a period extending up to six months or with fine extending to ₹ 10,000 (Section 420).

The status of Trust continues even though the balance in the Fund has been misapplied. Even if the balance standing to the credit of the provident fund, or the amounts deposited by the employees, is wrongfully invested and profits accrue to the company out of these wrongful investments the character of trust attaching to the fund is not altered. Neither would such a use have the effect of converting it into a loan. It will continue to remain a fund irrespective of the fact that the employees knew that the company had wrongfully employed the fund in its own business. It would not preclude the employees from claiming the funds from the company when it is in liquidation, as preferential creditors. This is because the company shall continue to be the trustee in respect of these funds and will not become mere debtor. *[Alliance Bank of Simla Ltd. (1924) 21 C.W.N. 721, Re. Bengal Zamindari and Banking Co. (1937) 2 Cal. 305].*

16. Receivers and Managers: A receiver of the property of a company should furnish the Registrar of Companies once in every half year while he remains in possession and also on his ceasing to act as receiver an abstract of receipts and payments during the period to which the abstract relates in Form No. 36 of the Companies (Central Government's) Rules and Forms, 1956. Moreover, on the appointment of the Receiver, an entry to this effect should appear in every invoice, order for goods or business letter issued by or on behalf of the company or the receiver. In the event of these provisions being contravened, the company and every officer thereof, who is in default, shall be liable to pay a fine of ₹ 2000 (Sections 421-423).

17. Security for costs by Limited Company: When a limited company is the plaintiff of petitioner in a suit or in any other legal proceedings, if the Court having the jurisdiction in the matter has reason to believe that the company will not be able to pay the cost of the defendant, if he is successful in his defence, it may require the company to furnish sufficient security for costs, and may stay all proceedings until the security is provided (Section 632).

18. Enforcement of duty of a company to make returns etc. to Registrar: Where a company is required under the Act to file or register any return, account or other document or notice, and the company defaults in doing so for a period of 14 days, then any member or creditor of the company or the Registrar may make an application to the

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Company Law Board for such compliance. On such an application, the Company Law Board may direct the company and any officer thereof to make good the default within such time as may be specified in the order. But this provision does not affect the levying of any penalty on the company or its officers in respect of any such default (Section 614).

19. Power of the Court trying offences under the Act to direct the filing of documents with Registrar: Any Court trying an offence for a default in compliance with any provisions of the Act, which requires a company or its officers to file or register with or deliver or send to the Registrar any return, account or other document, may, at the time of sentencing, acquitting or discharging the accused, as the case may be, compel such compliances by order on payment of the fee including the additional fee required to be paid under Section 611 within the time specified in the order. If such an order is not complied with, the defaulting officer or employee of the company shall be liable to be punished with imprisonment for a maximum period of 6 months or with fine, or with both (Section 614A). Further, if a director fails to comply with the order of the Court under the Companies Act to submit a return to the Registrar within the stipulated time, he shall be guilty of contempt of Court and the High Court has power to punish the direct or for contempt of the Court *[State of U.P. vs. Tikka Ram Uniyal (1964) 34 Comp. Cas. 5].*

20. Enforcement of orders: Any order made by a Court under the Companies Act is enforceable in the same manner as a decree made by the Court in a suit pending with it (Section 634).

21. Enforcement of orders of Company Law Board: Section 634A which has been added by the Companies (Amendment) Act, 1977 and as amended by the Companies (Amendment) Act, 1988 provides that any order made by the Company Law Board may be enforced by the Board in the same manner as if it were a decree by a Court in a suit pending therein and it shall be lawful for that Board to send in the case of its inability to execute such order, to the Court within the local limits of whose jurisdiction: (a) in the case of an order against a company the registered office of the company is situated; or (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

22. Enforcement of orders of one Court by other Court: Where the order of the Company Court, which is deemed to be decree, is to be executed outside its jurisdiction, a certified copy of the order has to be produced before the other Court [Section 635(1)]. The production of such certified copy shall be sufficient evidence of the order. Upon the production of such certified copy of the Court shall take the requisite steps for enforcing the order, in the same manner as if it had been made by itself [Sections 635(2) & (3)]. Where, any order made by the Company Law Board required to be enforced by a Court a certified copy of the order shall be produced to the proper officer of the Court required to enforce the order and the provisions of sub-sections (2) & (3) shall, as far as may be, apply to every such order in the same manner and to the same extent as they apply to an order made by a Court [Section 635(4) added by the Amendment Act, 1977 as amended by the Companies (Amendment) Act, 1988].

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18

Corporate Secretarial Practice – Drafting of Resolution, Minutes, Notices and Reports

18.0 General Hints on Drafting Reports

Reports are too numerous to be governed by precise rules. However, a few general hints for drafting them are given below:

(a) Collection of material or data being the foundation on which the report stands; the writer must collect them by referring to office records, interviewing people, visiting different places, etc., as may be necessary.

(b) The material collected as aforesaid has to be marshalled in a logical sequence so that the report, when made out, may read like a narrative.

(c) The report should have a leading and a preface explaining its purpose and nature.

(d) Its language has to be simple, clear and unequivocal short sentences are to be preferred to long ones. It should be drafted in an impersonal manner, making use of 'third person'.

(e) If the report is likely to be lengthy, it should be divided into parts and appropriate sub-heading should be used. The report must then contain a summary also. Many people adopt the practice of giving the gist in one page and the matter in detail later in the report.

(f) Where the directors are not technical persons, technical phraseology should be eschewed, yielding place to plain and simple phraseology, the idea being to make the report, as far as practicable, easily understandable by those for whom it is meant.

(g) The conclusions put forward should be founded on the material or data collected; also these should be unbiased in character.

18.1 Notice of Board meeting

Notice of Board meeting is required pursuant to Section 173(3) of the Companies Act, 2013. According to this section, a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Further, a meeting of the Board may be called at shorter notice to transact urgent business

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subject to the condition that at least one independent director, if any, shall be present at the meeting.

In case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

As per section 173(4) of the Companies Act, 2013, every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of Rs. 25,000.

Specimen notice

Board Meeting

Section 173(3) of the Companies Act, 2013: 'Notice' convening a Board Meeting

Paper wood Limited

Palkaji,
Bombay-900 012.
Dated the…… 20….

To
Mr. XYZ,
Nagpur-440 012.

Dear Sir,

Notice is hereby given that a meeting of the Board of Director which will be held at the registered office of the company at Palkaji, Bombay- 400 012 on…….. the…….. 20……. at……..a.m./p.m.

You are requested to make it convenient to attend the meeting.

A copy of the agenda of the businesses which are likely to be transacted at the meeting is enclosed for your perusal.

Yours faithfully
For PAPER WOOD LIMITED

Secretary

(Each director should be individually addressed
with a copy of agenda of the meeting)

18.2 Agenda

The various items of business to be transacted constitute the agenda, literally "things to be done" for the meeting. Though it is common practice to send to directors or members an agenda or a list of items of business proposed to be transacted at the meeting, the Act does not lay down any such requirement. The current practice is, to lay down the agenda preferably in the form of proposed resolutions. It is usually prepared by the secretary but issued however, after it has been approved by the managing director or an executive of an equal rank.

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Preparation of agenda: The preparation of agenda requires considerable care. An ideal agenda is the one which is so worded that only by altering a few words of an item to convert it into past tense, it would form the minutes. It may be, and is often drawn up on loose sheets of foolscap Paper. However, it is also preferable to write in bond book specially kept for that purpose. The order in which various items appear in the agenda is generally the order in which the business is to be transacted at the meeting. As it is customary to discuss routine matters first such items as relate to it come first in the agenda. They are followed by important items which, it is expected would provoke discussion among members. At the end, the item which require only to be noted by the members listed. Such an order generally has the merit of dividing equitably the time of the meeting among various items according to their importance. It must be added, however, that the chairman has the discretion to take up item for consideration by the meeting in the order he considers convenient for the disposal of the business. The various items listed on the agenda are numbered serially for convenience of recording minute and for future reference.

AGENDA for the Board Meeting

Summary Form

Agenda for Board Meeting to be held at……. one…… day, the……. 20……. at……. [a.m.]

…….. Ltd.

1. The Chairman to announce that the quorum for the meeting is present.
2. The Chairman to address the meeting, and to move that, with the permission of the members present, the notice of the meeting and the Directors' Report be taken as read, and to call on the Secretary to read the Auditors' Report.
3. The Chairman to make a statement commenting upon the working of the company.
4. The Chairman to propose:

   "Resolved that the audited Balance Sheet as at…….. 20…… at the Profit and Loss Account for the year ending…….. 20……. together with the Directors' Report and Auditors' Report thereon, be and the same are hereby received and adopted".

   Mr…….. to second.

   The Chairman to invite members to put questions regarding working of the company under review. After the members have spoken and their queries answered, put motion to meeting and declare result.
5. Mr…….. a Director to propose:

   "Resolved that pursuant to the recommendation of the directors, divided at the rate of Rupees…….. per share on the equity share capital of the company for the year ended…….. 20…… be and is hereby declare out of the current profits [or out of the accumulated profits] of the company and that the same be paid, after deduction of income-tax at source, to those shareholder whose names appear on the company's register of members on…….. 20…… and that divided warrants be posted within 30 days hereof only to those shareholders who are entitled to receive payment".

   Mr…….. to second.

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Put motion to meeting and declare result.

6. Mr…….. a Director to propose:

   "Resolved that Mr…….. who retires by rotation and is eligible for re-appointment, be and is hereby re-appointment as a Director of the Company".

   Mr…….. to second.

   Put motion to meeting and declare result.

7. The Chairman to declare the meeting closed.

18.3 Resolutions

A meeting is an important instrument in the corporate decision-making process. The business at a meeting is preceded by a notice containing the agenda. The resolution is the event that takes place in the meeting.

Dictionary meaning of the word 'resolution', is 'a formal proposal put before a public assembly or the formal determination of such proposal on any matter'. Derived from this meaning, a resolution is a formal agreement as to adoption of proposal put before an assembly of persons or meeting. In the context of company management, it is either a Board meeting or a General meeting of the members. The passing of a resolution should be construed as the manner in which a meeting formally acts expressing the intent and purpose of the meeting and if it is a meeting of members, it means the will of the company, and if it is a meeting of the Board of directors, it means the exposition of the intent of the executive action initiated or to be initiated subject to the limiting and regulatory force of the different statute.

Hints on drafting of resolution

While framing resolution, it is to be ensured that:

(i) They should be express clearly and in precise terms, and not vaguely, whether they embody the decisions of the directors or are those passed at general meeting.

(ii) All identification of instruments, persons, etc., referred to in the resolution are properly made.

(iii) If the resolution is being passed in pursuance to the provisions of the Act, it refers to relevant section or sections.

(iv) If the resolution is such as requires the approval of the Central Government/Company Law Board or confirmation of the Court, it states that effect.

(v) If the resolution is to be effective immediately, it is drawn to show that effect.

(vi) The resolution is confined to one subject matter.

Wherever possible, lengthy resolutions should be divided into paragraphs and arranged in their logical order having regard to the subject matter of the resolution.

Members' resolution

Resolutions that may be passed by a company are of two kinds:

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(i) Ordinary resolution and (ii) Special resolutions

Specimen General Meeting Resolutions-Ordinary

Sections 149, 150 and 152 of the Companies Act, 2013- Appointment of Independent Director – Ordinary Resolution

"RESOLVED that pursuant to the provisions of Sections 149, 150, 152 and any other applicable provisions of the Companies Act, 2013 and the rules made thereunder (including any statutory modification(s) or re-enactment thereof for the time being in force) read with Schedule IV to the Companies Act, 2013, Mr. ----- (holding DIN -------), Director of the Company who retires by rotation at the Annual General Meeting and in respect of whom the Company has received a notice in writing from a member proposing his candidature for the office of Director, be and is hereby appointed as an Independent Director of the Company to hold office for five consecutive years for a term up to ---, 20---."

Section 433 of the Companies Act, 1956: Winding up by Court-Ordinary Resolution

Whereas the company has been unable to pay its debts and whereas the Court is of opinion that it is just and equitable that the company should be wound up. *Now therefore* it is *Resolved* that the company be wound up by the Court at _____, which will become effective from the date the Court declares the company to be wound up by such Court and that the Board of Directors be and is hereby authorised to make necessary applications therefor and take action for the winding up of the company by the said Court".

Note: The above resolution is according to the provisions of section 433 of the Companies Act, 1956 as its corresponding section of the Companies Act, 2013 has not been notified till 30th September, 2014.

Section 394 of the Companies Act, 1956: Approval of scheme of arrangement between company and class of shareholders – Special resolution

Resolved that, subject to sanction by the Court at……., a scheme of arrangement in terms of the draft laid before this meeting and for the purpose of identification signed by the Chairman thereof, or with such alteration or modification thereof as may be directed by the said Court, between the company and the holders of the promoters shares and the holders of the equity shares for the purpose of eliminating existing…….. promoters shares of ₹…….. each by converting them into…….. equity shares of ₹…….. be and is hereby approved.

Note: The above resolution is according to the provisions of section 394 of the Companies Act, 1956 as its corresponding section of the Companies Act, 2013 has not been notified till 30th September, 2014.

Section 180 of the Companies Act, 2013: Power of Board of directors to borrow money– Special resolution

"RESOLVED that pursuant to Section 180(1)(c) and any other applicable provisions of the

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Companies Act, 2013 and the rules made thereunder (including any statutory modification(s) or re-enactment thereof for the time being in force), the consent of the Company be and is hereby accorded to the Board of Directors to borrow moneys in excess of the aggregate of the paid up share capital and free reserves of the Company, provided that the total amount borrowed and outstanding at any point of time, apart from temporary loans obtained/to be obtained from the Company's Bankers in the ordinary course of business, shall not be in excess of Rs. ___Crores (Rupees ____ crores) over and above the aggregate of the paid up share capital and free reserves of the Company."

Directors' Resolutions

(i) Resolutions passed in a Board meeting.

As a general rule, the directors act exercise their powers by resolutions passed at Board meetings. These resolutions may be resolution requiring:

(ii) Adoption by majority: The articles usually provides for a simple majority of votes to secure adoption of directors' resolution.

(iii) Unanimous adoption: The resolution must be passed unanimously where the Act as requires. For example: Third Proviso to section 203(3) of the Companies Act, 2013

(iv) Resolution by circulation

1. The Act allows the Board of directors to pass resolution by Circulation also. A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation if:

(a) 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,

(b) The resolution should be sent at their addresses registered with the company in India,

(c) It can be sent by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and

The Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax.

(d) It has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

2. If atleast 1/3rd of third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board instead of being decided by circulation.

3. 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.

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Specimen Board Resolution passed in the meeting

Section 202 of the Companies Act, 2013: Compensation for loss of office – Board Resolution

"*WHEREAS* Mr. NBS was employed for a period of three years as the Managing Director of the company from…….. 20….. and Whereas the company wanted to dispense with the services of the said Managing Director, and WHEREAS the company has duly served notice to the said Managing Director in terms of clause……. of the agreement between the company and the said Mr. NBS governing his terms and condition as the Managing Director of the company, it is hereby resolved that an amount of ₹……., be paid to Mr. NBS as compensation for the loss of his office as the Managing Director of the company."

Specimen Board Resolution – Passed by Circulation

……Ltd.

To

Mr……., Director

……

(Address in India only).

Dear Sir,

The following resolution, which is intended to be passed as a resolution by circulation as provided in Section 175 of the Companies Act, 2013, is circulated herewith as per the provisions of the said section.

If only you are *Not Interested* in the resolution, you may please indicate by appending your signature in the space provided beneath the resolution appearing herein below as a separate perforated slip if you are in favour or against the said resolution. The perforated slip may please be returned if and when signed within…….. days of this letter.

However, it need not be returned if you are interested in the resolution.

Yours faithfully,
(Secretary)

……Ltd.

Resolution by circulation passed by the directors as per circulation effected…….. 20…..

Resolved
that…….

[Set out the resolution intended to passed]

*For/Against
Signature

*Strike off whichever is inapplicable.

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18.4 Minutes

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. Section 119 of the Companies Act, 2013 provides for inspection of minutes-books of general meeting. The statutory requirements relating to keeping of the minutes of meeting are:

(1) Preparation of the minutes of the proceedings of meetings: 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.

(2) Contain fair and correct summary: The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.

(3) Appointments to be included in the minutes: All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(4) Other details: 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.

(5) Exemptions to matters from inclusion in the minutes: There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting,—

(a) is or could reasonably be regarded as defamatory of any person; or

(b) is irrelevant or immaterial to the proceedings; or

(c) is detrimental to the interests of the company.

(6) Absolute discretion of chairman: The 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).

(7) Considered as evidence of the proceedings: The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.

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(8) Minutes signifies the validity of the procedure: Where the minutes have been kept in accordance with sub-section (1) then, 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.

(9) Matter contained in the minutes shall be circulated: No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.

(10) Adherence of secretarial standards by company: Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.

(11) Default in compliance: 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 twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

(12) Tampering with the minutes: If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Drafting of minutes: The minutes may be drafted in a tabular form or they may be drafted in the form of a series of paragraphs, numbered consecutively and with relevant headings. However, all minutes whether of general meetings, or board meetings, should contain the following particulars:

Particulars of the Meeting

(1) Name of the meeting.

(2) Place, date and time of meeting.

(3) How the meeting was constituted:

Constitution of the Meeting - Present

(a) name of person in the Chair.

(b) names of directors and Secretary.

(c) names of persons in attendance……. Solicitor,…….auditor (in a board meeting).

(d) together with number of members (in general meeting).

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Contents of minutes

(4) Serial number of the minute.

(5) Brief subject heading or index of each minute.

(6) Full terms of resolutions adopted.

(7) All statistical figures, amounts, dates, rate of interest, disti. Nos. of Shares, etc.

(8) Specific business upon which decisions were taken.

(9) All appointments of officers, salaries, etc.

(10) Financial and contractual transactions considered by the meeting.

(11) In the case of special resolution number of votes for and against.

(12) Objections and protests raised by members together with the Chairman's rulings when members insist on their recording in the minutes, e.g., Mr. A objected to the proposed motion on the ground that it was *ultra vires*, the Chairman ruled that the motion was in order.

(13) Names of directors dissenting or not concurring with any resolution passed at a Board Meeting.

(14) Reference about interested directors abstaining from voting is necessary.

(15) The Chairman's signature and date of verification of minutes as correct.

Specimen Minutes

Minutes of…….. meeting of the Board of Directors of ABC Limited

held on…….. the…….. 2014, at New Delhi

Present:

1. …….. Chairman
2. …….. Director
3. …….. Director

In attendance Secretary

Item No. 1: Leave of absence:

Leave of absence was granted to Saravashri…….. directors.

Item No. 2: Confirmation of minutes of the…….. Board meeting:

The minutes of the…….. meeting of the Board of Directors held on…….. were considered and confirmed.

Item No. 3: Appointment of Managing Director:

The Board noted the appointment of Shri…….. director of the company as the Managing Director of the company. In this connection, the following resolutions were passed:

"*Resolved* that Shri…….. who fulfils the conditions specified in Parts I and II of

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Schedule V to the Companies Act, 2013, be and is here by appointed as the Managing Director of the company for a period of five years effective from…….. and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to the Act.

Resolved further that the Secretary of the company be and is hereby directed to file the necessary returns with the Registrar of Companies and to all acts and things as may be necessary in this connection."

Item No. 4: Next Board Meeting:

The next meeting of the Board will be held on…….. the…….. 20…… at the registered office of the company. The meeting ended with a vote of thanks to the chair.

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SECTION B

ALLIED LAWS

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